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1921



FEDERAL STATUTES ANNOTATED

SUPPLEMENT, 1921

Containing all the Laws of a Permanent and General
Nature Enacted by the Sixty-sixth and Sixty-seventh
Congresses between Dec. 19, 1920 and Dec. 31, 1921

WITH

SUPPLEMENTAL NOTES CONTINUING THE ANNOTATION IN THE
PRIOR VOLUMES

EDITED BY HAROLD N. ELDRIDGE

ASSISTED BY NEWELL DUVALL AND MEMBERS OF THE EDITORIAL STAFF

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1922

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PREFACE

The statutes collected in this Supplement connect, without break or duplication, with those contained in the 1920 Supplement. They are the general, permanent, and public acts passed by Congress between December 19, 1920, and December 31, 1921. These acts are classified according to the scheme of titles in the main work, and in using this Supplement the reader should examine the corresponding title to locate the late, amendatory, or repealing legislation on the topic under consideration.

The latter part of the volume is devoted to the supplemental notes. These supplemental notes connect directly with and continue those in the 1920 Supplement, and present all the subsequent decisions construing the statutes contained in the prior volumes. The arrangement is by title, volume, page, and section as the statutes are found in preceding volumes, and the investigator has merely to turn to the corresponding title, volume, page and section as shown by the captions in this Supplement to find the late cases. The omission of a title or of page and section captions implies that no new cases have been found.

Tables of titles, Revised Statutes sections, and statutes chronologically arranged are included, together with a table connecting the notes with the first edition and supplements thereto.

Supplemental notes to the Constitution are also included in this volume.



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CROSS-REFERENCES

See also *CORPORATIONS; STOCKYARDS; VOCATIONAL REHABILITATION*

An Act To amend section 4 of the Act approved July 17, 1916, known as the Federal Farm Loan Act, extending its provisions to Porto Rico.

[Act of Feb. 27, 1921.]

[Federal Land Banks — establishment — branches — loans — sec. 4 of Farm Loan Act amended.] That paragraph 2 of section 4 of the Act approved July 17, 1916, known as the Federal Farm Loan Act, be amended to read as follows:

"The Federal Farm Loan Board shall establish in each Federal land bank district a Federal land bank, with its principal office located in such city within the district as said board shall designate. Each Federal land bank shall include in its title the name of the city in which it is located. Subject to the approval of the Federal Farm Loan Board, any Federal land bank may establish branches within the land bank district. Subject to the approval of the Federal Farm Loan Board and under such conditions as it may prescribe, the provisions of

this Act are extended to the island of Porto Rico; and such Federal land bank as may be designated by the Federal Farm Loan Board, is hereby authorized to establish a branch bank at such point as the Federal Farm Loan Board may direct on the island of Porto Rico. Loans made by such branch bank, when so established, shall not exceed the sum of \$5,000 to any one borrower and shall be subject to the restrictions and provisions of this Act, except that such branch bank may loan direct to borrowers, and subject to such regulations as the Federal Farm Loan Board may prescribe the rate charged borrowers may be $1\frac{1}{2}$ per centum in excess of the rate borne by the last preceding issue of farm loan bonds of the Federal land bank with which such branch bank is connected: *Provided, however,* That no loans shall be made in the island of Porto Rico to run for a longer term than twenty years.

" Each borrower through such branch bank shall subscribe and pay for stock in the Federal land bank with which it is connected in the sum of \$5 for each \$100 or fraction thereof borrowed; such stock shall be held by such Federal land bank as collateral security for the loan of the borrower; shall participate in all dividends; and upon full payment of the loan shall be canceled at par and proceeds paid to borrower, or the borrower may apply the same to the final payments on his loan."

For sec. 4 of Act of July 17, 1916, as originally enacted, see 1918 Supp. Fed. Stat. Ann. 16.

* * * [Perishable farm products received in interstate commerce — certificate of quality and condition — prima facie evidence.] For enabling the Secretary of Agriculture to investigate and certify to shippers and other interested parties the quality and condition of fruits, vegetables, poultry, butter, hay, and other perishable farm products, when received in interstate commerce at such important central markets as the Secretary of Agriculture may from time to time designate, under such rules and regulations as he may prescribe, including payment of such fees as will be reasonable and as nearly as may be to cover the cost for the service rendered: *Provided,* That certificates issued by the authorized agents of the department shall be received in all courts of the United States as prima facie evidence of the truth of the statements therein contained, * * *.

This and the paragraph which follows are from the Agricultural Appropriation Act of March 3, 1921.

* * * [Bureau of Markets and Crop Estimates — powers and duties.] That hereafter the powers conferred and the duties imposed by law on the Bureau of Statistics and the Bureau of Crop Estimates of the Department of Agriculture shall be exercised and performed by the Bureau of Markets and Crop Estimates.

See note to preceding paragraph.

An Act To amend the first paragraph of section 20 of the Act of Congress approved July 17, 1916, known as the Federal Farm Loan Act, as amended by the Act of Congress approved April 20, 1920.

[Act of March 4, 1921.]

[Form of Farm Loan bonds — sec. 20 of Farm Loan Act amended.] That the first paragraph of section 20 of the Act of Congress approved July 17, 1916,

as amended by the Act of Congress approved April 20, 1920, be amended to read as follows:

“SEC. 20. That bonds provided for in this Act shall be issued in denominations of \$40, \$100, \$500, \$1,000, and such larger denominations as the Federal Farm Loan Board may authorize; they shall run for specified minimum and maximum periods, subject to payment and retirement, at the option of the land bank, at any time after the minimum period specified in the bonds, which shall not be longer than ten years from the date of their issue. They shall have interest coupons attached, payable semiannually, and shall be issued in series of not less than \$50,000, the amount and terms to be fixed by the Federal Farm Loan Board. They shall bear a rate of interest not to exceed 5 per centum per annum.”

For sec. 20 as originally enacted, see 1918 Supp. Fed. Stat. Ann. 32.

For sec. 20 as amended by Act of April 20, 1920, see 1920 Supp. Fed. Stat. Ann. 4.

For further amendment affecting rate of interest, see Act of Aug. 13, 1921, set out on following page.

An Act To amend section 32 of the Act of Congress approved July 17, 1916, known as the Federal Farm Loan Act.

[Act of July 1, 1921.]

[Federal Farm Loan Act — land banks — government deposits — sec. 32 amended.] That section 32 of the Federal Farm Loan Act, approved July 17, 1916, as amended, is hereby amended by adding after the first paragraph a new paragraph to read as follows:

“Until such time as the aggregate paid-in capital stock of the twelve Federal land banks shall be \$50,000,000, or more, the Secretary of the Treasury may in his discretion make deposits in addition to those authorized by the preceding paragraph, to be secured, redeemed, and paid in the same manner as provided in such paragraph, except that any additional deposit made hereunder shall be called by the Secretary of the Treasury and redeemed by the bank or banks holding the same, within fifteen days after the conclusion of each general offering of farm loan bonds by such bank or banks. The aggregate of such additional deposits outstanding at any time shall not exceed the difference between the aggregate paid-in capital stock of the twelve Federal land banks on the last day of the preceding month, and the sum of \$50,000,000. The certificates of indebtedness issued to the Secretary of the Treasury by the Federal land bank for such additional deposits shall bear a rate of interest not exceeding by more than one-half of 1 per centum per annum the rate borne by the last bond issue of the land bank receiving such deposits.”

Section 32 of the Federal Farm Loan Act, here amended, will be found in 1918 Supp. Fed. Stat. Ann. at p. 41.

Joint Resolution For the relief of States in the cotton belt that have given aid to cotton farmers forced from the fields in established nonproduction zones through efforts to eradicate the pink bollworm.

[Res. of Aug. 9, 1921, No. 12.]

[Eradication of pink bollworm — aid to cotton farmers — relief of states.] That when any State shall have enacted legislation and taken measures, includ-

ing the establishment and enforcement of noncotton zones, adequate, in the opinion of the Secretary of Agriculture, to eradicate the pink bollworm in any area thereof actually infested, or threatened, by such pest, the said Secretary, under regulations to be prescribed by him, is authorized, out of the appropriation of \$554,840 for "Eradication of pink bollworm" made by the Agricultural Appropriation Act of March 3, 1921, to utilize not to exceed \$200,000 in reimbursing such States for expenses incurred by them in compensating any farmer for his loss due to the enforced nonproduction of cotton within said zones: *Provided*, That such reimbursement of any State shall be based upon the actual and necessary loss suffered by the owner of said land; that such reimbursement shall not exceed one-third the amount actually paid by the State to any farmer, and, in no event, shall exceed \$5 per acre; and that no reimbursement shall be made in respect of any farmer who has not complied in good faith with all quarantine and control regulations prescribed by said Secretary of Agriculture and such State relative to the pink bollworm.

An Act To amend the Federal Farm Loan Act, as amended.

[Act of Aug. 13, 1921.]

[Federal Farm Loan Act — form of bonds — sec. 20 amended.] That the first paragraph of section 20 of the Federal Farm Loan Act, as amended, be, and hereby is, amended to read as follows:

"SEC. 20. That bonds provided for in this Act shall be issued in denominations of \$40, \$100, \$500, \$1,000, and such larger denominations as the Federal Farm Loan Board may authorize; they shall run for specified minimum and maximum periods, subject to payment and retirement, at the option of the land bank, at any time after the minimum period specified in the bonds, which shall not be longer than ten years from the date of their issue. They shall have interest coupons attached, payable semiannually, and shall be issued in series of not less than \$50,000, the amount and terms to be fixed by the Federal Farm Loan Board. They shall bear a rate of interest not to exceed 5½ per centum per annum, but no bonds issued or sold after June 30, 1923, shall bear a rate of interest to exceed 5 per centum per annum."

The paragraph here amended, as it read prior to amendment, will be found in 1918 Supp. Fed. Stat. Ann. 32.

This paragraph of sec. 20 was previously amended by Act of March 4, 1921, set out *supra*, this title p. 4.

An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes.

[Act of Aug. 24, 1921.]

[SEC. 1.] [Title of act — "The Future Trading Act."] That this Act shall be known by the short title of "The Future Trading Act."

SEC. 2. [Definition of terms — "contract of sale" — "person" — "grain" — "future delivery" — "board of trade."] That for the purposes of this Act "contract of sale" shall be held to include sales, agreements of sale,

and agreements to sell. That the word " person " shall be construed to import the plural or singular and shall include individuals, associations, partnerships, corporations, and trusts. That the word " grain " shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term " future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words " board of trade " shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

SEC. 3. [Tax on privilege or option relating to purchase or sale of grain.] That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as " privileges," " bids," " offers," " puts and calls," " indemnities," or " ups and downs."

SEC. 4. [Tax on contract of sale of grain for future delivery — exceptions.] That in addition to the taxes now imposed by law there is hereby levied a tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery except —

(a) **[Owner or renter of land — owner or grower of grain.]** Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is the grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners, or growers of grain, or of such owners or renters of land; or

(b) **[Contract made by or through member of board of trade designated as " contract market."]** Where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a " contract market," as hereinafter provided, and if such contract is evidenced by a memorandum in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery, and provided that each board member shall keep such memorandum for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

SEC. 5. [Designation of boards of trade as " contract markets " — conditions and requirements.] That the Secretary of Agriculture is hereby authorized and directed to designate boards of trade as " contract markets " when, and only when, such boards of trade comply with the following conditions and requirements:

(a) **[Location at terminal market.]** When located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service.

(b) **[Keeping of records.]** When the governing board thereof provides for the making and filing, by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consummated at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) **[Prevention of inaccurate reports.]** When the governing board thereof prevents the dissemination, by the board or any member thereof, of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) **[Prevention of manipulation of prices.]** When the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board.

(e) **[Admission to membership of representatives of associations of producers.]** When the governing board thereof admits to membership thereof and all privileges thereon on such boards of trade any duly authorized representative of any lawfully formed and conducted cooperative associations of producers having adequate financial responsibility: *Provided*, That no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such cooperative association.

(f) **[Provision for making effective orders affecting trading, privileges of members, etc.]** When the governing board shall provide for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) section 6 of this Act.

SEC. 6. [Application for designation as "contract market" — showing of compliance with requirements.] That any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) [**Suspension or revocation of designation — appeal from refusal to designate.**] A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided*, That such suspension or revocation shall be final and conclusive unless within fifteen days after such suspension or revocation by the said commission such board of trade appeals to the circuit court of appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further*, That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) [**Violation of provisions of act — refusal of trading privileges.**] That if the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all

trading privileges thereon to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this Act the provisions, including penalties, of section 12 of the Interstate Commerce Act, as amended, relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this Act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman, or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

For sec. 12 of the Interstate Commerce Act, mentioned in the text; see 4 Fed. Stat. Ann. (2d ed.) 448.

For sec. 240 of the Judicial Code, above mentioned, see 5 Fed. Stat. Ann. (2d ed.) 854.

SEC. 7. [Collection of tax.] That the tax provided for herein shall be paid by the seller, and such tax shall be collected either by the affixing of stamps or by such other method as may have been prescribed by the Secretary of the Treasury by regulations, and such regulations shall be published at such times and in such manner as shall be determined by the Secretary of the Treasury.

SEC. 8. [Vacation of designation as "contract market."] That any board of trade that has been designated a contract market, in the manner herein provided, may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served as [at] least ninety days prior to the date named therein, as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective, the said board of

trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

SEC. 9. [Investigations by secretary of agriculture — reports.] That the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and may publish from time to time, in his discretion, the result of such investigation, and such statistical information gathered therefrom, as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person, and trade secrets or names of customers: *Provided*, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary, relative to the conduct of any board of trade, or of the transactions of any person found guilty of violating the provisions of this Act under the proceedings prescribed in section 6 of this Act: *Provided further*, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretary of Agriculture, upon his own initiative or in cooperation with existing governmental agencies, shall investigate marketing conditions of grain and grain products, and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions, in this and other countries that affect the markets.

SEC. 10. [Penalties for failure to evidence contracts, keep records, pay taxes, etc.] That any person who shall fail to evidence any such contract by a memorandum in writing, or to keep the record, or make a report, or who shall fail to pay the tax, as provided in sections 4 and 5 hereof, or who shall fail to pay the tax required in section 3 hereof, shall pay in addition to the tax a penalty equal to 50 per centum of the tax levied against him under this Act and shall be guilty of a misdemeanor, and upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

SEC. 11. [Invalidity of part of act — effect on other provisions.] That if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 12. [Provision relating to payment of tax and enforcement of penalties when in effect.] That no tax shall be imposed by this Act within four months after its passage, and no fine, imprisonment, or other penalty shall be enforced for any violation of this Act occurring within four months after its passage.

SEC. 13. [Miscellaneous powers of Secretary of Agriculture — officers and employees.] The Secretary of Agriculture may cooperate with any department or agency of the Government, any State, Territory, District, or possession,

or department, agency or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and there is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

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CROSS-REFERENCE

See also *FOREIGN RELATIONS*

An Act To amend section 4, chapter 1 of Title I of an Act entitled "An Act making further provision for a civil government for Alaska, and for other purposes," approved June 6, 1900, as heretofore amended by section 2 of an Act entitled "An Act to amend section 86 of an Act to provide a government for the Territory of Hawaii, to provide for additional judges, and for other judicial purposes," approved March 3, 1909, and for other purposes.

[*Act of March 2, 1921.*]

[District courts established — judges — divisions, terms, etc.—sec. 4 of Act of June 6, 1900 amended.] That section 4 of chapter 1 of Title I of the Act entitled "An Act making further provision for a civil government for Alaska, and for other purposes," approved June 6, 1900, as amended by section 2 of an Act entitled "An Act to amend section 86 of an Act to provide a government for the Territory of Hawaii, to provide for additional judges, and for other judicial purposes," approved March 3, 1909, which section also constitutes section 363 of the Compiled Statutes of the Territory of Alaska, 1913, be, and the same hereby is, further amended so as to read as follows:

"SEC. 363. There is hereby established a district court for the District of Alaska, with the jurisdiction of district courts of the United States and with

general jurisdiction in civil, criminal, equity, and admiralty causes; and four district judges shall be appointed for the district, each at an annual salary of \$7,500, who shall during their terms of office reside in the divisions of the district to which they may be respectively assigned by the President. The court shall consist of four divisions, which shall also be recording divisions.

“Division numbered one shall consist of all that part of the District of Alaska lying east of the one hundred and forty-first meridian of west longitude.

“Division numbered two shall consist of all that territory lying west of a line commencing on the Arctic coast at the one hundred and forty-eighth meridian; thence extending south along the easterly watershed of the Colville River to a point on the Rocky Mountain divide between the headwaters of Colville River on the north and west and the waters of the Chandlar River on the south; thence southwesterly along the divide between the waters of the Colville River, Kotzebue Sound, and Norton Sound on the north and west and the waters of the Yukon on the south to the one hundred and sixty-first meridian of west longitude; thence along said meridian to a point midway between the Yukon River and the Kuskokwim River; thence southwesterly to the point of intersection of the sixty-first parallel of north latitude with the shore of Bering Sea; the said division to include all the islands lying north of the fifty-eighth parallel of north latitude and west of the one hundred and forty-eighth meridian of west longitude, excepting Nelson Island, all islands in Kuskokwim Bay, all islands in Bristol Bay, and all islands in the Gulf of Alaska, north of the fifty-eighth parallel of north latitude.

“Division numbered three shall consist of all that territory lying south and west of the line starting on the coast of the Gulf of Alaska at the one hundred and forty-first meridian of west longitude; thence northerly along said meridian to a point due east from Mount Kimball; thence west to the summit of Mount Kimball; thence south westerly along the southerly watershed of the headwaters of Tanana River; thence westerly along the divide between the waters of the Gulf of Alaska on the south and the waters of the Yukon on the north to the summit of Mount McKinley; thence continuing southwesterly along the divide between the waters of the Kuskokwim River and Bay on the north and west and the Gulf of Alaska and Bristol Bay on the south to the westerly point of Cape Newenham; the said division to include the Alaska Peninsula, the Aleutian and Pribilof Islands, and all islands along and off the coast of this division, between Cape Newenham and the point where the one hundred and forty-first meridian, west longitude, intersects the northern line of the territory.

“Division numbered four shall consist of that part of the district of Alaska lying east of the second division and north of the third division, and all islands along the north coast of said division, east of the one hundred and forty-eighth meridian of west longitude, also Nelson Island and all islands in Kuskokwim Bay.

“One general term of court shall be held each year at Juneau, and such additional terms at other places in the first division as the Attorney General may direct. One general term of court shall be held each year at Nome, and such additional terms at other places in the second division as the Attorney General may direct. One general term of court shall be held each year at Valdez, and such additional terms at other places in the third division as the Attorney General may direct. One general term of court shall be held each year at Fairbanks, and such additional terms at other places in the fourth division as the Attorney General may direct. Each of the judges is authorized

and directed to hold such special terms of court as may be necessary for the public welfare or for the dispatch of the business of the court at such times and places in their respective districts as any of them, respectively, may deem expedient, or as the Attorney General may direct; and each shall have authority to employ interpreters and to make allowances for the necessary expenses of his court and to employ an official court stenographer at such compensation as shall be fixed by the Attorney General. At least thirty days' notice shall be given by the judge, or the clerk, of the time and place of holding the several terms of the court."

For sec. 4 of the Act of June 6, 1900, amended by the text, as it read after the amendment of March 3, 1909, see 1 Fed. Stat. Ann. (2d ed.) 261.

[SEC. 1.] * * * **[Government Railroad — covering into appropriation moneys derived from certain sources.]** During the fiscal year 1922 there shall be covered into the appropriation established from time to time under the Act entitled "An Act to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes," approved March 12, 1914, as amended, the proceeds of the sale of material utilized for temporary work and structures in connection with the operations under said Act, as well as the sales of all other condemned property which has been purchased or constructed under the provisions thereof, also any moneys refunded in connection with the construction and operations under said Act, and a report hereunder shall be made to Congress at the beginning of its next session.

This and the paragraphs which follow are from the Sundry Civil Appropriation Act of March 4, 1921.

For Act of March 12, 1914, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 336.

* * * **[Hospitals — admission of patients.]** Patients who are not indigent may be admitted to the hospitals for care and treatment on the payment of such reasonable charges therefor as the Secretary of the Interior shall prescribe.

See note to preceding paragraph.

* * * **[Reindeer.]** For support of reindeer stations in Alaska and instruction of Alaskan natives in the care and management of reindeer, \$10,000, to be available immediately: *Provided*, That the Commissioner of Education is authorized to sell such of the male reindeer belonging to the Government as he may deem advisable and to use the proceeds in the purchase of female reindeer belonging to missions and in the distribution of reindeer to natives in those portions of Alaska in which reindeer have not yet been placed and which are adapted to the reindeer industry.

See note under first paragraph of this section.

An Act To amend an Act entitled "An Act to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes," approved March 12, 1914, as amended.

[Act of Nov. 18, 1921.]

[Government railroad — construction and equipment — amount of expenditures — Act of March 12, 1914 amended.] That the Act entitled "An Act

to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes," approved March 12, 1914, as amended, is further amended by adding at the end of section 2 a proviso to read as follows:

"Provided further, That in order to complete the construction and equipment of the railroad between Seward and Fairbanks, together with necessary sidings, spurs, and lateral branches, there is hereby authorized to be appropriated, in addition to all sums heretofore appropriated therefor, the sum of \$4,000,000, to be immediately and continuously available until expended."

For Act of March 12, 1914, here amended, see 1 Fed. Stat. Ann. (2d ed.) 336.

ALIEN PROPERTY CUSTODIAN

See TRADING WITH THE ENEMY

ALIENS

See CHINESE EXCLUSION; IMMIGRATION; PASSPORTS; PATENTS; SEAMEN

AMBASSADORS

See DIPLOMATIC AND CONSULAR OFFICERS

AMERICAN NATIONAL RED CROSS

See CHARITIES

ANIMALS

See STOCKYARDS

ANTIDUMPING ACT

See CUSTOMS DUTIES

ARBITRATION

See FOREIGN RELATIONS

ARLINGTON MEMORIAL AMPHITHEATER

See CEMETERIES

ARMY

See CEMETERIES; CENSUS; CLAIMS; HOSPITALS AND ASYLUMS; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

BANKS

See AGRICULTURE; CORPORATIONS; NATIONAL BANKS

BONDS

See AGRICULTURE; PUBLIC DEBT; SURETY AND SURETYSHIP

BOUNDARIES

See FOREIGN RELATIONS; STATES

BUDGET AND ACCOUNTING ACT

See EXECUTIVE DEPARTMENTS

BUREAU OF STANDARDS

See WEIGHTS AND MEASURES

CABLES

See TELEGRAPHS, TELEPHONES AND CABLES

CANADA

See FOREIGN RELATIONS

CANALS

See HIGHWAYS

CEMETERIES

Act of March 4, 1921, 16.

- Sec. 1. Arlington Memorial Amphitheater — Memorials and Entombment of Bodies — Creation of Commission, 16.*
2. Chairman of Commission — Executive and Disbursing officer, 16.
3. Congressional Control over Memorials and Entombments, 16.
4. Persons Commemorated in Amphitheater — Lapse of Certain Period After Death When Necessary, 16.
5. Proposed Memorials as Subject to Approval of Commission, 17.

Res. of March 4, 1921, No. 67, 17.

Burial of Unknown American Serving in World War in Arlington Memorial Amphitheater, 17.

Act of March 4, 1921 (Sundry Civil Appropriation Act), 17.

- Sec. 1. National Cemetery — Railroads — Right of Way, 17.*
Approaches to National Cemetery — Maintenance, 17.

An Act To provide for the erection of memorials and the entombment of bodies in the Arlington Memorial Amphitheater, in Arlington National Cemetery, Virginia.

[*Act of March 4, 1921.*]

[SEC. 1.] [**Arlington Memorial Amphitheater — memorials and entombment of bodies — creation of commission.**] That a commission is hereby created, to be composed of the Secretary of War and the Secretary of the Navy, which shall submit annually to the President, who shall transmit the same to Congress by the first Monday in December, recommendations as to what, if any, inscriptions, tablets, busts, or other memorials shall be erected, and what, if any, bodies of deceased members of the Army, Navy, and Marine Corps shall be entombed during the next ensuing year within the Arlington Memorial Amphitheater, in the Arlington National Cemetery, Virginia: *Provided*, That no memorial shall be placed and no body shall be interred in the grounds about the Arlington Memorial Amphitheater within a distance of two hundred and fifty feet from the said memorial.

SEC. 2. [**Chairman of commission — executive and disbursing officer.**] That the Secretary of War shall be the chairman of the said commission and the depot quartermaster of the Army in Washington shall be its executive and disbursing officer.

SEC. 3. [**Congressional control over memorials and entombments.**] That no inscription, tablet, bust, or other memorial shall be erected nor shall any body be entombed within the Arlington Memorial Amphitheater unless specifically authorized in each case by Act of the Congress.

SEC. 4. [**Persons commemorated in amphitheater — lapse of certain period after death when necessary.**] That no inscription, tablet, bust, or other memorial as herein provided for shall be erected to commemorate any person who

shall not have rendered conspicuously distinguished service in the United States Army, Navy, or Marine Corps, nor shall the body of any such person be entombed in the Arlington Memorial Amphitheater; nor shall any such memorial be erected or any body be entombed therein within ten years after the date of the death of the person so to be commemorated, except as heretofore or hereafter authorized by Congress.

SEC. 5. [Proposed memorials as subject to approval of commission.] That the character, design, and location of any such inscriptions, tablets, busts, or other memorials when authorized as herein provided shall be subject to the approval of the commission herein created, which shall in each case obtain the advice of the Commission of Fine Arts.

Joint Resolution Providing for the bringing to the United States of the body of an unknown American, who was a member of the American Expeditionary Forces, who served in Europe and lost his life during the World War, and for the burial of the remains with appropriate ceremonies.

[Res. of March 4, 1921, No. 67.]

[Burial of unknown American serving in World War in Arlington Memorial Amphitheater.] That the Secretary of War be, and he is hereby, authorized and directed, under regulations to be prescribed by him, to cause to be brought to the United States the body of an American, who was a member of the American Expeditionary Forces who served in Europe, who lost his life during the World War and whose identity has not been established, for burial in the Memorial Amphitheater of the National Cemetery at Arlington, Virginia.

Such sum as may be necessary to carry out the provisions of the joint resolution is hereby authorized to be expended by the Secretary of War.

[SEC. 1.] * * * [National cemetery — railroads — right of way.] That no railroads shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery, or to encroach upon any roads or walks constructed thereon and maintained by the United States.

This and the paragraph following are from the Sundry Civil Appropriation Act of March 4, 1921.

* * * [Approaches to national cemetery — maintenance.] No part of any appropriation for national cemeteries or the repair of roadways thereto shall be expended in the maintenance of more than a single approach to any national cemetery.

See note to preceding paragraph.

CENSUS

Res. of March 3, 1921, No. 65, 18.

*Fourteenth Decennial Census — Enumerators for Army and Navy
— Validation of Appointment — Payment, 18.*

Act of March 3, 1921 (Legislative, Executive and Judicial Appropriation Act), 18.

Sec. 1. Census Office — Suspension of Unnecessary Work, 18.

Joint Resolution To authorize payment to members of the Army and Navy who were employed as enumerators during the Fourteenth Decennial Census to take the census of persons in the Army and Navy.

[*Res. of March 3, 1921, No. 65.*]

[Fourteenth Decennial Census — enumerators for army and navy — validation of appointment — payment.] Whereas it appears that in making an enumeration of persons in the Army and Navy for the Fourteenth Decennial Census, in the judgment of the Director of the Census it was impracticable to do otherwise than, with the official sanction of the Army and Navy, employ officers and enlisted men of the Army and Navy as enumerators, and that such officers and enlisted men were duly employed to make the enumeration and were promised compensation at the rate of 3 cents for each person enumerated; and

Whereas the vouchers for such compensation have been disallowed by the accounting officers of the Treasury Department on the ground that payment thereof was unwarranted; and

Whereas it further appears that in the judgment of the Director of the Census the census of the military and naval forces was taken more accurately by reason of the assurance of compensation to such enumerators than if it had been taken under orders of the War Department: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the appointment of such enumerators be, and the same is hereby, validated and that the moneys appropriated for the Fourteenth Decennial Census are hereby made available for the payment of their services as such enumerators.

For Act providing for taking of Fourteenth Decennial Census, see 1919 Supp. Fed. Stat. Ann. 15.

[SEC. 1.] * * * **[Census office — suspension of unnecessary work.]** That the Secretary of Commerce is authorized, in his discretion, to suspend during the decennial census period such work of the Census Office, other than the Fourteenth Census, as he may deem advisable.

This is from the Legislative, Executive and Judicial Appropriation Act of March 3, 1921.

CHARITIES

Act of March 3, 1921.

Sec. 1. American National Red Cross — Executive Committee of Central Committee — Quorum — Sec. 5 of Act of Jan. 5, 1905, Amended, 18.

2. Time of Taking Effect of Act, 18.

An Act To amend section 5 of the Act entitled "An Act to incorporate the American National Red Cross," approved January 5, 1905.

[*Act of March 3, 1921.*]

[SEC. 1.] **[American National Red Cross — executive committee of central committee — quorum — sec. 5 of Act of Jan. 5, 1905, amended.]** That section 5 of the Act for the incorporation of the American National Red Cross approved

January 5, 1905, be, and the same hereby is, amended so that the executive committee of the central committee shall consist of nine instead of seven persons, five of whom shall be a quorum.

SEC. 2. [Time of taking effect of Act.] That this Act shall take effect immediately.

For sec. 5 as originally enacted see 2 Fed. Stat. Ann. (2d ed.) 63.

CHILD LABOR

Tax on employment, see INTERNAL REVENUE

CHILDREN'S BUREAU OF LABOR DEPARTMENT

See HEALTH AND QUARANTINE

CHINA

See CHINESE EXCLUSION; DIPLOMATIC AND CONSULAR OFFICERS;
JUDICIAL OFFICERS

CHINESE EXCLUSION

Res. of Nov. 23, 1921, No. 29, 19.

Sec. 1. Registration of Chinese Men Attached to Military Expedition against Mexico in 1916, 19.

2. Method of Registration — Certificate as Evidence — Examination — Deportation, 20.

3. Charges Incident to Procurement of Certificate, 20.

Joint Resolution Permitting certain Chinese to register under certain provisions and conditions.

[*Res. of Nov. 23, 1921, No. 29.*]

[SEC. 1.] * * * [Registration of Chinese men attached to military expedition against Mexico in 1916.] That the Commissioner General of Immigration be, and he hereby is, authorized and directed to register, and to issue an appropriate certificate showing registration to, the three hundred and sixty-five Chinese men, now temporarily domiciled in the United States, who attached themselves to the punitive military expedition under the command of General Pershing which entered Mexico in 1916, and who were brought into the United States as refugees by said expedition when it returned from Mexico.

SEC. 2. [Method of registration — certificate as evidence — examination — deportation.] That the registration hereby provided shall correspond as nearly as circumstances permit to the registration of domiciled Chinese prescribed by section 6 of the Act approved May 5, 1892 (Twenty-seventh Statutes at Large, page 25), as amended by section 1 of the Act approved November 3, 1893 (Twenty-eighth Statutes at Large, page 7), and the certificates of registration issued to such Chinese shall constitute evidence of their right to be and remain within the United States: *Provided, however,* That before being registered hereunder the said Chinese shall be given the examination prescribed by the Immigration Act of February 5, 1917 (Thirty-ninth Statutes at Large, page 874), with the exception of the reading test prescribed by section 3 thereof, and such of them as may be found inadmissible under said Act shall not be registered hereunder, but shall be deported by the Secretary of Labor in the manner prescribed by section 19 of said Immigration Act: *Provided, further,* That if any of the said Chinese shall, at any time after being registered pursuant to this resolution, become members of any of the classes for the expulsion of which provision is made in section 19 of the said Immigration Act, they shall be taken into custody and deported upon the warrant of the Secretary of Labor in accordance with the terms of said section.

For sec. 6 of Act of May 5, 1895, as amended, mentioned in the text, see 2 Fed. Stat. Ann. (2d ed.) 98.

For Act of Feb. 5, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 211 et seq.

SEC. 3. [Charges incident to procurement of certificate.] That the certificate of registration herein provided shall be issued to the said Chinese by the Commissioner General without charge; and it shall be unlawful for any person, directly or indirectly, to collect any fee, gift, or remuneration for services rendered, or alleged to have been rendered, said Chinese in the procurement of such certificate or, directly or indirectly, to collect from the said Chinese any fee, gift, or remuneration for services performed in placing before Congress evidence or information on which the passage of this resolution is based; and any person who shall violate either of these provisions shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both such fine and imprisonment.

CITIZENSHIP

See DIPLOMATIC AND CONSULAR OFFICERS; VIRGIN ISLANDS

CIVIL SERVICE

Act of March 3, 1921 (Legislative, Executive and Judicial Appropriation Act), 20.

Sec. 1. Retirement of Employees in Civil Service — Appropriation for Carrying Out Sec. 13 of Act of May 22, 1920, 20.

[SEC. 1.] * * * [Retirement of employees in civil service — appropriation for carrying out sec. 13 of Act of May 22, 1920.] To carry out the provisions of section 13 of the Act entitled "An Act for the retirement of employees

in the classified civil service, and for other purposes," approved May 22, 1920, including personal services in the District of Columbia, stationery, printing, purchase of books, office equipment, and other supplies, \$40,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding \$1,740 per annum except one at \$2,000 and four at \$1,800 each.

This is from the Legislative, Executive and Judicial Appropriation Act of March 3, 1921. For sec. 13 of the Act of May 22, 1920, mentioned in the text, see 1920 Supp. Fed. Stat. Ann. 23.

CLAIMS

Act of March 4, 1921, 21.

Private Property Destroyed in Military Service Belonging to Officers, Enlisted Men and Nurses — Former Acts Amended, 21.

CROSS-REFERENCES

See also *FOREIGN RELATIONS; TRADING WITH THE ENEMY*

An Act To amend an Act entitled "An Act to provide for the settlement of the claims of officers and enlisted men of the Army for the loss of private property destroyed in the military service of the United States," approved March 3, 1885, as amended by the Act of July 9, 1918, and for other purposes.

[*Act of March 4, 1921.*]

[Private property destroyed in military service belonging to officers, enlisted men and nurses — former acts amended.] That the Act entitled "An Act to provide for the settlement of the claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States," approved March 3, 1885, as amended by the Act of July 9, 1918 (Fortieth Statutes, page 880), be, and the same hereby is, amended to read as follows:

"SECTION 1. That private property belonging to officers, enlisted men, and members of the Nurse Corps (female) of the Army, including all prescribed articles of equipment and clothing which they are required by law or regulation to own and use in the performance of their duties, and horses and equipment required by law or regulations to be provided by mounted officers, which since the 5th day of April, 1917, has been or shall hereafter be lost, damaged, or destroyed in the military service, shall be replaced, or the damage thereto, or its value recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur without fault or negligence on the part of the owner in any of the following circumstances:

"First. When such private property so lost, damaged, or destroyed was shipped on board an unseaworthy vessel by order of an officer authorized to give such order or direct such shipment.

"Second. When it appears that such private property was so lost, damaged, or destroyed in consequence of its owner having given his attention to the saving of human life or property belonging to the United States which was in danger at the same time and under similar circumstances, or while, at

the time of such loss, damage, or destruction, the claimant was engaged in authorized military duties in connection therewith.

“Third. When during travel under orders such private property, including the regulating allowance of baggage, transferred by a common carrier, or otherwise transported by the proper agent or agency of the United States Government, is lost, damaged, or destroyed; but replacement, recoupment, or commutation in these circumstances, where the property was or shall be transported by a common carrier, shall be limited to the extent of such loss, damage, or destruction over and above the amount recoverable from said carrier.

“Fourth. When such private property is destroyed or captured by the enemy, or is destroyed to prevent its falling into the hands of the enemy, or is abandoned on account of lack of transportation or by reason of military emergency requiring its abandonment, or is otherwise lost in the field during campaign.

“SEC. 2. That except as to such property as by law or regulation is required to be possessed and used by officers, enlisted men, and members of the Army Nurse Corps (female), respectively, the liability of the Government under this Act shall be limited to damage to or loss of such sums of money or such articles of personal property as the Secretary of War shall decide or declare to be reasonable, useful, necessary, and proper for officers, enlisted men, or members of the Army Nurse Corps (female), respectively, as the case may be, to have in their possession while in quarters, or in the field, engaged in the public service in the line of duty.

“SEC. 3. That the Secretary of War is authorized and directed to examine into, ascertain, and determine the value of such property lost, destroyed, captured, or abandoned as specified in the foregoing paragraphs, or the amount of damage thereto, as the case may be; and the amount of such value or damage so ascertained and determined shall be paid by disbursing officers of the Army, or such property lost, destroyed, captured, or abandoned, or so damaged as to be unfit for service, may be replaced in kind from Government property on hand when the Secretary of War shall so direct.

“SEC. 4. That the tender of replacement or of commutation or the determination made by the Secretary of War upon a claim presented, as provided for in the foregoing section, shall constitute a final determination of any claim cognizable under this chapter, and such claim shall not thereafter be reopened or considered.

“SEC. 5. That no claim arising under this Act shall be considered unless made within two years from the time that it accrued, except that when a claim accrues in time of war, or when war intervenes within two years after its accrual, such claim may be presented within two years after peace is established.

“SEC. 6. That for the payment of claims arising and established under this Act there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of \$300,000.

“SEC. 7. That so much of the Act of March 28, 1918 (Fortieth Statutes, pages 479, 480), as makes provision for the presentation, adjustment, and payment of claims of officers and enlisted men for loss of private property destroyed in the military service be, and the same hereby is, repealed.”

For former acts here amended, see 1918 Supp. Fed. Stat. Ann. 89.

CLERKS OF COURTS

See JUDICIAL OFFICERS

COAST AND GEODETIC SURVEY

Act of March 4, 1921 (Sundry Civil Appropriation Act), 23.

Sec. 1. Assistant Director — Designation of Engineer, 23.

[SEC. 1.] * * * [Assistant director — designation of engineer.] That the Secretary of Commerce may designate one of the hydrographic and geodetic engineers to act as assistant director.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

COINAGE, MINTS AND ASSAY OFFICES

Act of May 27, 1921, 23.

Sec. 403. Value of Foreign Coins — Amendment and Repeal of Statutes, 23.

SEC. 403. [Value of foreign coins — amendment and repeal of statutes.]

This section amends sec. 25 of Act of Aug. 27, 1894 (2 Fed. Stat. Ann. (2d ed.) 368), and repeals R. S. secs. 2903 (2 Fed. Stat. Ann. (2d ed.) 1047) and 3565 (2 Fed. Stat. Ann. (2d ed.) 365). It will be found set out in the title CUSTOMS DUTIES, *infra*, this volume.

COMMERCE

See AGRICULTURE; CORPORATIONS; INTERSTATE COMMERCE; STOCKYARDS

COMMERCE DEPARTMENT

Act of March 3, 1921 (Legislative, Executive and Judicial Appropriation Act), 23.

Sec. 1. Purchases from Contingent Funds — Applicability of R. S. Sec. 3683, 23.

CROSS-REFERENCE

See also *EXECUTIVE DEPARTMENTS*

[SEC. 1.] * * * [Purchases from contingent funds — applicability of R. S. sec. 3683.] Hereafter section 3683 of the Revised Statutes of the United States shall not be construed to apply to any purchase made by the Department of Commerce when the aggregate amount involved does not exceed the sum of \$25.

This is from the Legislative, Executive and Judicial Appropriation Act of March 3, 1921.

For R. S. sec. 3683 mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 141.

COMPTROLLER OF CURRENCY

See EXECUTIVE DEPARTMENTS; TREASURY DEPARTMENT

CONGRESS

Res. of Dec. 19, 1920, No. 54, 24.

- Sec. 1. Reorganization of Administrative Branch of Government — Creation of Congressional Committee for Purpose, 24.*
- 2. Scope of Committee's Power, 24.*
- 3. Reports to Congress — Employment of Assistants — Compensation — Expenditures of Committee, 25.*
- 4. Duty of Administrative Service to Furnish Information to Committee — Examination of Records, 25.*

Act of March 1, 1921 ("First Deficiency Act, Fiscal Year 1921"), 25.

- Sec. 1. House — Index to Daily Calendar, 25.*

CROSS-REFERENCES

See also *CEMETERIES; EXECUTIVE DEPARTMENTS; POSTAL SERVICE, WAR DEPARTMENT AND MILITARY ESTABLISHMENT; WATERS.*

Joint Resolution To create a Joint Committee on the Reorganization of the Administrative Branch of the Government.¹

[Res. of Dec. 19, 1920. No. 54.]

[SEC. 1.] **[Reorganization of administrative branch of government — creation of Congressional Committee for purpose.]** That a joint committee is created, to be known as the Joint Committee on Reorganization, which shall consist of three Members of the Senate to be appointed by the President thereof, and three Members of the House of Representatives to be appointed by the Speaker thereof. Vacancies occurring in the membership of the committee shall be filled in the same manner as the original appointments.

SEC. 2. [Scope of committee's power.] That it shall be the duty of the Joint Committee on Reorganization to make a survey of the administrative services of the Government for the purpose of securing all pertinent facts concerning their powers and duties, their distribution among the several executive departments, and their overlapping and duplication of authority; also to determine what redistribution of activities should be made among the several services, with a view to the proper correlation of the same, and what departmental regrouping of services should be made, so that each executive department shall embrace only services having close working relation with each other and

¹ This resolution was received by the President, December 17, 1920, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution became a law without his approval.

ministering directly to the primary purpose for which the same are maintained and operated, to the end that there shall be achieved the largest possible measure of efficiency and economy in the conduct of Government business.

SEC. 3. [Reports to Congress — employment of assistants — compensation — expenditures of committee.] That the committee shall, from time to time, report to both the Senate and the House of Representatives the results of its inquiries, together with its recommendations, and shall prepare and submit bills or resolutions having for their purpose the coordination of Government functions and their most efficient and economical conduct, and the final report of said committee shall be submitted not later than the second Monday in December, 1922. The committee is authorized to employ such assistance as it may require, at such compensation as the committee may determine to be just and reasonable, and to make such reasonable expenditures as may be necessary for the proper conduct of its work, such expenditures to be paid in equal parts from the contingent funds of the House of Representatives and the Senate, as from time to time may be duly authorized by resolutions of those bodies.

SEC. 4. [Duty of administrative service to furnish information to committee — examination of records.] That the officers and employees of all administrative services of the Government shall furnish to the committee such information regarding powers, duties, activities, organization, and methods of business as the committee may from time to time require, and the committee or any of its employees, when duly authorized by the committee, shall have access to and the right to examine any books, documents, papers, or records of any administrative service for the purpose of securing the information needed by the committee in the prosecution of its work.

[SEC. 1.] * * * [House — index to daily calendar.] That hereafter the index to the daily calendar shall be printed on Monday of each week.

This is from the "First Deficiency Act, fiscal year 1921," approved March 1, 1921.

CONSULS

See DIPLOMATIC AND CONSULAR OFFICERS

CONTRACT MARKETS

See AGRICULTURE

CONTRACTS

See AGRICULTURE; PUBLIC CONTRACTS

CORPORATIONS

Res. of Jan. 4, 1921, No. 55, 26.

War Finance Corporation—Revival of Activities—Financing of Exportations, 26.

Act of Aug. 24, 1921 (Amendments to War Finance Corporation Act), 27.

Sec. 1. "Person" Defined, 27.

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CROSS-REFERENCES

See also *INTERNAL REVENUE; NATIONAL BANKS; TIMBER LANDS AND FOREST RESERVES*

Joint Resolution Directing the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country, and for other purposes.

[Res. of Jan. 4, 1921. No. 55.]

[War Finance Corporation—revival of activities—financing of exportations.] That the Secretary of the Treasury and the members of the War Finance Corporation are hereby directed to revive the activities of the War Finance Corporation, and that said corporation be at once rehabilitated with the view of assisting in the financing of the exportation of agricultural and other products to foreign markets.

F H GILLETT

Speaker of the House of Representatives.

CHARLES CURTIS

Acting President of the Senate Pro Tempore.

**In the House of Representatives
of the United States.**

January 4, 1921.

The House having proceeded, in pursuance of the Constitution, to reconsider the joint resolution (S. J. Res. 212) entitled "Joint resolution directing

the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country, and for other purposes," returned to the Senate by the President of the United States, with his objections thereto, and sent by the Senate to the House of Representatives, with the message of the President returning the joint resolution:

Resolved, That the joint resolution do pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

WM TYLER PAGE
Clerk.

In the Senate of the United States
January 3, 1921.

The President of the United States having returned to the Senate, in which it originated, the joint resolution (S. J. Res. 212) "Joint Resolution directing the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country, and for other purposes," with his objections thereto, the Senate proceeded in conformity with the Constitution to reconsider the same and has

Resolved, That the joint resolution do pass, two-thirds of the Senate agreeing to pass the same.

Attest:

GEORGE A. SANDERSON
Secretary.

By the Joint Resolution of March 3, 1921, set out in the title WAR DEPARTMENT AND MILITARY ESTABLISHMENT, in this volume, *infra*, much war time legislation was repealed, but the Resolution with respect of the War Finance Corporation Act, excepted from its operation titles 1 and 3 of that Act and this Resolution of January 4, 1921.

An Act To amend the War Finance Corporation Act,* approved April 5, 1918, as amended, to provide relief for producers of and dealers in agricultural products, and for other purposes.

[Act of Aug. 24, 1921.]

[SEC. 1.] ["Person" defined.] That when used in this Act the term "person" includes partnerships, corporations, and associations, as well as individuals.

SEC. 2. [Creation of War Finance Corporation — duration of exercise of powers — sec. 1 amended.] That section 1 of Title I of the War Finance Corporation Act, approved April 5, 1918, as amended, is amended to read as follows:

"That the Secretary of the Treasury, the Secretary of Agriculture, and four additional persons (who shall be the directors first appointed as hereinafter provided) are hereby created a body corporate and politic in deed and in law by the name, style, and title of the War Finance Corporation (herein called the Corporation), and shall have succession for a period of ten years: *Provided*, That except as otherwise provided by this Act the Corporation shall not exercise any of the powers conferred by this Act except such as are incidental to the liquidation of its assets and the winding up of its affairs, after July 1, 1922."

* The War Finance Corporation Act will be found in 1918 Supp. 107, and amendments thereto will be found in 1919 Supp. 36; 1920 Supp. 30.

SEC. 3. [Advances for agricultural purposes — new sections added.] The War Finance Corporation Act, approved April 5, 1918, as amended, is amended by adding after section 21 of Title I thereof the following new sections:

“**SEC. 22.** Whenever the Board of Directors of the Corporation shall be of the opinion that conditions arising out of the war, or out of the disruption of foreign trade created by the war, have resulted in or may result in an abnormal surplus accumulation of any staple agricultural product of the United States or lack of a market for the sale of same or that the ordinary banking facilities are inadequate to enable producers of or dealers in such products to carry them until they can be exported or sold for export in an orderly manner, the Corporation shall thereupon be empowered to make advances, for periods not exceeding one year from the respective dates of such advances, upon such terms, not inconsistent with this Act, as it may determine;

“(a) To any person engaged in the United States in dealing in, or marketing any such products, or to any association composed of persons engaged in producing such products, for the purpose of assisting such person or association to carry such products until they can be exported or sold for export in an orderly manner. Any such advance shall bear interest at a rate not exceeding 1½ per centum in excess of the rate of discount for ninety-day commercial paper prevailing at the Federal Reserve Bank of the district in which the borrower is located at the time when such advance is made;

“(b) To any person without the United States purchasing such products, but in no case shall any of the money so advanced be expended without the United States. Every such advance shall be secured by adequate security of such character as shall be prescribed by the Board of Directors of the Corporation. The rate of interest charged on any such advance shall be determined by the Board of Directors. The Corporation shall retain power to recall an advance or require additional security at any time.

“(c) To any bank, banker, or trust company of the United States which makes or has made an advance or advances to any such person as is described in paragraph (a) of this section for the purpose therein set forth or which makes or has made an advance or advances to any producer for the purpose set forth in paragraph (a). The aggregate of advances made to any bank, banker, or trust company shall not exceed the amount remaining unpaid of the advances made by such bank, banker, or trust company for purposes herein described. Such advances shall bear interest at the rates fixed by the Corporation.

“**SEC. 23.** Notwithstanding the limitation of section 1, the advances provided for by section 21 and section 22 of this Act may be made until July 1, 1922. The Corporation may from time to time extend the time of payment of any such advance or advances through renewals, substitution of new obligations, or otherwise, but the time for the payment of any advance made under authority of section 21 and section 22 shall not be extended beyond three years from the date upon which such advance was originally made.

“All advances made under section 21 or under section 22 of this Act shall be made against promissory note or notes, or other instrument or instruments in writing imposing on the borrower a primary and unconditional obligation to repay the advance at maturity, with interest as stipulated therein, with full and adequate security in each instance by indorsement, guaranty, pledge, or otherwise. The Corporation shall retain the power to require additional security at any time. All notes or other instruments evidencing advances to persons outside the United States shall be in terms payable in the United States, in

currency of the United States, and shall be secured by adequate guaranties or indorsements in the United States, or by warehouse receipts, acceptable collateral, or other instruments in writing conveying or securing marketable title to agricultural products in the United States.

" SEC. 24. Whenever in the opinion of the Board of Directors of the Corporation the public interest may require it, the Corporation shall be authorized and empowered to make advances upon such terms not inconsistent with this Act as it may determine to any bank, banker, or trust company in the United States, or to any cooperative association of producers in the United States which may have made advances for agricultural purposes, including the breeding, raising, fattening, and marketing of live stock, or may have discounted or rediscounted notes, drafts, bills of exchange or other negotiable instruments issued for such purposes. Such advance or advances may be made upon promissory note or notes, or other instrument or instruments, in such form as to impose on the borrowing bank, banker, trust company, or cooperative association a primary and unconditional obligation to repay the advance at maturity with interest as stipulated therein, and shall be fully and adequately secured in each instance by indorsement, guaranty, pledge, or otherwise. Such advances may be made for a period not exceeding one year and the Corporation may from time to time extend the time of payment of any such advance through renewals, substitution of new obligations or otherwise, but the time for the payment of any such advance shall not be extended beyond three years from the date upon which such advance was originally made. The aggregate of advances made to any bank, banker, trust company, or cooperative association shall not exceed the amount remaining unpaid of the advances made by such bank, banker, trust company, or cooperative association for purposes herein described.

" The Corporation may, in exceptional cases, upon such terms not inconsistent with this Act as it may determine, purchase from domestic banks, bankers, or trust companies, notes, drafts, bills of exchange, or other instruments of indebtedness secured by chattel mortgages, warehouse receipts, bills of lading, or other instruments in writing conveying or securing marketable title to staple agricultural products, including live stock. The Corporation may from time to time, upon like security, extend the time of payment of any note, draft, bill of exchange, or other instrument acquired under this section, but the time for the payment of any such note, draft, bill of exchange, or other instrument shall not be extended beyond three years from the date upon which such note, draft, bill of exchange, or other instrument was acquired by the Corporation. The Corporation is further authorized, upon such terms as it may prescribe, to purchase, sell, or otherwise deal in acceptances, adequately secured, issued by banking corporations organized under section 25 (a) of the Federal Reserve Act: *Provided*, That no purchase of acceptances of the said banking corporations shall be made except for the purpose of assisting the said banking corporations in financing the exportation of agricultural and manufactured products from the United States to foreign countries. No such acceptances shall be purchased which have a maturity at the time of such purchase of more than three years.

" Advances or purchases may be made under this section at any time prior to July 1, 1922.

" SEC. 25. The aggregate amount of all advances made under sections 21, 22, and 24, and of all notes, drafts, bills of exchange, or other securities purchased under section 24 remaining unpaid, shall not at any one time exceed \$1,000,000,000.

" SEC. 26. Whenever in this Act the words ' bank, banker, or trust company ' are used, they shall be deemed to include any reputable and responsible financing institution incorporated under the laws of any State or of the United States with resources adequate to the undertaking contemplated.

" SEC. 27. In order to enable the Corporation to carry out the purposes of this Act, the Comptroller of the Currency is hereby authorized to furnish to the Corporation for its confidential use such reports, records, or other information as he may have available relating to financial condition of national banks to which the Corporation has made or contemplates making advances, and to make, through his examiners, for the confidential use of the Corporation, examinations of banks, bankers, or trust companies, other than national banks, to which the Corporation has made or contemplates making advances: Provided, That no such examination shall be made without the consent of such bank, banker, or trust company.

" SEC. 28. No person, bank, banker, or trust company receiving money under the provisions of this Act shall loan such money at a rate of interest greater than 2 per centum per annum in excess of the rate of interest charged or received by the Corporation upon such money.[""]

" SEC. 4. [Advances to promote commerce with foreign nations — sec. 21 partially repealed.] Sec. 21 of Title I of the War Finance Corporation Act is hereby amended by striking out paragraphs (b) and (c) thereof, and by striking out at the beginning of the first paragraph the letter (a).

" SEC. 5. [Issuance of notes and bonds — sec. 12 amended.] The first paragraph of section 12 of Title I of the War Finance Corporation Act is hereby amended and reenacted to read as follows:

" SEC. 12. That the Corporation shall be empowered and authorized to issue and have outstanding at any one time its notes or bonds in an amount aggregating not more than three times its paid-in capital, such notes or bonds to mature not less than six months nor more than five years from the respective dates of issue, and may be redeemable before maturity at the option of the Corporation, as may be stipulated in such notes or bonds, and to bear such rate or rates of interest as may be determined by the board of directors, but such rate or rates of interest shall be subject to the approval of the Secretary of the Treasury. Such notes or bonds shall have a first and paramount floating charge on all the assets of the Corporation, and the Corporation shall not at any time mortgage or pledge any of its assets. Such notes or bonds may be issued at not less than par in payment of any advances authorized by this title, or may be offered for sale publicly or to any individual, firm, corporation, or association, at such price or prices at not less than par as the board of directors, with the approval of the Secretary of the Treasury, may determine."

The power of the corporation to issue notes or bonds, may be exercised at any time prior to January 1, 1925, but no notes or bonds shall mature later than July 1, 1925.

SEC. 6. [Notes and bonds of Corporation as security in Federal Reserve Bank transactions — discounts and rediscounts — sec. 13 amended.] Paragraph 1 of section 13 of Title I of the War Finance Corporation Act is hereby amended and reenacted to read as follows:

" That the Federal Reserve Banks shall be authorized, subject to the maturity limitations of the Federal Reserve Act and to regulations of the Federal

Reserve Board, to discount the direct obligations of member banks secured by such notes or bonds of the Corporation and to rediscount notes or other negotiable instruments secured by such notes or bonds and indorsed by a member bank. Discounts or rediscounts under this section shall be at an interest rate equal to the prevailing rate for eligible commercial paper of corresponding maturities."

SEC. 7. [Unemployed moneys of Corporation — disposition — Federal Reserve Banks as depositories, etc.— liquidation of assets — winding up affairs — sec. 15 amended.] That section 15 of Title I of the War Finance Corporation Act be amended and reenacted to read as follows:

"SEC. 15. That all moneys of the Corporation not otherwise employed may be kept on deposit, subject to check, with the Treasurer of the United States, or in any of the Federal reserve banks, or may, upon the direction of the board of directors of the Corporation, with the approval of the Secretary of the Treasury, be invested in bonds or other obligations of the United States issued or converted after September 24, 1917, or upon like direction and approval, may be used from time to time in the purchase or redemption of any bonds issued by the Corporation.

"The Federal reserve banks are hereby authorized to act as depositories for and as fiscal agents of the Corporation in the general performance of the powers conferred by this title.

"Beginning July 1, 1922, the directors of the Corporation shall proceed to liquidate its assets and wind up its affairs, except as specifically provided in this title; but the directors of the Corporation, in their discretion, may, from time to time prior to such liquidation, sell and dispose of any securities or other property acquired by the Corporation.

"After July 1, 1922, the Corporation may, with the approval of the Secretary of the Treasury, deposit with the Treasurer of the United States, as a special deposit, out of money belonging to the Corporation, or from time to time received by it in the course of liquidation or otherwise, an amount equal to the aggregate amount of all outstanding bonds or notes of the Corporation, including principal and interest to maturity. Moneys so deposited shall constitute a special fund for the payment of principal and interest of such bonds or notes, or for the purchase or redemption of such bonds or notes at not more than par and accrued interest, and may be drawn upon or paid out for no other purpose.

"Whenever there shall have been deposited in such special fund an amount equal to the aggregate amount of all bonds or notes of the Corporation then outstanding, including principal and interest to maturity, the Corporation may, with the approval of the Secretary of the Treasury, pay into the Treasury of the United States, as miscellaneous receipts, any moneys belonging to the Corporation, or received from time to time in the course of liquidation or otherwise, in excess of a reasonable reserve to meet all liabilities and expenses during liquidation. Whenever any such payment is made, an amount of capital stock of the Corporation equal in par value to the amount so paid in shall be canceled and retired.

"All net earnings of the Corporation not required for its operations shall be accumulated as a reserve fund until such time as the Corporation liquidates under the terms of this title.

“Any balance remaining after the payment of all the Corporation’s debts, and after the retirement of all its capital stock as herein provided, shall be paid into the Treasury of the United States as miscellaneous receipts, and thereupon the Corporation shall be dissolved.”

COTTON

See AGRICULTURE

COUNCIL OF NATIONAL DEFENSE

See HIGHWAYS

COURT OF CLAIMS

See JUDICIARY

COURTS

See ALASKA; JUDICIAL OFFICERS; JUDICIARY

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CRIMINAL LAW *

Act of Nov. 17, 1921, 33.

Sec. 1. Limitations — Offenses Not Capital — R. S. Sec. 1014 Amended, 33.

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CROSS-REFERENCES

See also *INTOXICATING LIQUORS; PENAL LAWS; SURETY AND SURETYSHIP*

* Espionage Act.— Title 1, sec. 3, of the “Espionage Act,” set out in 1918 Supp. Fed. Stat. Ann. 122, was affected by Resolution of March 3, 1921, set out under WAR DEPARTMENT AND MILITARY ESTABLISHMENT, this volume, *infra*. The Resolution repealed the Act of May 16, 1918, which amended said sec. 3 as originally enacted by Act of June 15, 1917, and thereby revived and restored the section “with the same force and effect as originally enacted.” The section as originally enacted is set out in 1918 Supp. Fed. Stat. Ann. 123 *note*.

An Act To amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases.

[Act of Nov. 17, 1921.]

[SEC. 1.] [Limitations — offenses not capital — R. S. sec. 1044 amended.] That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

“ SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.”

SEC. 2. [Act when in effect.] That this Act shall be in force and effect from and after the date of its passage.

For R. S. sec. 1044 as it read before this amendment, see 2 Fed. Stat. Ann. (2d ed.) 692.
For R. S. sec. 1046 referred to in the text, see 2 Fed. Stat. Ann. (2d ed.) 697.

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CROSS-REFERENCE

See also *INTERNAL REVENUE*

An Act Imposing temporary duties upon certain agricultural products to meet present emergencies, and to provide revenue; to regulate commerce with foreign countries; to prevent dumping of foreign merchandise on the markets of the United States; to regulate the value of foreign money; and for other purposes.

[*Act of May 27, 1921.*]

TITLE I.

EMERGENCY TARIFF.

[**SEC. 1.**] [**Articles dutiable and rates of duties.**] That on and after the day following the passage of this Act, for the period of six months, there shall be levied, collected, and paid upon the following articles, when imported from

any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila), the rates of duty which are prescribed by this section, namely:

1. Wheat, 35 cents per bushel.
2. Wheat flour and semolina, 20 per centum ad valorem.
3. Flaxseed, 30 cents per bushel of fifty-six pounds.
4. Corn or maize, 15 cents per bushel of fifty-six pounds.
5. Beans, provided for in paragraph 197 of the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, 2 cents per pound.
6. Peanuts or ground beans, 3 cents per pound.
7. Potatoes, 25 cents per bushel of sixty pounds.
8. Onions, 40 cents per bushel of fifty-seven pounds.
9. Rice, cleaned, 2 cents per pound, except rice cleaned for use in the manufacture of canned foods, on which the rate of duty shall be 1 cent per pound; uncleaned rice, or rice free of the outer hull and still having the inner cuticle on, $1\frac{3}{4}$ cents per pound; rice flour, and rice meal, and rice broken which will pass through a number twelve wire sieve of a kind prescribed by the Secretary of the Treasury, one-fourth of 1 cent per pound; paddy, or rice having the outer hull on, three-fourths of 1 cent per pound.
10. Lemons, 2 cents per pound.
11. Oils: Peanut, 26 cents per gallon; cottonseed, coconut, and soya bean, 20 cents per gallon; olive, 40 cents per gallon in bulk, 50 cents per gallon in containers of less than five gallons.
12. Cattle, 30 per centum ad valorem.
13. Sheep: One year old or over, \$2 per head; less than one year old, \$1 per head.
14. Fresh or frozen beef, veal, mutton, lamb, and pork, 2 cents per pound. Meats of all kinds, prepared or preserved, not specially provided for herein, 25 per centum ad valorem.
15. Cattle and sheep and other stock imported for breeding purposes shall be admitted free of duty.
16. Cotton having a staple of one and three-eighths inches or more in length, 7 cents per pound.
17. Manufactures of which cotton of the kind provided for in paragraph 16 is the component material of chief value, 7 cents per pound, in addition to the rates of duty imposed thereon by existing law.
18. Wool, commonly known as clothing wool, including hair of the camel, angora goat, and alpaca, but not such wools as are commonly known as carpet wools: Unwashed, 15 cents per pound; washed, 30 cents per pound; scoured, 45 cents per pound. Unwashed wools shall be considered such as shall have been shorn from the animal without any cleaning; washed wools shall be considered such as have been washed with water only on the animal's back or on the skin; wools washed in any other manner than on the animal's back or on the skin shall be considered as scoured wool. On wool and hair provided for in this paragraph, which is sorted or increased in value by the rejection of any part of the original fleece, the duty shall be twice the duty to which it would otherwise be subject, but not more than 45 cents per pound.

19. Wool and hair of the kind provided for in paragraph 18, when advanced in any manner or by any process of manufacture beyond the washed or scoured condition, and manufactures of which wool or hair of the kind provided for in paragraph 18 is the component material of chief value, 45 cents per pound in addition to the rates of duty imposed thereon by existing law.

20. Sugars, tank bottoms, sirups of cane juice, melada, concentrated melada, concrete and concentrated molasses, testing by the polariscope not above seventy-five degrees, one and sixteen one-hundredths of 1 cent per pound, and for every additional degree shown by the polariscopic test, four one-hundredths of 1 cent per pound additional, and fractions of a degree in proportion; molasses testing not above forty degrees, 24 per centum ad valorem; testing above forty degrees and not above fifty-six degrees, $3\frac{1}{2}$ cents per gallon; testing above fifty-six degrees, 7 cents per gallon; sugar drainings and sugar sweepings shall be subject to duty as molasses or sugar, as the case may be, according to polariscopic test.

21. Butter, and substitutes therefor, 6 cents per pound.

22. Cheese, and substitutes therefor, 23 per centum ad valorem.

23. Milk, fresh, 2 cents per gallon; cream, 5 cents per gallon.

24. Milk, preserved or condensed, or sterilized by heating or other processes, including weight of immediate coverings, 2 cents per pound; sugar of milk, 5 cents per pound.

25. Wrapper tobacco and filler tobacco when mixed or packed with more than 15 per centum of wrapper tobacco, and all leaf tobacco the product of two or more countries or dependencies when mixed or packed together, if unstemmed, \$2.35 per pound; if stemmed, \$3 per pound; filler tobacco not specially provided for in this section, if unstemmed, 35 cents per pound; if stemmed, 50 cents per pound.

The term "wrapper tobacco" as used in this section means that quality of leaf tobacco which has the requisite color, texture, and burn, and is of sufficient size for cigar wrappers, and the term "filler tobacco" means all other leaf tobacco.

26. Apples, 30 cents per bushel.

27. Cherries in a raw state, preserved in brine or otherwise, 3 cents per pound.

28. Olives, in solutions, 25 cents per gallon; olives, not in solutions, 3 cents per pound.

SEC. 2. [Suspension of former rates for six months period.] The rates of duty imposed by section 1 (except under paragraphs 17 and 19) in the case of articles on which a rate of duty is imposed by existing law, shall be in lieu of such rate of duty during the six months' period referred to in section 1.

SEC. 3. [Rates in force after six months period.] After the expiration of the six months' period referred to in section 1, the rates of duty upon the articles therein enumerated shall be those, if any, imposed thereon by existing law.

By Act of Nov. 16, 1921 (see *infra*, this title, p. 45), it is provided that this title I "shall continue in force until otherwise provided by law."

SEC. 4. [Levy, collection, payment and penalties.] The duties imposed by this title shall be levied, collected, and paid on the same basis, in the same

manner, and subject to the same provisions of law, including penalties, as the duties imposed by such Act of 1913.

SEC. 5. [Short title — “Emergency Tariff Act.”] That this title shall be cited as the “Emergency Tariff Act.”

TITLE II.—ANTIDUMPING.

DUMPING INVESTIGATION.

SEC. 201. (a) That whenever the Secretary of the Treasury (hereinafter in this Act called the “Secretary”), after such investigation as he deems necessary, finds that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, then he shall make such finding public to the extent he deems necessary, together with a description of the class or kind of merchandise to which it applies in such detail as may be necessary for the guidance of the appraising officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the appraiser or person acting as appraiser has reason to believe or suspect, from the invoice or other papers or from information presented to him, that the purchase price is less, or that the exporter’s sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the cost of production) he shall forthwith, under regulations prescribed by the Secretary, notify the Secretary of such fact and withhold his appraisement report to the collector as to such merchandise until the further order of the Secretary, or until the Secretary has made public a finding as provided in subdivision (a) in regard to such merchandise.

SPECIAL DUMPING DUTY.

SEC. 202. (a) That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, if the purchase price or the exporter’s sales price is less than the foreign market value (or, in the absence of such value, than the cost of production) there shall be levied, collected, and paid, in addition to the duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

(b) If it is established to the satisfaction of the appraising officers that the amount of such difference between the purchase price and the foreign market value is wholly or partly due to the fact that the wholesale quantities, in which such or similar merchandise is sold or freely offered for sale to all purchasers for exportation to the United States in the ordinary course of trade, are greater than the wholesale quantities in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), then due allowance shall be made therefor in determining the foreign market value for the purposes of this section.

(c) If it is established to the satisfaction of the appraising officers that the amount of such difference between the exporter's sales price and the foreign market value is wholly or partly due to the fact that the wholesale quantities, in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the United States in the ordinary course of trade, are greater than the wholesale quantities in which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), then due allowance shall be made therefor in determining the foreign market value for the purposes of this section.

PURCHASE PRICE.

SEC. 203. That for the purposes of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

EXPORTER'S SALES PRICE.

SEC. 204. That for the purpose of this title the exporter's sales price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and (4) the amount of any export tax imposed by the country of exportation on the exportation of

the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

FOREIGN MARKET VALUE.

SEC. 205. That for the purposes of this title the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption (or, if not so sold or offered for sale for home consumption, then for exportation to countries other than the United States), plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

COST OF PRODUCTION.

SEC. 206. That for the purposes of this title the cost of production of imported merchandise shall be in the sum of —

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing, identical or substantially identical merchandise, at a time preceding the date of shipment of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of identical or substantially identical merchandise;

(3) The cost of all containers and coverings, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) equal to the profit which is ordinarily added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same general trade as the manufacturer or producer of the particular merchandise under consideration.

EXPORTER.

SEC. 207. That for the purposes of this title the exporter of imported merchandise shall be the person by whom or for whose account the merchandise is imported into the United States:

(1) If such person is the agent or principal of the exporter, manufacturer, or producer; or

(2) If such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer; or

(3) If the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in any business conducted by such person; or

(4) If any person or persons, jointly or severally, directly or indirectly, through stock ownership or control or otherwise, own or control in the aggregate 20 per centum or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States, and also 20 per centum or more of such power or control in the business of the exporter, manufacturer, or producer.

OATHS AND BONDS ON ENTRY.

SEC. 208. That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and delivery of which has not been made by the collector before such finding has been so made public, unless the person by whom or for whose account such merchandise is imported makes oath before the collector, under regulations prescribed by the Secretary, that he is not an exporter, or unless such person declares under oath at the time of entry, under regulations prescribed by the Secretary, the exporter's sales price of such merchandise, it shall be unlawful for the collector to deliver the merchandise until such person has made oath before the collector, under regulations prescribed by the Secretary, that the merchandise has not been sold or agreed to be sold by such person, and has given bond to the collector, under regulations prescribed by the Secretary, with sureties approved by the collector, in an amount equal to the estimated value of the merchandise, conditioned: (1) that he will report to the collector the exporter's sales price of the merchandise within 30 days after such merchandise has been sold or agreed to be sold in the United States, (2) that he will pay on demand from the collector the amount of special dumping duty, if any, imposed by this title upon such merchandise, and (3) that he will furnish to the collector such information as may be in his possession and as may be necessary for the ascertainment of such duty, and will keep such records as to the sale of such merchandise as the Secretary may by regulation prescribe.

DUTIES OF APPRAISERS.

SEC. 209. That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and as to which the appraiser or person

acting as appraiser has made no appraisement report to the collector before such finding has been so made public, it shall be the duty of each appraiser or person acting as appraiser, by all reasonable ways and means to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost of production to the contrary notwithstanding) and report to the collector the foreign market value or the cost of production, as the case may be, the purchase price, and the exporter's sales price, and any other facts which the Secretary may deem necessary for the purposes of this title.

APPEALS AND PROTESTS.

SEC. 210. That for the purposes of this title the determination of the appraiser or person acting as appraiser as to the foreign market value or the cost of production, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; and the general appraisers, the Board of General Appraisers, and the Court of Customs Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law.

DRAWBACKS.

SEC. 211. That the special dumping duty imposed by this title shall be treated in all respects as regular customs duties within the meaning of all laws relating to the drawback of customs duties.

SHORT TITLE.

SEC. 212. That this title may be cited as the "Antidumping Act, 1921."

TITLE III.—ASSESSMENT OF AD VALOREM DUTIES.

SEC. 301. [**Export value of merchandise as basis of assessment.**] That whenever merchandise which is imported into the United States is subject to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value thereof, duty shall in no case be assessed on a value less than the export value of such merchandise.

EXPORT VALUE.

SEC. 302. That for the purposes of this title the export value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United

States, and plus, if not included in such price, the amount of any export tax imposed by the country of exportation on merchandise exported to the United States.

REFERENCES TO "VALUE" IN EXISTING LAW.

SEC. 303. (a) That wherever in Title I of this Act, or in the Tariff Act of 1913, as amended, or in any law of the United States in existence at the time of the enactment of this Act relative to the appraisement of imported merchandise (except sections 2874, 2976, and 3016 of the Revised Statutes, and section 801 of the Revenue Act of 1916), reference is made to the value of imported merchandise (irrespective of the particular phraseology used and irrespective of whether or not such phraseology is limited or qualified by words referring to country or port of exportation or principal markets) such reference shall, in respect to all merchandise imported on or after the day this Act takes effect, be construed to refer, except as provided in subdivision (b), to actual market value as defined by the law in existence at the time of the enactment of this Act, or to export value as defined by section 302 of this Act, whichever is higher.

(b) If the rate of duty upon imported merchandise is in any manner dependent upon the value of any component material thereof, such value shall be an amount determined under the provisions of the Tariff Act of 1913, as in force prior to the enactment of this Act.

DEFINITIONS.

SEC. 304. That when used in this title the term "Tariff Act of 1913" means the Act entitled "An Act to reduce tariff duties and provide revenue for the Government, and for other purposes," approved October 3, 1913.

TITLE IV.—GENERAL PROVISIONS.

STATEMENTS IN INVOICE.

SEC. 401. That all invoices of imported merchandise, and all statements in the form of an invoice, in addition to the statements required by law in existence at the time of the enactment of this Act, shall contain such other statements as the Secretary may by regulation prescribe, and a statement as to the currency in which made out, specifying whether gold, silver, or paper.

STATEMENTS AT TIME OF ENTRY.

SEC. 402. That the owner, importer, consignee, or agent, making entry of imported merchandise, shall set forth upon the invoice, or statement in the form of an invoice, and in the entry, in addition to the statements required by the law in existence at the time of the enactment of this Act, such statements, under oath if required, as the Secretary may by regulation prescribe.

CONVERSION OF CURRENCY.

SEC. 403. (a) That section 25 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," is amended to read as follows:

"SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the

various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the first day of January, April, July, and October in each year."

(b) For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary under the provisions of section 25 of such Act of August 27, 1894, for the quarter in which the merchandise was exported.

(c) If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve Bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through the exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

(d) Sections 2903 and 3565 of the Revised Statutes are repealed.

(e) Section 25 of such Act of August 27, 1894, as in force prior to the enactment of this Act, and section 2903 of the Revised Statutes, shall remain in force for the assessment and collection of duties on merchandise imported into the United States prior to the day of the enactment of this Act.

For Act of Aug. 27, 1894, sec. 25, here amended, see 2 Fed. Stat. Ann. (2d ed.) 368.

For R. S. sec. 2903, here repealed, see 2 Fed. Stat. Ann. (2d ed.) 1047.

For R. S. sec. 3565, here repealed, see 2 Fed. Stat. Ann. (2d ed.) 365.

INSPECTION OF EXPORTER'S BOOKS.

SEC. 404. That if any person manufacturing, producing, selling, shipping, or consigning merchandise exported to the United States fails, at the request of the Secretary, or an appraiser, or person acting as appraiser, or a collector, or a general appraiser, or the Board of General Appraisers, as the case may be, to permit a duly accredited officer of the United States to inspect his books, papers, records, accounts, documents, or correspondence, pertaining to the market value or classification of such merchandise, then while such failure continues the Secretary, under regulations prescribed by him, (1) shall prohibit the importation into the United States of merchandise manufactured, produced, sold, shipped or consigned by such person, and (2) may instruct the collectors to withhold delivery of merchandise manufactured, produced, sold, shipped or consigned by such person. If such failure continues for a period of one year from the date of such instructions the collector shall cause the merchandise, unless previously exported, to be sold at public auction as in the case of forfeited merchandise.

INSPECTION OF IMPORTER'S BOOKS.

SEC. 405. That if any person importing merchandise into the United States or dealing in imported merchandise fails, at the request of the Secretary, or an appraiser, or person acting as appraiser, or a collector, or a general appraiser, or the Board of General Appraisers, as the case may be, to permit a duly accredited officer of the United States to inspect his books, papers, records, accounts, documents, or correspondence, pertaining to the value or classification of such merchandise, then while such failure continues the Secretary, under regulations prescribed by him, (1) shall prohibit the importation of merchandise into the United States by or for the account of such person, and (2) shall instruct the collectors to withhold delivery of merchandise imported by or for the account of such person. If such failure continues for a period of one year from the date of such instructions the collector shall cause the merchandise, unless previously exported, to be sold at public auction as in the case of forfeited merchandise.

DEFINITIONS.

SEC. 406. That when used in Title II or Title III or in this title —

The term "person" includes individuals, partnerships, corporations, and associations; and

The term "United States" includes all Territories and possessions subject to the jurisdiction of the United States, except the Philippine Islands, the Virgin Islands, the islands of Guam and Tutuila, and the Canal Zone.

RULES AND REGULATIONS.

SEC. 407. That the Secretary shall make rules and regulations necessary for the enforcement of this Act.

TITLE V.—DYES AND CHEMICALS.

SEC. 501. (a) **[Refusal of entry]** That on and after the day following the enactment of this Act, for the period of three months, no sodium nitrite, no dyes or dyestuffs, including crudes and intermediates, no product or products derived directly or indirectly from coal tar (including crudes, intermediates, finished or partly finished products, and mixtures and compounds of such coal-tar products), and no synthetic organic drugs or synthetic organic chemicals, shall be admitted to entry or delivered from customs custody in the United States or in any of its possessions unless the Secretary determines that such article or a satisfactory substitute therefor is not obtainable in the United States or in any of its possessions in sufficient quantities and on reasonable terms as to quality, price and delivery, and that such article in the quantity to be admitted is required for consumption by an actual consumer in the United States or in any of its possessions within six months after receipt of the merchandise.

This subdivision was amended by Act of Aug. 24, 1921 (see *infra*, p. 45), by striking out the words "three months" and inserting in lieu thereof the words "six months." It was further amended by Act of Nov. 16, 1921 (see *infra*, this title, p. 45), which provided that Title V "shall continue in force until otherwise provided by law."

(b) **[War Trade Board Section of Department of State — Abolishment — Treasury Department as successor — effect on existing licenses relating to dye and chemical imports.]** Upon the day following the enactment of this

Act the War Trade Board Section of the Department of State shall cease to exist; all clerks and employees of such War Trade Board Section shall be transferred to and become clerks and employees of the Treasury Department and all books, documents, and other records relating to such dye and chemical import control of such War Trade Board Section shall become books, documents and records of the Treasury Department. All individual licenses issued by such War Trade Board Section prior to the enactment of this Act shall remain in effect during the period of their validity, and the importations under such licenses shall be permitted. All unexpended funds and appropriations for the use and maintenance of such War Trade Board Section shall become funds and appropriations available to be expended by the Secretary in the exercise of the power and authority conferred upon him by this section.

Sec. 502. [Short Title.] That this title may be cited as the "Dye and Chemical Control Act, 1921."

An Act To constitute Forth Worth, in the State of Texas, a port of entry and to extend to said port the privileges of section 7 of an Act approved June 10, 1880, entitled "An Act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes."

[Act of June 18, 1921.]

[Port of Fort Worth — immediate transportation privileges.] That Fort Worth, in the State of Texas, be, and the same is hereby, constituted a port of entry in the customs collection district of San Antonio, Texas, and that the privileges of section 7 of an Act entitled "An Act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes," approved June 10, 1880, as amended, governing the immediate transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to the said port of Fort Worth, in the State of Texas.

For Act of June 10, 1880, as amended, see 2 Fed. Stat. Ann. (2d ed.) 1119.

An Act To control importations of dyes and chemicals.

[Act of Aug. 24, 1921.]

[Sec. 1.] [Dyes and chemicals — refusal of entry.] That subdivision (a) of section 501 of the Dye and Chemical Control Act, approved May 27, 1921, is amended by striking out the words "three months," and inserting in lieu thereof the words "six months."

For subd. (a) of sec. 501 of the Dye and Chemical Control Act, here amended, see *supra*, this title, p. 44.

An Act To extend the Tariff Act approved May 27, 1921.

[Act of Nov. 16, 1921.]

[Tariff Act of 1921 — continuance in force.] That Titles I and V of the Act entitled "An Act imposing temporary duties upon certain agricultural

products to meet present emergencies and to provide revenue; to regulate commerce with foreign countries; to prevent dumping of foreign merchandise on the markets of the United States; to regulate the value of foreign money; and for other purposes," approved May 27, 1921, shall continue in force until otherwise provided by law.

For the parts of the Act of May 27, 1921, here continued in force, see *supra*, this title.

DESERT LANDS

See PUBLIC LANDS

DIPLOMATIC AND CONSULAR OFFICERS

Act of March 2, 1921 (Diplomatic and Consular Appropriation Act), 46.

Sec. 1. Ambassadors, Ministers and Consuls General — Salaries, 46.

Secretaries in Diplomatic Service — Salaries, 47.

Interpreters — Salaries, 47.

Buildings for Diplomatic and Consular Establishments, 48.

Consuls — Citizenship, 49.

Clerks at Consulates — Appointment — Civil-service Rules, 49.

American Convicts in China, Chosen, Siam and Turkey — Expense of Maintenance, 49.

3. International Conferences — Limitation on Character of Expenditures, 49.

CROSS-REFERENCE

See also *HEALTH AND QUARANTINE*

An Act Making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1922.

[*Act of March 2, 1921.*]

[SEC. 1.] * * * [Ambassadors, ministers and consuls general — salaries.] Ambassadors extraordinary and plenipotentiary to Argentina, Belgium, Brazil, Chile, France, Germany, Great Britain, Italy, Japan, Mexico, Peru, Spain, and Turkey, at \$17,500 each, \$227,500;

Envoys extraordinary and ministers plenipotentiary to China, Cuba, the Netherlands and Luxemburg, at \$12,000 each, \$36,000;

Envoys extraordinary and ministers plenipotentiary to Austria, Bolivia, Bulgaria, Czecho-Slovakia, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, Greece, Guatemala, Haiti, Honduras, Hungary, Nicaragua, Norway, Panama, Paraguay, Poland, Uruguay, Persia, Portugal, Rumania, Salvador, Siam, Sweden, Switzerland, and Venezuela, at \$10,000 each, and to the Serbs, Croats, and Slovenes, \$10,000; in all, \$300,000;

Minister resident and consular general to Liberia, \$5,000;

Agent and consul general at Tangier, \$7,500;

Agent and consul general at Cairo, \$7,500;

Provided, That no salary herein appropriated shall be paid to any official receiving any other salary from the United States Government.

* * * **[Secretaries in Diplomatic Service — salaries.]** For salaries of secretaries in the Diplomatic Service, as provided in the Act of February 5, 1915, entitled "An Act for the improvement of the foreign service," as amended by the Act making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1917, approved July 1, 1916, and the Act making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1921, approved June 4, 1920, \$379,000;

Japanese secretary of embassy to Japan, \$5,500;

Turkish secretary of embassy to Turkey, \$3,600;

Chinese secretary of legation to China, \$5,500;

Chinese assistant secretary of legation to China, \$4,000;

Japanese assistant secretary of embassy to Japan, \$4,000;

Turkish assistant secretary of embassy to Turkey, \$2,000; * * *

For Act of Feb. 5, 1915, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 18.

For Act of June 4, 1920, mentioned in the text, see 1920 Supp. Fed. Stat. Ann. (2d ed.) 34.

* * * **[Interpreters — salaries.]** Interpreter to legation and consulate general to Persia, \$2,000;

Interpreter to legation and consulate general to Bangkok, Siam, \$2,000;

For ten student interpreters at the legation to China, who shall be citizens of the United States, and whose duty it shall be to study the Chinese language with a view to supplying interpreters to the legation and consulates in China, at \$1,500 each, \$15,000: *Provided*, That the method of selecting said student interpreters shall be nonpartisan: *And provided further*, That upon receiving such appointment each student interpreter shall sign an agreement to continue in the service as an interpreter at the legation or consulates in China so long as his services may be required within a period of five years;

For the payment of the cost of tuition of student interpreters in China, at the rate of \$350 per annum each, \$3,500.

For six student interpreters at the embassy to Japan, who shall be citizens of the United States, and whose duty it shall be to study the Japanese language with a view to supplying interpreters to the embassy and consulates in Japan, at \$1,500 each, \$9,000: *Provided*, That the method of selecting said student interpreters shall be nonpartisan: *And provided further*, That upon receiving such appointment each student interpreter shall sign an agreement to continue in the service as an interpreter at the embassy or consulates in Japan so long as his services may be required within a period of five years;

For the payment of the cost of tuition of student interpreters at the embassy to Japan, at the rate of \$200 per annum each, \$1,200;

For four student interpreters at the embassy to Turkey, who shall be citizens of the United States, and whose duty it shall be to study the language of Turkey and any other language that may be necessary to qualify them for service as interpreters to the embassy and consulates in Turkey, at \$1,500 each, \$6,000: *Provided*, That the method of selecting said student interpreters shall be nonpartisan: *And provided further*, That upon receiving such appointment

each student interpreter shall sign an agreement to continue in the service as an interpreter to the embassy and consulates in Turkey so long as his services may be required within a period of five years;

For the payment of the cost of tuition of student interpreters at the embassy to Turkey, at the rate of \$200 per annum each, \$800;

No person drawing the salary of interpreter or student interpreter as above provided shall be allowed any part of the salary appropriated for any secretary of legation or other officer * * *.

* * * **[Buildings for diplomatic and consular establishments.]** For filling and grading the grounds of the American legation building in the city of San Salvador, the construction on said grounds of driveways, sidewalks, tile court at back of building, fence, drains, water tank, and for such other minor improvements as may be found necessary, \$11,000, to be immediately available.

For the acquisition of land and buildings in Paris, France, to be used as the American embassy under the provisions of the Act of February 17, 1911, \$150,000, or so much thereof as may be necessary.

The President is hereby authorized to accept, on behalf of the United States, for use as a residence by the diplomatic representatives of the United States the land and buildings thereon known as numbers 13-14 Prince's Gate in the city of London, England, and such other lands and buildings as form a part of said property, presented by J. Pierpont Morgan: *Provided*, That the deed of transfer of said property to the United States shall be unconditional and free from encumbrance and shall convey such estate as may be held by the said J. Pierpont Morgan: *And provided further*, That the property is held on freehold tenure and not on customary London ground lease.

For the acquisition of embassy, legation, or consular buildings and grounds at any or all of the following places: Rome, Brussels, Berlin, Christiania, Athens, Belgrade, Bucharest, Prague, Monrovia, Vienna, Budapest, Canton, Hankow and Amoy, \$300,000: *Provided*, That the limit of cost shall not exceed the sum of \$150,000 at any one place: *And provided further*, That such acquisition shall be subject to the approval of the commission hereinafter constituted.

There is hereby constituted a commission composed of the chairman and the ranking minority member of the Committee on Foreign Relations of the Senate, the chairman and the ranking minority member of the Committee on Foreign Affairs of the House of Representatives, the Secretary of State, and the Secretary of the Treasury, of which the chairman of the Committee on Foreign Relations of the Senate shall be the chairman, whose duty it shall be to consider and formulate plans or proposals for the purchase of embassy, legation, and consular buildings and grounds under the authority contained in this Act.

With the approval of said commission and within a limit of cost at any one place of \$150,000, the Secretary of State shall have power to purchase from any foreign government suitable buildings, or buildings and grounds, for embassy, legation, and consular purposes, separate or combined, in any city specified in connection with the foregoing appropriation of \$300,000, and to effect payment therefor by causing the purchase price thereof to be credited upon the obligations or debts of such government then held by or owing to the United States, or by causing a part of such purchase price so to be credited, paying the remainder in money from applicable sums hereinbefore appropriated

for the acquisition of embassy, legation, and consular buildings and grounds; and when the Secretary of State shall certify to the Secretary of the Treasury that a purchase has been made, the government from which made, and that a part or all of the purchase price is to be paid by crediting the same upon obligations or debts of said government then held by or owing to the United States, the date as of which said payment is to be made and the amount in United States dollars so to be credited, the Secretary of the Treasury is authorized and directed to credit the amount so certified upon unpaid principal or interest of obligations or debts of said foreign government held by the United States: *And provided further*, That the President is hereby authorized in his discretion to accept on behalf of the United States unconditional gifts of land, buildings, furniture, and furnishings, or any of them, for the use of diplomatic and consular offices and residences.

* * * [**Consuls — citizenship.**] Every consul general, consul, vice consul, and wherever practicable, every consular agent shall be an American citizen.

* * * [**Clerks at consulates — appointment — civil-service rules.**] Clerks, whenever hereafter appointed, shall, so far as practicable, be appointed under civil-service rules and regulations.

* * * [**American convicts in China, Chosen, Siam and Turkey — expense of maintenance.**] Expenses of maintaining at Shanghai, under charge of the United States marshal for China, an institution for incarcerating American convicts and insane in China, \$2,000; for salary of deputy marshal, \$1,200; assistant deputy marshal, \$800; in all, \$4,000;

Paying for the keeping, feeding, and transportation of prisoners in China, Chosen, Siam, and Turkey and of those declared insane by the United States Court for China, \$9,000;

Rent of prison for American convicts in Smyrna, Turkey, and for wages of keepers of the same, \$1,000.

Rent of prison for American convicts in Constantinople, Turkey, and for wages of keepers of the same, \$1,000; * * *

SEC. 3. [**International conferences — limitation on character of expenditures.**] No sums herein appropriated in connection with the participation of the United States in international conferences, congresses, or meetings within the United States shall be expended in payment of the personal expense, subsistence, transportation, or entertainment of any person or for the purchase of medals, badges, or souvenirs.

DISTRICT ATTORNEYS

See JUDICIAL OFFICERS

DISTRICT COURTS

See ALASKA; JUDICIAL OFFICERS; JUDICIARY

DISTRICT OF COLUMBIA

Act of Dec. 21, 1920, 50.

Sec. 1. Hotel Proprietors and Innkeepers — Liability to Guests — Articles of Value — Providing Safe, 50.

2. Baggage Stolen from Room of Guest — Liability of Proprietor, 50.

Act of Aug. 24, 1921 (Rent Act Amended), 51.

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CROSS-REFERENCES

See also *JUDICIAL OFFICERS; PUBLIC OFFICERS AND EMPLOYEES*

An Act Establishing the liability of hotel proprietors and innkeepers in the District of Columbia.

[*Act of Dec. 21, 1920.*]

[SEC. 1.] [**Hotel proprietors and innkeepers — liability to guests — articles of value — providing safe.**] That whenever the proprietor of any hotel or inn in the District of Columbia shall provide in such hotel or inn a suitable safe or vault for the safekeeping of any money, jewelry, or other articles of value, other than wearing apparel, belonging to or in the custody of guests, and shall notify the guests thereof by keeping conspicuously posted in the office and on the inside of the entrance door of the sleeping rooms of said hotel or inn a notice printed in distinct English type, such proprietor shall not be liable for the loss of or injury to any such property by theft or otherwise sustained by any guest unless such guest has offered to deliver the same to such proprietor for custody in such safe or vault and such proprietor has omitted or refused to receive it and deposit it in such safe or vault and to give such guest a receipt therefor: *Provided*, That in no case shall such proprietor be liable for the loss or injury to property so deposited in an amount exceeding the sum of \$500, except by special contract in writing, stating the kind and value of property received, the kind and extent of the liability of said proprietor, and the reasonable consideration to be paid for such safekeeping, not in excess of the customary insurance charge or premium, and which said contract shall be signed by said guest and said proprietor or his clerk: *Provided further*, That nothing herein contained shall apply to such an amount of money and such jewelry or other articles of value as is usual, common, or prudent for guests to retain in their rooms.

SEC. 2. [**Baggage stolen from room of guest — liability of proprietor.**] That whenever the proprietor of any hotel or inn shall keep posted in a conspicuous manner on the inside of the entrance door to the sleeping rooms of said hotel or inn a notice printed in distinct English type requiring the guests occupying said rooms to lock or bolt the door of said room and upon leaving said room

to lock the door and deposit the key at the office, the proprietor shall not be liable for any baggage stolen from said room if it shall appear that said room was left by the guest unlocked or unbolted, or that the key was not so deposited at the office at the time of the loss of said baggage, unless the loss is directly or indirectly caused by or attributable to the proprietor or his employee or employees.

An Act To extend for the period of seven months the provisions of Title II of the Food Control and the District of Columbia Rents Act,* approved October 22, 1919, and for other purposes.

[Act of Aug. 24, 1921.]

[SEC. 1.] [Extension of period for remaining in force.] That Title II of the Food Control and the District of Columbia Rents Act, approved October 22, 1919, shall remain in full force and effect until May 22, 1922.

SEC. 2. [“ Rental property ” defined — sec. 101 amended.] That the second paragraph of section 101 of such Act is amended to read as follows:

“ The term ‘ rental property ’ means any building or part thereof or land appurtenant thereto in the District of Columbia rented or hired and the service agreed or required by law or by determination of the commission to be furnished in connection therewith; but does not include (a) any portion of a hotel or apartment building, (b) a garage or warehouse, or (c) any other building or part thereof or land appurtenant thereto, used by the tenant exclusively for a business purpose other than the subleasing or otherwise subcontracting for use for living accommodations.”

SEC. 3. [Salaries and expenditures — employees — sec. 103 amended.] That section 103 of such Act is amended to read as follows:

“ SEC. 103. Each commissioner shall receive a salary of \$5,000 a year payable monthly. The commission shall appoint a secretary, who shall receive a salary of \$3,000 a year, and an attorney, who shall receive a salary of \$5,000 a year, payable in like manner; and subject to the provisions of the civil service laws, it may appoint and remove such officers, employees, and agents, and make such expenditures for rent, printing, telegrams, telephone, law books, books of reference, periodicals, furniture, stationery, office equipment and other supplies and expenses as may be necessary to the administration of this title. The attorney appointed by the commission shall appear for and represent the commission in all judicial proceedings and generally perform such professional duties and services as attorney and counsel to the commission as may reasonably be required of him by the commission. All of the expenditures of the commission shall upon the presentation of itemized vouchers therefor approved by the chairman of the commission be audited and paid in the same manner as other expenditures for the District of Columbia.

“ With the exception of the secretary and the attorney, all employees of the commission shall be appointed from lists of eligibles supplied by the Civil Service Commission and in accordance with the civil service law.”

* The District of Columbia Rents Act will be found in 1919 Supp., p. 41.

SEC. 4. [Return of excess rentals — validity of judgment for excess rentals — prosecutions for violations of act — new sections added.] That Title II of such Act is amended by adding at the end thereof two new sections to read as follows:

“**SEC. 123.** In all cases where the owner of any rental property, apartment, or hotel has, prior to April 18, 1921, collected or received any rent or charge therefor in excess of the amount fixed in a determination of the commission made and in full force and effect in accordance with the provisions of the title, he may within thirty days after this section takes effect return such excess rental or charge to the tenant directly, and if such return is made within such period the owner shall not become liable under the provisions of section 112 of this Act. An owner who has obtained a judgment against a tenant for, or which includes, such rent or charge in excess of the amount fixed in such a determination of the commission shall move to vacate such judgment to the amount of such excess; within sixty days after this section takes effect. In case such motion is not made and such owner does not exercise reasonable diligence to have such judgment vacated, such judgment, to the amount of such excess, shall be null and void.

“**SEC. 124. (a)** Any violation of this Act or of any order of the commission, committed before the termination of this Act may, after such termination, be prosecuted by and in the name of the Attorney General in lieu of the commission in the same manner and with the same effect as if this Act had not been terminated.

“(b) In the case of (1) any proceeding begun under the provisions of section 114 before the termination of this Act, or (2) any proceeding on appeal from a determination of the commission begun before the termination of this Act, such proceeding may, after such termination, be continued in the same manner with the same effect as if this Act had not been terminated, and all powers and duties in respect to such proceedings vested in the commission by this Act shall for the purposes of such proceedings be vested in the Attorney General.

“(c) Any right or obligation based upon any provision of this Act or upon any order of the commission, accrued prior to the termination of this Act may, after the termination of this Act, be enforced in the same manner and with the same effect as if this Act had not been terminated.

“(d) The Attorney General may, after the termination of this Act, appoint the attorney last appointed by the commission under the provisions of section 103 to assist in the enforcement of this Act. Such attorney shall continue to receive compensation for such services at the rate of \$5,000 per annum, payable monthly.”

SEC. 5. [Provisions of amendatory Act when in effect.] That the provisions of this Act, except section 2, shall take effect upon the enactment of the Act. Section 2 shall take effect on and after October 22, 1921.

DRAINAGE

See PUBLIC LANDS

EDUCATION

See INDIANS; VOCATIONAL REHABILITATION

EMERGENCY FLEET CORPORATION

See SHIPPING AND NAVIGATION

EMERGENCY TARIFF

See CUSTOMS DUTIES

EMPLOYEES

See PUBLIC OFFICERS AND EMPLOYEES

ESPIONAGE ACT

See the Resolution of March 3, 1921, set out in the title WAR DEPARTMENT AND MILITARY ESTABLISHMENT, in this volume, *infra*. This resolution repeals much war time legislation, and expressly repeals the Act of May 16, 1918, which amended title 1, sec. 3 of Act of June 15, 1917, thereby reviving and restoring said sec. 3 with the same force and effect as originally enacted. Section 3 as originally enacted is set out in 1918 Supp. Fed. Stat. Ann. 123 note.

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CROSS-REFERENCES

See also CONGRESS; PUBLIC OFFICERS AND EMPLOYEES;
TREASURY DEPARTMENT

SEC. 4. [Typewriting machines — purchase.] That no part of any money appropriated by this or any other Act shall be used during the fiscal year 1922 for the purchase of any standard typewriting machine, except bookkeeping and billing machines, at a price in excess of the following, to wit: For correspondence models with carriages which will accommodate paper ten inches in width, \$70; for models with carriages which will accommodate paper twelve inches in width, \$75; for models with carriages which will accommodate paper fourteen inches in width, \$77.50; for models with carriages which will accommodate paper sixteen inches in width, \$82.50; for models with carriages which will accommodate paper eighteen inches in width, \$87.50; for models with carriages which will accommodate paper twenty inches in width, \$94; for models with carriages which will accommodate paper twenty-two inches in width,

\$95; for models with carriages which will accommodate paper twenty-four inches in width, \$97.50; for models with carriages which will accommodate paper twenty-six inches in width, \$103.50; for models with carriages which will accommodate paper twenty-eight inches in width, \$104; for models with carriages which will accommodate paper thirty inches in width, \$105; for models with carriages which will accommodate paper thirty-two inches in width, \$107.50.

All purchases of typewriting machines during the fiscal year 1922 by executive departments and independent establishments for use in the District of Columbia or in the field, except as hereinafter provided, shall be made from the surplus machines in the stock of the General Supply Committee. The War Department shall furnish the General Supply Committee, immediately upon the approval of this Act, a complete inventory of the various makes, models, and classes of typewriters in its possession, the condition of such machines, and the point of storage, and shall turn over to the General Supply Committee such typewriting machines in such quantities as the Secretary of the Treasury from time to time may call for by specific requisition for sale to the various services of the Government. If the General Supply Committee is unable to furnish serviceable machines to any such service of the Government, it shall furnish unserviceable machines at current exchange prices and such machines shall then be applied by the service of the Government receiving them as part payment for new machines from commercial sources in accordance with the prices fixed in the preceding paragraph. And in selling typewriting machines to the various services the General Supply Committee may accept an equal number of unserviceable machines as part payment thereon at the exchange prices quoted in the current general schedule of supplies.

This is from the Legislative, Executive and Judicial Appropriation Act of March 3, 1921.

SEC. 3. [Publications — discontinuance.] Any journal, magazine, periodical, or similar publication which is now being issued by a department or establishment of the Government may, in the discretion of the head thereof, be continued, within the limitation of available appropriations or other Government funds, until December 1, 1921, when, if it shall not have been specifically authorized by Congress before that date, such journal, magazine, periodical, or similar publication shall be discontinued.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

An Act To provide a national budget system and an independent audit of Government accounts, and for other purposes.

[Act of June 10, 1921.]

TITLE I.—DEFINITIONS.

SECTION 1. [Title of Act — (“ Budget and Accounting Act, 1921 ”).] This Act may be cited as the “ Budget and Accounting Act, 1921.”

SEC. 2. [“ Department and establishment ”—“ the Budget ”—“ Bureau ”—“ Director ”—“ Assistant Director.”] When used in this Act—

The terms “ department and establishment ” and “ department or establishment ” mean any executive department, independent commission, board, bureau,

office, agency, or other establishment of the Government, including the municipal government of the District of Columbia, but do not include the Legislative Branch of the Government or the Supreme Court of the United States;

The term "the Budget" means the Budget required by section 201 to be transmitted to Congress;

The term "Bureau" means the Bureau of the Budget;

The term "Director" means the Director of the Bureau of the Budget; and

The term "Assistant Director" means the Assistant Director of the Bureau of the Budget.

TITLE II.—THE BUDGET.

SEC. 201. [Transmission of Budget to Congress by President — contracts.]

The President shall transmit to Congress on the first day of each regular session, the Budget, which shall set forth in summary and in detail:

(a) Estimates of the expenditures and appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year; except that the estimates for such year for the Legislative Branch of the Government and the Supreme Court of the United States shall be transmitted to the President on or before October 15th of each year, and shall be included by him in the Budget without revision;

(b) His estimates of the receipts of the Government during the ensuing fiscal year, under (1) laws existing at the time the Budget is transmitted and also (2) under the revenue proposals, if any, contained in the Budget;

(c) The expenditures and receipts of the Government during the last completed fiscal year;

(d) Estimates of the expenditures and receipts of the Government during the fiscal year in progress;

(e) The amount of annual, permanent, or other appropriations, including balances of appropriations for prior fiscal years, available for expenditure during the fiscal year in progress, as of November 1 of such year;

(f) Balanced statements of (1) the condition of the Treasury at the end of the last completed fiscal year, (2) the estimated condition of the Treasury at the end of the fiscal year in progress, and (3) the estimated condition of the Treasury at the end of the ensuing fiscal year if the financial proposals contained in the Budget are adopted;

(g) All essential facts regarding the bonded and other indebtedness of the Government; and

(h) Such other financial statements and data as in his opinion are necessary or desirable in order to make known in all practicable detail the financial condition of the Government.

SEC. 202. [Recommendations in Budget.]

(a) If the estimated receipts for the ensuing fiscal year contained in the Budget, on the basis of laws existing at the time the Budget is transmitted, plus the estimated amounts in the Treasury at the close of the fiscal year in progress, available for expenditure in the ensuing fiscal year, are less than the estimated expenditures for the ensuing fiscal year contained in the Budget, the President in the Budget shall make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency.

(b) If the aggregate of such estimated receipts and such estimated amounts in the Treasury is greater than such estimated expenditures for the ensuing fiscal

year, he shall make such recommendations as in his opinion the public interests require.

SEC. 203. [Transmission to Congress of supplemental or deficiency estimates.]

(a) The President from time to time may transmit to Congress supplemental or deficiency estimates for such appropriations or expenditures as in his judgment (1) are necessary on account of laws enacted after the transmission of the Budget, or (2) are otherwise in the public interest. He shall accompany such estimates with a statement of the reasons therefor, including the reasons for their omission from the Budget.

(b) Whenever such supplemental or deficiency estimates reach an aggregate which, if they had been contained in the Budget, would have required the President to make a recommendation under subdivision (a) of section 202, he shall thereupon make such recommendation.

SEC. 204. [Conformity of Budget to requirements of existing law — estimates for lump-sum appropriations.]

(a) Except as otherwise provided in this Act, the contents, order, and arrangement of the estimates of appropriations and the statements of expenditures and estimated expenditures contained in the Budget or transmitted under section 203, and the notes and other data submitted therewith, shall conform to the requirements of existing law.

(b) Estimates for lump-sum appropriations contained in the Budget or transmitted under section 203 shall be accompanied by statements showing, in such detail and form as may be necessary to inform Congress, the manner of expenditure of such appropriations and of the corresponding appropriations for the fiscal year in progress and the last completed fiscal year. Such statements shall be in lieu of statements of like character now required by law.

SEC. 205. [Transmission to Congress of alternative budget.] The President, in addition to the Budget, shall transmit to Congress on the first Monday in December, 1921, for the service of the fiscal year ending June 30, 1923, only, an alternative budget, which shall be prepared in such form and amounts and according to such system of classification and itemization as is, in his opinion, most appropriate, with such explanatory notes and tables as may be necessary to show where the various items embraced in the Budget are contained in such alternative budget.

SEC. 206. [Submission of estimates or requests to Congress by officers or employees of department — prohibition.] No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request, and no recommendation as to how the revenue needs of the Government should be met, shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress.

SEC. 207. [Bureau of the Budget — creation — director — salary — preparation of Budget.] There is hereby created in the Treasury Department a Bureau to be known as the Bureau of the Budget. There shall be in the Bureau a Director and an Assistant Director, who shall be appointed by the President and receive salaries of \$10,000 and \$7,500 a year, respectively. The Assistant Director shall perform such duties as the Director may designate, and during the absence or incapacity of the Director or during a vacancy in the office of Director he shall act as Director. The Bureau, under such rules and regula-

tions as the President may prescribe, shall prepare for him the Budget, the alternative Budget, and any supplemental or deficiency estimates. and to this end shall have authority to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments.

SEC. 208. [Employees in Bureau — appointment and compensation — expenditures.] (a) The Director, under such rules and regulations as the President may prescribe, shall appoint and fix the compensation of attorneys and other employees and make expenditures for rent in the District of Columbia, printing, binding, telegrams, telephone service, law books, books of reference, periodicals, stationery, furniture, office equipment, other supplies, and necessary expenses of the office, within the appropriations made therefor.

(b) No person appointed by the Director shall be paid a salary at a rate in excess of \$6,000 a year, and not more than four persons so appointed shall be paid a salary at a rate in excess of \$5,000 a year.

(c) All employees in the Bureau whose compensation is at a rate of \$5,000 a year or less shall be appointed in accordance with the civil-service laws and regulations.

(d) The provisions of law prohibiting the transfer of employees of executive departments and independent establishments until after service of three years shall not apply during the fiscal years ending June 30, 1921, and June 30, 1922, to the transfer of employees to the Bureau.

(e) The Bureau shall not be construed to be a bureau or office created since January 1, 1916, so as to deprive employees therein of the additional compensation allowed civilian employees under the provisions of section 6 of the Legislative, Executive, and Judicial Appropriation Act for the fiscal years ending June 30, 1921, and June 30, 1922, if otherwise entitled thereto.

SEC. 209. [Duties of Bureau — study of departments and establishments — reports to President.] The Bureau, when directed by the President, shall make a detailed study of the departments and establishments for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of the public service) should be made in (1) the existing organization, activities, and methods of business of such departments or establishments, (2) the appropriations therefor, (3) the assignment of particular activities to particular services, or (4) the regrouping of services. The results of such study shall be embodied in a report or reports to the President, who may transmit to Congress such report or reports or any part thereof with his recommendations on the matters covered thereby.

SEC. 210. [Codification by Bureau of laws relating to transmission to Congress of statements of receipts, and expenditures and estimates of appropriation.] The Bureau shall prepare for the President a codification of all laws or parts of laws relating to the preparation and transmission to Congress of statements of receipts and expenditures of the Government and of estimates of appropriations. The President shall transmit the same to Congress on or before the first Monday in December, 1921, with a recommendation as to the changes which, in his opinion, should be made in such laws or parts of laws.

SEC. 211. [Compiling of estimates — transfer of duty to Bureau.] The powers and duties relating to the compiling of estimates now conferred and

imposed upon the Division of Bookkeeping and Warrants of the office of the Secretary of the Treasury are transferred to the Bureau.

SEC. 212. [Duty of Bureau to give aid and information to congressional committees.] The Bureau shall, at the request of any committee of either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request.

SEC. 213. [Duty of departments to furnish information to Bureau.] Under such regulations as the President may prescribe, (1) every department and establishment shall furnish to the Bureau such information as the Bureau may from time to time require, and (2) the Director and the Assistant Director, or any employee of the Bureau when duly authorized, shall, for the purpose of securing such information, have access to, and the right to examine, any books, documents, papers, or records of any such department or establishment.

SEC. 214. [Designation of Budget officer for each department—preparation of departmental estimates.] (a) The head of each department and establishment shall designate an official thereof as budget officer therefor, who, in each year under his direction and on or before a date fixed by him, shall prepare the departmental estimates.

(b) Such budget officer shall also prepare, under the direction of the head of the department or establishment, such supplemental and deficiency estimates as may be required for its work.

SEC. 215. [Revision and submission of departmental estimates to Bureau of the Budget—necessity.] The head of each department and establishment shall revise the departmental estimates and submit them to the Bureau on or before September 15 of each year. In case of his failure so to do, the President shall cause to be prepared such estimates and data as are necessary to enable him to include in the Budget estimates and statements in respect to the work of such department or establishment.

SEC. 216. [Preparation and submission of departmental estimates, form, etc.] The departmental estimates and any supplemental or deficiency estimates submitted to the Bureau by the head of any department or establishment shall be prepared and submitted in such form, manner, and detail as the President may prescribe.

SEC. 217. [Appropriation for expenses of Bureau.] For expenses of the establishment and maintenance of the Bureau there is appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$225,000, to continue available during the fiscal year ending June 30, 1922.

TITLE III.—GENERAL ACCOUNTING OFFICE.

SEC. 301. [Establishment—abolishment of office of Comptroller of Treasury—transfer of officers, employees and property.] There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the

office of the Comptroller of the Treasury shall become officers and employees in the General Accounting Office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office. The Comptroller General is authorized to adopt a seal for the General Accounting Office.

SEC. 302. [Comptroller General and Assistant Comptroller General of United States — appointment and compensation — duties of Assistant Comptroller.] There shall be in the General Accounting Office a Comptroller General of the United States and an Assistant Comptroller General of the United States, who shall be appointed by the President with the advice and consent of the Senate, and shall receive salaries of \$10,000 and \$7,500 a year, respectively. The Assistant Comptroller General shall perform such duties as may be assigned to him by the Comptroller General, and during the absence or incapacity of the Comptroller General, or during a vacancy in that office, shall act as Comptroller General.

SEC. 303. [Term of office — removal — retirement.] Except as hereinafter provided in this section, the Comptroller General and the Assistant Comptroller General shall hold office for fifteen years. The Comptroller General shall not be eligible for reappointment. The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any Comptroller General or Assistant Comptroller General removed in the manner herein provided shall be ineligible for reappointment to that office. When a Comptroller General or Assistant Comptroller General attains the age of seventy years, he shall be retired from his office.

SEC. 304. [Powers and duties of General Accounting Office — transfer from other offices of Treasury Department — establishment of Bureau of Accounts in Post Office Department.] All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.

The administrative examination of the accounts and vouchers of the Postal Service now imposed by law upon the Auditor for the Post Office Department shall be performed on and after July 1, 1921, by a bureau in the Post Office Department to be known as the Bureau of Accounts, which is hereby established for that purpose. The Bureau of Accounts shall be under the direction of a Comptroller, who shall be appointed by the President with the advice and

consent of the Senate, and shall receive a salary of \$5,000 a year. The Comptroller shall perform the administrative duties now performed by the Auditor for the Post Office Department and such other duties in relation thereto as the Postmaster General may direct. The appropriation of \$5,000 for the salary of the Auditor for the Post Office Department for the fiscal year 1922 is transferred and made available for the salary of the Comptroller, Bureau of Accounts, Post Office Department. The officers and employees of the Office of the Auditor for the Post Office Department engaged in the administrative examination of accounts shall become officers and employees of the Bureau of Accounts at their grades and salaries on July 1, 1921. The appropriations for salaries and for contingent and miscellaneous expenses and tabulating equipment for such office for the fiscal year 1922, and all books, records, documents, papers, furniture, office equipment, and other property shall be apportioned between, transferred to, and made available for the Bureau of Accounts and the General Accounting Office, respectively, on the basis of duties transferred.

SEC. 305. [Claims, demands and accounts affecting United States — adjustment in General Accounting Office — R. S. sec. 236 amended.] Section 236 of the Revised Statutes is amended to read as follows:

“SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.”

For R. S. sec. 236, here amended, see 9 Fed. Stat. Ann. (2d ed.) 797.

SEC. 306. [Laws governing General Accounting Office — copies of books, etc., as evidence.] All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. Copies of any books, records, papers, or documents, and transcripts from the books and proceedings of the General Accounting Office, when certified by the Comptroller General or the Assistant Comptroller General under its seal, shall be admitted as evidence with the same effect as the copies and transcripts referred to in sections 882 and 886 of the Revised Statutes.

For R. S. secs. 882 and 886, referred to in the text, see 3 Fed. Stat. Ann. (2d ed.) 197, 199.

SEC. 307. [Payment of adjusted accounts or claims.] The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office, through disbursing officers of the several departments and establishments, instead of by warrant.

SEC. 308. [Office of Secretary of Treasury — Division of Bookkeeping and Warrants — Division of Public Moneys — transfer of duties.] The duties now appertaining to the Division of Public Moneys of the Office of the Secretary of the Treasury, so far as they relate to the covering of revenues and repayments into the Treasury, the issue of duplicate checks and warrants, and the certification of outstanding liabilities for payment, shall be performed by the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury.

SEC. 309. [Administrative appropriation and fund accounting — examination of accounts and claims against United States — forms, systems and procedure.] The Comptroller General shall prescribe the forms, systems, and

procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States.

SEC. 310. [Abolishment of offices of auditors of Treasury Department — transfer of officers, employees and property to General Accounting Office.] The offices of the six auditors shall be abolished, to take effect July 1, 1921. All other officers and employees of these offices except as otherwise provided herein shall become officers and employees of the General Accounting Office at their grades and salaries on July 1, 1921. All books, records, documents, papers, furniture, office equipment, and other property of these offices, and of the Division of Bookkeeping and Warrants, so far as they relate to the work of such division transferred by section 304, shall become the property of the General Accounting Office. The General Accounting Office shall occupy temporarily the rooms now occupied by the office of the Comptroller of the Treasury and the six auditors.

SEC. 311. [Officers and employees of General Accounting Office — appointment, etc.— compensation — duties — rules and regulations of office.] (a) The Comptroller General shall appoint, remove, and fix the compensation of such attorneys and other employees in the General Accounting Office as may from time to time be provided for by law.

(b) All such appointments, except to positions carrying a salary at a rate of more than \$5,000 a year, shall be made in accordance with the civil-service laws and regulations.

(c) No person appointed by the Comptroller General shall be paid a salary at a rate of more than \$6,000 a year, and not more than four persons shall be paid a salary at a rate of more than \$5,000 a year.

(d) All officers and employees of the General Accounting Office, whether transferred thereto or appointed by the Comptroller General, shall perform such duties as may be assigned to them by him.

(e) All official acts performed by such officers or employees specially designated therefor by the Comptroller General shall have the same force and effect as though performed by the Comptroller General in person.

(f) The Comptroller General shall make such rules and regulations as may be necessary for carrying on the work of the General Accounting Office, including rules and regulations concerning the admission of attorneys to practice before such office.

SEC. 312. [Investigations and reports by Comptroller General.] (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time.

SEC. 313. [Duty of departments and establishments to furnish information to Comptroller General.] All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes.

SEC. 314. [Accountants — civil service examinations.] The Civil Service Commission shall establish an eligible register for accountants for the General Accounting Office, and the examinations of applicants for entrance upon such register shall be based upon questions approved by the Comptroller General.

SEC. 315. [Appropriations available for General Accounting Office.] (a) All appropriations for the fiscal year ending June 30, 1922, for the offices of the Comptroller of the Treasury and the six auditors, are transferred to and made available for the General Accounting Office, except as otherwise provided herein.

(b) During such fiscal year the Comptroller General, within the limit of the total appropriations available for the General Accounting Office, may make such changes in the number and compensation of officers and employees appointed by him or transferred to the General Accounting Office under this Act as may be necessary.

(c) There shall also be transferred to the General Accounting Office such portions of the appropriations for rent and contingent and miscellaneous expenses, including allotments for printing and binding, made for the Treasury Department for the fiscal year ending June 30, 1922, as are equal to the amounts expended from similar appropriations during the fiscal year ending June 30, 1921, by the Treasury Department for the offices of the Comptroller of the Treasury and the six auditors.

(d) During the fiscal year ending June 30, 1922, the appropriations and portions of appropriations referred to in this section shall be available for salaries and expenses of the General Accounting Office, including payment for rent in

the District of Columbia, traveling expenses, the purchase and exchange of law books, books of reference, and for all necessary miscellaneous and contingent expenses.

SEC. 316. [Additional compensation — allowance to employees of General Accounting Office.] The General Accounting Office and the Bureau of Accounts shall not be construed to be a bureau or office created since January 1, 1916, so as to deprive employees therein of the additional compensation allowed civilian employees under the provisions of section 6 of the Legislative, Executive, and Judicial Appropriation Act for the fiscal year ending June 30, 1922, if otherwise entitled thereto.

For sec. 6 of the Legislative, Executive and Judicial Appropriation Act, mentioned in the text, see *infra*, this volume, title **PUBLIC OFFICERS AND EMPLOYEES**.

SEC. 317. [Transfer of employees to General Accounting Office — laws governing.] The provisions of law prohibiting the transfer of employees of executive departments and independent establishments until after service of three years shall not apply during the fiscal year ending June 30, 1922, to the transfer of employees to the General Accounting Office.

SEC. 318. [Time of taking effect of Act.] This Act shall take effect upon its approval by the President: *Provided*, That sections 301 to 317, inclusive, relating to the General Accounting Office and the Bureau of Accounts, shall take effect July 1, 1921.

SEC. 2. [Office appliances of War Trade Section of State Department — transfer to Treasury Department.] That all furniture, file cases, typewriters, and other office appliances in use by the War Trade Section of the Department of State on May 28, 1921, shall be transferred to and become the property of the Treasury Department.

This is from the Act of Aug. 24, 1921. Section 1 relates to the importation of dyes and chemicals and will be found *supra*, this volume, p. 45.

EXPLOSIVES

See **PENAL LAWS**

EXPORTS

See **CORPORATIONS; CUSTOMS DUTIES**

FARM LOAN ACT

See **AGRICULTURE**

FEDERAL HIGHWAY ACT

See HIGHWAYS

FEDERAL LAND BANK

See AGRICULTURE

FEDERAL POWER ACT

See WATERS

FEDERAL RESERVE ACT

See CORPORATIONS; NATIONAL BANKS

FEDERAL TRADE COMMISSION

See STOCKYARDS

FISH AND FISHERIES

See HAWAIIAN ISLANDS

FOOD AND FUEL

See the Resolution of March 3, 1921, set out in the title **WAR DEPARTMENT AND MILITARY ESTABLISHMENT** in this supplement, *infra*. This resolution repeals much war time legislation, including the Lever Act, so called, and amendments thereto. The Lever Act is set out in 1918 Supp. Fed. Stat. Ann. p. 181, and amendments thereto are set out in 1919 Supp. Fed. Stat. Ann. p. 60.

FOREIGN RELATIONS

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Boundaries — Alaska and Canada — Surveys — Salaries and Expenses, 67.

Act of July 2, 1921, 68.

Sec. 1. Declaration erminating War with Germany, 68.

2. Reservation of Rights, etc., under Terms of Armistice, Treaty of Versailles, etc., 68.

3. Declaration Terminating War with Austro-Hungary, 68.

4. Reservation of Rights, etc., under Armistice, Treaties, etc., 68.

5. Seized Property — Disposition, 69.

6. Effect on War Legislation, 69.

CROSS-REFERENCES

See also *DIPLOMATIC AND CONSULAR OFFICERS; NAVY; POSTAL SERVICE*

[SEC. 1.] * * * [Pecuniary claims between United States and Great Britain — arbitration — salaries and expenses.] For the expenses of the arbitration of outstanding pecuniary claims between the United States and Great Britain, in accordance with the special agreement concluded for that purpose August 18, 1910, and the schedules of claims thereunder, to be expended under the direction of the Secretary of State, and to be immediately available, as follows: * * * Salaries, United States agency: Agent, to be appointed by the President, by and with the advice and consent of the Senate, \$7,500 per annum; counsel, \$5,000 per annum; counsel and joint secretary, who shall also act as disbursing clerk, \$3,000 per annum; two counsel, at \$2,750 each per annum; one law clerk, \$2,240 per annum; two stenographers, at \$1,440 each per annum; and messenger, \$840 per annum.

This and the paragraph which follows are from the Diplomatic and Consular Appropriation Act of March 2, 1921.

* * * [Boundaries — Alaska and Canada — surveys — salaries and expenses.] To enable the Secretary of State to mark the boundary and make the surveys incidental thereto between the Territory of Alaska and the Dominion of Canada, in conformity with the award of the Alaskan Boundary Tribunal and existing treaties, including employment at the seat of government of such surveyors, computers, draftsmen, and clerks as are necessary; and for the more effective demarcation and mapping, pursuant to the treaty of April 11, 1908, between the United States and Great Britain, of the land and water boundary line between the United States and the Dominion of Canada, as established under existing treaties, to be expended under the direction of the Secretary of State, including the salaries of the commissioner and the necessary engineers, surveyors, draftsmen, computers, and clerks in the field and at the seat of government, expense of printing and necessary traveling, for payment for

timber necessarily cut in determining the boundary line not to exceed \$500, and commutation to members of the field force while on field duty or actual expenses not exceeding \$5 per day each, to be expended in accordance with regulations from time to time prescribed by the Secretary of State, \$36,500, together with the unexpended balances of previous appropriations for these objects: *Provided*, That hereafter advances of money under the appropriation "Boundary line, Alaska and Canada, and the United States and Canada," may be made to the commissioner on the part of the United States and by his authority to chiefs of parties, who shall give bond under such rules and regulations and in such sum as the Secretary of State may direct, and accounts arising under advances shall be rendered through and by the commissioner on the part of the United States to the Treasury Department as under advances heretofore made to chiefs of parties: *Provided*, That when the commissioner is absent from Washington and from his regular place of residence on official business he shall be allowed actual and necessary expenses of subsistence not in excess of \$8 per day.

See note to preceding paragraph.

Joint Resolution Terminating the state of war between the Imperial German Government and the United States of America and between the Imperial and Royal Austro-Hungarian Government and the United States of America.

[Act of July 2, 1921.]

[SEC. 1.] **[Declaration terminating war with Germany.]** That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

SEC. 2. **[Reservation of rights, etc., under terms of armistice, treaty of Versailles, etc.]** That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

SEC. 3. **[Declaration terminating war with Austro-Hungary.]** That the state of war declared to exist between the Imperial and Royal Austro-Hungarian Government and the United States of America by the joint resolution of Congress approved December 7, 1917, is hereby declared at an end.

SEC. 4. **[Reservation of rights, etc., under armistice, treaties, etc.]** That in making this declaration, and as a part of it, there are expressly reserved to the

United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 3, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Saint Germain-en-Laye or the treaty of Trianon, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

SEC. 5. [Seized property — disposition.] All property of the Imperial German Government, or its successor or successors, and of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America.

SEC. 6. [Effect on war legislation.] Nothing herein contained shall be construed to repeal, modify or amend the provisions of the joint resolution "declaring that certain Acts of Congress, joint resolutions and proclamations shall be construed as if the war had ended and the present or existing emergency

expired," approved March 3, 1921, or the passport control provisions of an Act entitled "An act making appropriations for the diplomatic and consular service for the fiscal year ending June 30, 1922," approved March 2, 1921; nor to be effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the Selective Service law, approved May 18, 1917, of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof.

For Res. of March 3, 1921, mentioned in the text, see *infra*, this volume, title WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

For Act of March 2, 1921, mentioned in the text, see *infra*, this volume, title PASSPORTS.

For Act of May 18, 1917, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1136.

FOREST PRESERVES

See PUBLIC LANDS; TIMBER LANDS AND FOREST PRESERVES

FOREST ROADS AND TRAILS

See HIGHWAYS

FUTURE TRADING ACTS

See AGRICULTURE

GEODETIC SURVEY

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CROSS-REFERENCE

See also *JUDICIAL OFFICERS*

An Act To provide for the acquisition by the United States of private rights of fishery in and about Pearl Harbor, Territory of Hawaii.

[*Act of June 28, 1921.*]

[**Pearl Harbor — rights of fishery — acquisition by United States.**] That the Secretary of the Navy is hereby authorized to examine and appraise the value of the privately owned rights of fishery in Pearl Harbor, island of Oahu, Territory of Hawaii, from an imaginary line from Kaak Point to Beckoning Point, both within said harbor, to the seaward, and the privately owned rights of fishery in and about the entrance channel to said harbor, and to enter into negotiations for the purchase of the said rights and, if in his judgment the price for such rights is reasonable and satisfactory, to make contracts for the purchase of same subject to future ratification and appropriation by Congress; or in the event of the inability of the Secretary of the Navy to make a satisfactory contract for the voluntary purchase of the said rights of fishery, he is hereby authorized and directed through the Attorney General to institute and carry to completion proceedings for the condemnation of said rights of fishery, the acceptance of the award in said proceedings to be subject to the future ratification and appropriation by Congress. Such condemnation proceedings shall be instituted and conducted in, and jurisdiction of said proceedings is hereby given to, the district court of the United States for the district of Hawaii, substantially as provided in "An Act to authorize condemnation of land for sites for public buildings, and for other purposes," approved August 1, 1888; and

the sum of \$5,000 is hereby authorized to be appropriated, to be immediately and continuously available until expended, to pay the necessary costs thereof and expenses in connection therewith. The Secretary of the Navy is further authorized and directed to report the proceedings hereunder to Congress.

An Act To amend an Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900,* as amended, to establish an Hawaiian Homes Commission, granting certain powers to the board of harbor commissioners of the Territory of Hawaii, and for other purposes.

[Act of July 9, 1921.]

TITLE 1.—DEFINITIONS.

SECTION 1. ["Hawaiian Homes Commission Act, 1920."] That this Act may be cited as the "Hawaiian Homes Commission Act, 1920."

SEC. 2. ["Hawaiian Organic Act."] That when used in this Act the term "Hawaiian Organic Act" means the Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, as amended.

TITLE 2.—HAWAIIAN HOMES COMMISSION.

SEC. 201. [Meaning of terms used in title.] (a) That when used in this title —

- (1) The term "commission" means the Hawaiian Homes Commission;
- (2) The term "public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act;
- (3) The term "fund" means the Hawaiian home loan fund;
- (4) The term "Territory" means the Territory of Hawaii;
- (5) The term "Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title;
- (6) The term "tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of such tract; and
- (7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawaii of 1915, except a term defined in subdivision (a) of this section, shall, whenever used in this title, have the same meaning as given by such definition or description.

SEC. 202. [Establishment of Commission — membership compensation, etc.]

(a) There is hereby established a commission to be known as the "Hawaiian Homes Commission" and to be composed of five members, as follows:

- (1) The governor of the Territory, and
- (2) Four citizens of the Territory to be appointed by the governor, by and with the advice and consent of the senate of the legislature of the Territory. At least three of the appointed members of the commission shall be native Hawaiians.

* For Act of April 30, 1900, see 3 Fed. Stat. Ann. (2d ed.) 483.

(b) Any vacancy in the office of an appointed member shall be filled in the same manner and under the same limitations as the original appointment.

(c) The governor of the Territory shall be the chairman of the commission. The commission shall designate one of its members to serve as the executive officer and secretary of the commission. The executive officer and secretary shall receive such annual salary, not to exceed \$6,000, as the commission may determine. The members of the commission, except the executive officer and secretary, shall receive an annual salary of \$500. Of the original appointed members of the commission, one shall be appointed for a term of one year, one for two years, one for three years, and one for four years. Their successors shall hold office for terms of four years, except that any member appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds. A member may after due notice and public hearing be removed by the governor for neglect of duty or malfeasance in office, but for no other cause.

SEC. 203. [Enumeration of public lands designated as "available lands."]
All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres, more or less), in the district of Kau; Puukapu (twelve thousand acres, more or less), Kawaihae I (ten thousand acres, more or less), and Pauahi (seven hundred and fifty acres, more or less), in the district of South Kohala; Kamoku-Kapulena (five thousand acres, more or less), Waimanu (two hundred acres, more or less), and Nienie (seven thousand three hundred and fifty acres, more or less), in the district of Hamakua; fifty-three thousand acres to be selected by the commission from the lands of Humuula Mauka, in the district of North Hilo; Panaewa, Waiakea (two thousand acres, more or less), Waiakea-kai, or Keaaukaha (two thousand acres, more or less), and two thousand acres of agricultural lands to be selected by the commission from the lands of Piihonua, in the district of South Hilo; and two thousand acres to be selected by the commission from the lands of Kaohe-Makuu, in the district of Puna;

(2) On the island of Maui: Kahikinui (twenty-five thousand acres, more or less) in the district of Kahikinui, and the public lands (six thousand acres, more or less) in the district of Kula;

(3) On the island of Molokai: Palaau (eleven thousand four hundred acres, more or less), Kapaakea (two thousand acres, more or less), Kalamaula (six thousand acres, more or less), Hoolehua (three thousand five hundred acres, more or less), Kamiloloa I and II (three thousand six hundred acres, more or less), and Makakupaia (two thousand two hundred acres, more or less); and Kalaupapa (five thousand acres, more or less);

(4) On the island of Oahu: Nanakuli (three thousand acres, more or less), and Lualualei (two thousand acres, more or less), in the district of Waianae; and Waimanalo (four thousand acres, more or less), in the district of Koolau-poko, excepting therefrom the military reservation and the beach lands; and

(5) On the island of Kauai: Upper land of Waimea, above the cultivated sugar cane lands, in the district of Waimea (fifteen thousand acres, more or

less); and Moloaa (two thousand five hundred acres, more or less); and Anahola and Kamalomalo (five thousand acres, more or less).

SEC. 204. [Status of "available lands"—Hawaiian home lands—authority of Commission with respect to use and disposition.] Upon the passage of this Act all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the commission to be used and disposed of in accordance with the provisions of this title, except that—

(1) For a period of five years after the first meeting of the Hawaiian Homes Commission only those lands situate on the island of Molokai, which are particularly named in paragraphs 1 and 3 of section 203 hereof; Waimanu, in the district of Hamakua; Keaaukaha, in the district of South Hilo; and Panaewa, Waiakea, in the district of South Hilo, island of Hawaii, shall be available for use and disposition by said commission under the provisions of this title and none of the remaining available lands named in said section 203 shall, after the expiration of the said five-year period, be leased, used, or otherwise disposed of by the commission under the provisions of this title, except by further authorization of Congress and with the written approval of the Secretary of the Interior of the United States.

(2) In case any available land is under lease at the time of the passage of this Act such land shall not assume the status of Hawaiian home lands until the lease expires or the commissioner of public lands withdraws the lands from the operation of the lease. If the land is covered by a lease containing a withdrawal clause as provided in subdivision (d) of section 73 of the Hawaiian Organic Act, the commissioner of public lands shall withdraw such lands from the operation of the lease whenever the commission with the approval of the Secretary of the Interior gives notice to him that the commission is of the opinion that the lands are required by it for leasing as authorized by the provisions of section 207, or for a community pasture as provided in section 211 of this title. Such withdrawal shall be held to be for a public purpose within the meaning of that term as used in subdivision (d) of section 73 of the Hawaiian Organic Act.

(3) In case any land is to be selected by the commission out of a larger area of available lands, such land shall not assume the status of Hawaiian home lands until the commission, with the approval of Secretary of the Interior, makes the selection and gives notice thereof to the commissioner of public lands. The commission shall give such notice within three years after the expiration of the five-year period referred to in paragraph 1 of this section. Any such notice given thereafter shall be deemed invalid and of no effect.

SEC. 205. [Sale and lease of "available lands"—manner and purpose.] Available lands shall be sold or leased only (1) in the manner and for the purposes set out in this title, or (2) as may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of this Act; except that such limitations shall not apply to the unselected portions of lands from which the commission has made a selection and given notice thereof, or failed so to select and give notice within the time limit, as provided in paragraph (3) of section 204 of this title.

SEC. 206. [Powers and duties of governor, etc., in respect to Hawaiian home lands.] The powers and duties of the governor, the commissioner of public lands, and the board of public lands, in respect to lands of the Territory, shall

not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title.

SEC. 207. [Lease of Hawaiian home lands to native Hawaiians.] (a) The commission is authorized to lease to native Hawaiians the right to the use and occupancy of a tract of Hawaiian home lands within the following acreage limits:

- (1) Not less than twenty nor more than eighty acres of agricultural lands; or
- (2) Not less than one hundred nor more than five hundred acres of first-class pastoral lands; or
- (3) Not less than two hundred and fifty nor more than one thousand acres of second-class pastoral lands.

(b) The title to lands so leased shall remain in the United States. Applications for tracts shall be made to and granted by the commission, under such regulations, not in conflict with any provision of this title, as the commission may prescribe. The commission shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the commission, is qualified to perform the conditions of such lease.

SEC. 208. [Conditions imposed on lessee.] Each lease made under the authority granted the commission by the provisions of section 207 of this title and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

- (1) The lessee shall be a native Hawaiian.
- (2) The lessee shall pay a rental of \$1 a year for the tract and the lease shall be for a term of ninety-nine years;
- (3) The lessee shall occupy and commence to use or cultivate the tract as his home or farm within one year after the lease is made;
- (4) The lessee shall thereafter, for at least such part of each year as the commission shall by regulation prescribe, so occupy and use or cultivate the tract on his own behalf;
- (5) The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for the benefit of, any other person, except a native Hawaiian, and then only upon the approval of the commission, or agree so to transfer, mortgage, pledge, or otherwise hold, his interest in the tract. Such interest shall not, except in pursuance of such a transfer, mortgage, or pledge to or holding for or agreement with a native Hawaiian, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon. Upon the death of the lessee his interest in the tract and improvements thereon shall vest under the limitations provided for homesteads in section 403 of the Revised Laws of Hawaii of 1915:
- (6) The lessee shall pay all taxes assessed upon the tract and improvements thereon within sixty days after they became delinquent. If the lessee fails so to pay, the commission shall thereupon pay the taxes and have a lien therefor as provided in section 216 of this title;
- (7) The lessee shall perform such other conditions, not in conflict with any provision of this title, as the commission may stipulate in the lease: *Provided, however,* That the lessee shall be exempt from all taxes for the first five years from date of lease.

SEC. 209. [Successors to interest of lessee — conditions.] All successors, whether by agreement or process of law, to the interest of the lessee in any tract, shall be deemed to receive such interest subject to the conditions which would rest upon the lessee, if he then were the party holding the interest in the tract: *Provided*, That a successor receiving such interest by inheritance shall not, during the two years next following his inheritance, be deemed to have violated any of the conditions enumerated in section 208 of this title, even though he is not a native Hawaiian and does not on his own behalf occupy and use or cultivate the tract as a home or farm for such part of the year as the commission requires in accordance with the regulations prescribed by it under paragraph (4) of section 208 of this title.

SEC. 210. [Violation of conditions.] Whenever the commission has reason to believe that any condition enumerated in section 208, or any provision of section 209, of this title has been violated, the commission shall give due notice and afford opportunity for a hearing to the lessee of the tract in respect to which the alleged violation relates or to the successor of the lessee's interest therein, as the case demands. If upon such hearing the commission finds that the lessee or his successor has violated any condition in respect to the leasing of such tract, the commission may declare his interest in the tract and all improvements thereon to be forfeited and the lease in respect thereto canceled, and shall thereupon order the tract to be vacated within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such tract shall thereupon revert in the commission and the commission may take possession of the tract and the improvements thereon.

SEC. 211. [Community pastures.] The commission shall, when practicable, provide from the Hawaiian home lands a community pasture adjacent to each district in which agricultural lands are leased, as authorized by the provisions of section 207 of this title.

SEC. 212. [Unleased Hawaiian home lands — disposition.] The commission may return any Hawaiian home lands not leased as authorized by the provisions of section 207 of this title to the control of the commissioner of public lands. Any Hawaiian home lands so returned shall, until the commission gives notice as hereinafter in this section provided, resume and maintain the status of public lands in accordance with the provisions of the Hawaiian Organic Act and the Revised Laws of Hawaii of 1915, except that such lands may be disposed of under a general lease only. Each such lease, whether or not stipulated therein, shall be deemed subject to the right and duty of the commissioner of public lands to terminate the lease and return the lands to the commission whenever the commission, with the approval of the Secretary of the Interior, gives notice to him that the commission is of the opinion that the lands are required by it for leasing as authorized by the provisions of section 207 of this title or for a community pasture.

SEC. 213. [“Hawaiian Home Loan Fund” — establishment — receipts available.] There is hereby established in the treasury of the Territory a revolving fund, to be known as the “Hawaiian home loan fund.” The entire receipts derived from any leasing of public lands under the provisions of section 212 of this title and 30 per centum of the Territorial receipts derived from the

leasing of cultivated sugar-cane lands under any other provision of law or from water licenses shall be covered into the fund until the total amount of the moneys paid therein equals \$1,000,000.

SEC. 214. [Loans from "fund"—purposes.] The commission is hereby authorized to make loans from the fund to the lessee of any tract or the successor to his interest therein. Such loans may be made for the following purposes:

- (1) The erection of dwellings on any tract and the undertaking of other permanent improvements thereon;
- (2) The purchase of live stock and farm equipment; and
- (3) Otherwise assisting in the development of tracts.

SEC. 215. [Conditions imposed on loans.] Each contract of loan with the lessee or the successor to his interest in the tract shall be held subject to the following conditions, whether or not stipulated in the contract of loan:

- (1) The amount of loans to any one borrower outstanding at any one time shall not exceed \$3,000.

- (2) The loans shall be repaid upon an amortization plan by means of a fixed number of annual installments sufficient to cover (a) interest on the unpaid principal at the rate of 5 per centum per annum, and (b) such amount of the principal as will extinguish the debt within an agreed period not exceeding thirty years. The moneys received by the commission from any installment paid upon such loan shall be covered into the fund. The payment of any installment due shall, with the concurrence therein of at least three of the five members of the commission, be postponed in whole or in part by the commission for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponed payments shall continue to bear interest at the rate of 5 per centum per annum on the unpaid principal and interest.

- (3) In case the borrower's interest in his tract or his successor's interest therein is transferred to or mortgaged, pledged, or otherwise held for the benefit of any native Hawaiian, or agreed so to be transferred, mortgaged, pledged, or otherwise held, as permitted by paragraph (5) of section 208 of this title, the commission may at its option declare all annual installments upon the loan immediately due and payable or permit the successor to the borrower's interest in the tract to assume the contract of loan. In case of the borrower's death, the commission shall permit the successor to the borrower's interest in the tract to assume the contract of loan.

- (4) No part of the moneys loaned shall be devoted to any purpose other than those for which the loan is made.

- (5) The borrower or the successor to his interest in the tract shall comply with such other conditions, not in conflict with any provision of this title, as the commission may stipulate in the contract of loan.

- (6) The borrower or the successor to his interest in the tract shall comply with the conditions enumerated in section 208, and with the provisions of section 209 of this title in respect to the lease of the tract.

SEC. 216. [Duty of borrowers to insure property—liens.] The commission may require the borrower to insure, in such amount as the commission may

by regulation prescribe, all live stock and dwellings and other permanent improvements upon his tract, purchased or constructed out of any moneys loaned from the fund; or in lieu thereof the commission may directly take out such insurance and add the cost thereof to the amount of the annual installments payable under the amortization plan. Whenever the commission has reason to believe that the borrower has violated any condition enumerated in paragraphs (2), (4), (5), or (6) of section 215 of this title, the commission shall give due notice and afford opportunity for a hearing to the borrower or the successor to his interest in the tract, as the case demands. If upon such hearing the commission finds that the borrower has violated the condition, the commission may declare all annual installments immediately due and payable, notwithstanding any provision in the contract of loan to the contrary. The commission shall have a lien upon the borrower's or lessee's interest in his tract, dwellings, and other permanent improvements thereon, and his live stock to the amount of all annual installments due and unpaid and of all taxes upon such tract and improvements paid by the commission. Such liens shall have priority over any other obligation for which the tract, dwellings, other improvements, or live stock may be security.

The commission may, at such time as it deems advisable, enforce any such lien by declaring the borrower's interest in his tract or his successor's interest therein, as the case may be, together with the dwellings and other permanent improvements thereon and the live stock, to be forfeited, and the lease in respect to such tract canceled, and shall thereupon order the tract to be vacated and the live stock surrendered within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such tract shall thereupon revert in the commission, and the commission may take possession of the tract and the improvements thereon: *Provided*, That the commission shall pay to the borrower any difference in his favor between (1) the fair value of the live stock and any improvements in respect to the tract made by the borrower or any predecessor to his interest in the tract, and (2) the amount of the lien.

SEC. 217. [Failure of lessee or borrower to comply with orders of Commission — penalties — new leasing of forfeited tracts.] In case the lessee or borrower or the successor to his interest in the tract, as the case may be, fails to comply with any order issued by the commission under the provisions of section 210 or 216 of this title, the commission may (1) bring action of ejectment or other appropriate proceeding, or (2) invoke the aid of the circuit court of the Territory for the judicial circuit in which the tract designated in the commission's order is situated. Such court may thereupon order the lessee or his successor to comply with the order of the commission. Any failure to obey the order of the court may be punished by it as contempt thereof. Any tract forfeited under the provisions of section 210 or 216 of this title may be again leased by the commission as authorized by the provisions of section 207 of this title, except that the value, in the opinion of the commission, of all improvements made in respect to such tract by the original lessee or any successor to his interest therein shall constitute a loan by the commission to the new lessee. Such loan shall be subject to the provisions of this section and sections 215, except paragraph (1), and 216 to the same extent as loans made by the commission from the Hawaiian loan fund.

SEC. 218. [“ Farm Loan Act of Hawaii ”— applicability to lessee of homo lands.] No lessee of any tract or any successor to his interest therein shall

be eligible to receive in respect to such tract any loan made under the provisions of the act of the legislature of the Territory entitled "the Farm Loan Act of Hawaii," approved April 30, 1919.

SEC. 219. [Agricultural experts — employment — duties.] The commission is authorized to employ agricultural experts at such compensation and in such number as it deems necessary. The annual expenditures for such compensation shall not exceed \$6,000. It shall be the duty of such agricultural experts to instruct and advise the lessee of any tract or the successor to the lessee's interest therein as to the best methods of diversified farming and stock raising and such other matters as will tend successfully to accomplish the purposes of this title.

SEC. 220. [Water and other development projects — authority of Commission — funds for purpose — bonds.] The commission is hereby authorized directly to undertake and carry on general water and other development projects in respect to Hawaiian home lands. The legislature of the Territory is authorized to appropriate out of the treasury of the Territory such sums as it deems necessary to provide the commission with funds sufficient to execute such projects. The legislature is further authorized to issue bonds to the extent required to yield the amount of any sum so appropriated. The commission shall pay from the Hawaiian home loan fund into the treasury of the Territory:

(1) Upon the date when any interest payment becomes due upon any bond so issued, the amount of the interest then due; and

(2) Commencing with the first such date more than one year subsequent to the issuance of any bond and at each interest date thereafter, an amount such that the aggregate of all such amounts which become payable during the term of the bond, compounded annually at the rate of interest specified therein, shall equal the par value of the bond at the expiration of its term.

SEC. 221. ["Water license"—"surplus water"—water for domestic use and irrigation.] (a) When used in this section —

(1) The term "water license" means any license issued by the commissioner of public lands granting to any person the right to the use of Government-owned water; and

(2) The term "surplus water" means so much of any Government-owned water covered by a water license or so much of any privately owned water as is in excess of the quantity required for the use of the licensee or owner, respectively.

(b) All water licenses issued after the passage of this Act shall be deemed subject to the condition, whether or not stipulated in the license, that the licensee shall, upon the demand of the commission, grant to it the right to use, free of all charge, any water which the commission deems necessary adequately to supply the live stock or the domestic needs of individuals upon any tract.

(c) In order adequately to supply live stock or the domestic needs of individuals upon any tract, the commission is authorized (1) to use, free of all charge, Government-owned water not covered by any water license or covered by a water license issued after the passage of this Act, or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public, and (2) to contract with any person for the right to use or to acquire, under eminent domain proceedings similar, as

near as may be, to the proceedings provided in respect to land by sections 667 to 678, inclusive, of the Revised Laws of Hawaii of 1915, the right to use any privately owned surplus water or any Government-owned surplus water covered by a water license issued previous to the passage of this Act, but not containing a reservation of such water for the benefit of the public. Any such acquirement shall be held to be for a public use and purpose. The commission may institute the eminent domain proceedings in its own name.

(d) The commission is authorized, for the additional purpose of adequately irrigating any tract, to use, free of all charge, Government-owned water upon the island of Molokai and Government-owned surplus water tributary to the Waimea River upon the island of Kauai, not covered by a water license or covered by a water license issued after the passage of this Act. Any water license issued after the passage of this Act and covering any such Government-owned water shall be deemed subject to the condition, whether or not stipulated therein, that the licensee shall, upon the demand of the commission, grant to it the right to use, free of all charge, any of the water upon the island of Molokai, and any of the surplus water tributary to the Waimea River upon the island of Kauai, which is covered by the license and which the commission deems necessary for the additional purpose of adequately irrigating any tract.

(e) All rights conferred on the commission by this section to use, contract for, acquire the use of water shall be deemed to include the right to use, contract for, or acquire the use of any ditch or pipe line constructed for the distribution and control of such water and necessary to such use by the commission.

SEC. 222. [Authority of Commission with reference to regulations and expenditures — reports — surety bonds by employees.] The commission may make such regulations and, with the approval in writing of the governor of the Territory, may make such expenditures including salaries, and appoint and remove such employees and agents, as are necessary to the efficient execution of the functions vested in the commission by this title. All expenditures of the commission shall be allowed and paid, and all moneys necessary for loans made by the commission in accordance with the provisions of this title advanced, from the Hawaiian home loan fund upon the presentation of itemized vouchers therefor, approved by the chairman of the commission. The commission shall make a biennial report to the legislature of the Territory upon the first day of each regular session thereof and such special reports as the legislature may from time to time require. The executive officer and secretary shall give bond in the sum of \$25,000 for the faithful performance of his duties. The sureties upon the bond and the conditions thereof shall be approved annually by the commission.

SEC. 223. [Amendment on repeal of title — reservation of right by Congress.] The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.

TITLE 3.—AMENDMENTS TO HAWAIIAN ORGANIC ACT.

SEC. 301. [Sec. 26 amended — legislature — compensation of members.] Section 26 of the Hawaiian Organic Act is hereby amended to read as follows:

“ SEC. 26. That the members of the legislature shall receive for their services, in addition to mileage at the rate of 20 cents a mile each way, the sum of \$1,000

for each regular session, payable in three equal installments on and after the first, thirtieth, and fiftieth days of the session, and the sum of \$500 for each special session: *Provided*, That they shall receive no compensation for any extra session held under the provisions of section 54 of this Act."

For sec. 26 as it read before this amendment see 3 Fed. Stat. Ann. (2d ed.) 498.

SEC. 302. [Sec. 55 amended — power of corporations to hold real estate — indebtedness of Territory.] Section 55 of the Hawaiian Organic Act is hereby amended by deleting therefrom that portion thereof which reads: "*Provided*, That no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres, and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States, but existing vested rights in real estate shall not be impaired," and by amending so much of section 55 as reads, "and the total indebtedness of the Territory shall not at any time be extended beyond 7 per centum of such assessed value of property in the Territory," to read as follows: "and the total indebtedness of the Territory shall not at any time be extended beyond 10 per centum of such assessed value of property in the Territory."

For sec. 55 as it read before this amendment see 3 Fed. Stat. Ann. (2d ed.) 503.

SEC. 303. [Sec. 66 amended — executive power.] Section 66 of the Hawaiian Organic Act is hereby amended to read as follows:

"SEC. 66. That the executive power of the government of the Territory of Hawaii shall be vested in a governor, who shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and shall hold office for four years and until his successor shall be appointed and qualified, unless sooner removed by the President. He shall be not less than thirty-five years of age; shall be a citizen of the Territory of Hawaii; shall have resided therein for at least three years next preceding his appointment; shall be commander in chief of the militia thereof; and may grant pardons or reprieves for offenses against the laws of the said Territory and reprieves for offenses against the laws of the United States until the decision of the President is made known thereon."

For sec. 66 as it read before this amendment see 3 Fed. Stat. Ann. (2d ed.) 509.

SEC. 304. [Sec. 73 amended — first, second and third paragraphs — public lands.] The first, second, and third paragraphs of section 73 of the Hawaiian Organic Act are hereby amended to read as follows:

"SEC. 73. (a) That when used in this section —

"(1) The term 'commissioner' means the commissioner of public lands of the Territory of Hawaii;

"(2) The term 'land board' means the board of public lands, as provided in subdivision (1) of this section;

"(3) The term 'public lands' includes all lands in the Territory of Hawaii classed as government or crown lands previous to August 15, 1895, or acquired by the government upon or subsequent to such date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; except (1) lands designated in section 203 of the Hawaiian Homes Commission Act, 1920. (2) lands set apart or reserved by Executive order by the President,

(3) lands set aside or withdrawn by the governor under the provisions of subdivision (g) of this section, (4) sites of public buildings, lands used for roads, streets, landings, nurseries, parks, tracts reserved for forest growth or conservation of water supply, or other public purposes, and (5) lands to which the United States has relinquished the absolute fee and ownership, unless subsequently placed under the control of the commissioner and given the status of public lands in accordance with the provisions of this Act, the Hawaiian Homes Commission Act, 1920, or the Revised Laws of Hawaii of 1915; and

“(4) The term ‘ person ’ includes individual, partnership, corporation, and association.

“(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawaii of 1915, except a term defined in subdivision (a) of this section, shall, whenever used in this section, if not inconsistent with the context or any provision of this section, have the same meaning as given it by such definition or description.

“(c) The laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. Subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the 7th day of July, 1898, and the 28th day of September, 1899, are hereby ratified and confirmed. In said laws ‘ land patent ’ shall be substituted for ‘ royal patent ’; ‘ commissioner of public lands,’ for ‘ minister of the interior,’ ‘ agent of public lands,’ and ‘ commissioners of public lands,’ or their equivalents; and the words ‘ that I am a citizen of the United States,’ or ‘ that I have declared my intention to become a citizen of the United States, as required by law,’ for the words ‘ that I am a citizen by birth (or naturalization) of the Republic of Hawaii,’ or ‘ that I have received letters of denization under the Republic of Hawaii,’ or ‘ that I have received a certificate of special right of citizenship from the Republic of Hawaii.’

“(d) No lease of agricultural lands or of undeveloped arid public land which is capable of being converted into agricultural land by the development, for irrigation purposes, of either the underlying or adjacent waters, or both, shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than fifteen years. Each such lease shall be sold at public auction to the highest bidder after due notice as provided in subdivision (h) of this section and the laws of the Territory of Hawaii. Each such notice shall state all the terms and conditions of the sale. The land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, in which case the rent reserved shall be reduced in proportion to the value of the part so withdrawn. Every such lease shall contain a provision to that effect: *Provided*, That the commissioner may, with the approval of the governor and at least two-thirds of the members of the land board, omit such withdrawal provision from the lease of any lands suitable for the cultivation of sugar cane whenever he deems it advantageous to the Territory of Hawaii. Land so leased shall not be subject to such right of withdrawal.

“(e) All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of Hawaii

and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July 7, 1898.

“(f) No person shall be entitled to receive any certificate of occupation, right of purchase lease, cash freehold agreement, or special homestead agreement who, or whose husband or wife, has previously taken or held more than ten acres of land under any such certificate, lease, or agreement made or issued after May 27, 1910, or under any homestead lease or patent based thereon; or who, or whose husband or wife, or both of them, owns other land in the Territory, the combined area of which and the land in question exceeds eighty acres; or who is an alien, unless he has declared his intention to become a citizen of the United States as provided by law. No person who has so declared his intention and taken or held under any such certificate, lease, or agreement shall continue so to hold or become entitled to a homestead lease or patent of the land, unless he becomes a citizen within five years after so taking.

“(g) No public land for which any such certificate, lease, or agreement is issued after May 27, 1910, or any part thereof, or interest therein or control thereof, shall, without the written consent of the commissioner and governor, thereafter, whether before or after a homestead lease of patent has been issued thereon, be or be contracted to be in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to, or acquired or held by or for the benefit of, any alien or corporation; or before or after the issuance of a homestead lease or before the issuance of a patent to or by or for the benefit of any other person; or, after the issuance of a patent, to or by or for the benefit of any person who owns, or holds, or controls, directly or indirectly, other land or the use thereof, the combined area of which and the land in question exceeds eighty acres. The prohibitions of this paragraph shall not apply to transfers or acquisitions by inheritance or between tenants in common.”

For sec. 73 as it read before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 305. [Sec. 73 further amended — fourth and fifth paragraphs.] The fourth and fifth paragraphs of section 73 of the Hawaiian Organic Act are hereby amended by inserting “(h)” at the beginning of the fourth paragraph and “(i)” at the beginning of the fifth paragraph.

For sec. 73 as it read before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 306. [Sec. 73 further amended — sixth paragraph.] The sixth paragraph of section 73 of the Hawaiian Organic Act is hereby amended to read as follows:

“(j) The commissioner, with the approval of the governor, may give to any person (1) who is a citizen of the United States or who has legally declared his intention to become a citizen of the United States and hereafter becomes such, and (2) who has, or whose predecessors in interest have, improved any parcel of public lands and resided thereon continuously for the ten years next preceding the application to purchase, a preference right to purchase so much of such parcel and such adjoining land as may reasonably be required for a home, at a fair price to be determined by three disinterested citizens to be appointed by the governor. In the determination of such purchase price the commissioner may, if he deems it just and reasonable, disregard the value of the improvements

on such parcel and adjoining land. If such parcel of public lands is reserved for public purposes, either for the use of the United States or the Territory of Hawaii, the commissioner may with the approval of the governor grant to such person a preference right to purchase public lands which are of similar character, value, and area, and which are situated in the same land district. The privilege granted by this paragraph shall not extend to any original lessee or to an assignee of an entire lease of public lands."

For sec. 73 as it read before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 307. [Sec. 73 further amended — seventh paragraph.] The seventh paragraph of section 73 of the Hawaiian Organic Act is hereby amended by inserting "(k)" at the beginning thereof.

For sec. 73 as it read before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 308. [Sec. 73 further amended — eighth paragraph.] The eighth paragraph of section 73 of the Hawaiian Organic Act is hereby amended to read as follows:

"(l) No sale of lands for other than homestead purposes, except as herein provided, and no exchange by which the Territory shall convey lands exceeding either forty acres in area or \$5,000 in value shall be made. No lease of agricultural lands exceeding forty acres in area, or of pastoral or waste lands exceeding two hundred acres in area, shall be made without the approval of two-thirds of the board of public lands, which is hereby constituted, the members of which are to be appointed by the governor as provided in section 80 of this Act, and until the legislature shall otherwise provide said board shall consist of six members, and its members be appointed for a term of four years: *Provided, however,* That the commissioner shall, with the approval of said board, sell to any citizen of the United States, or to any person who has legally declared his intention to become a citizen, for residence purposes lots and tracts, not exceeding three acres in area, and that sales of Government lands may be made upon the approval of said board whenever necessary to locate thereon railroad rights of way, railroad tracks, side tracks, depot grounds, pipe lines, irrigation ditches, pumping stations, reservoirs, factories, and mills and appurtenances thereto, including houses for employees, mercantile establishments, hotels, churches, and private schools; and all such sales shall be limited to the amount actually necessary for the economical conduct of such business or undertaking: *Provided further,* That no exchange of Government lands shall hereafter be made without the approval of two-thirds of the members of said board, and no such exchange shall be made except to acquire lands directly for public uses."

For sec. 73 as it read before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 309. [Sec. 73 further amended — ninth paragraph.] The ninth paragraph of section 73 of the Hawaiian Organic Act is hereby amended by inserting "(m)" at the beginning thereof.

For sec. 73 as it read before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 310. [Sec. 73 further amended — tenth paragraph.] The tenth paragraph of section 73 of the Hawaiian Organic Act is hereby amended to read as follows:

"(n) It shall be the duty of the commissioner to cause to be surveyed and opened for homestead entry a reasonable amount of desirable agricultural lands

and also of pastoral lands in the various parts of the Territory for homestead purposes on or before January 1, 1911, and he shall annually thereafter cause to be surveyed for homestead purposes such amount of agricultural lands and pastoral lands in various parts of the Territory as there may be demand for by persons having the qualifications of homesteaders. In laying out any homestead the commissioner shall include in the homestead lands sufficient to support thereon an ordinary family, but not exceeding eighty acres of agricultural lands and two hundred and fifty acres of first-class pastoral lands or five hundred acres of second-class pastoral lands; or in case of a homestead, including pastoral lands only, not exceeding five hundred acres of first-class pastoral lands or one thousand acres of second-class pastoral lands. All necessary expenses for surveying and opening any such lands for homesteads shall be paid for out of any funds of the Territorial treasury derived from the sale or lease of the public lands, which funds are hereby made available for such purposes.

“(o) The commissioner, with the approval of the governor, may by contract or agreement authorize any person who has the right of possession, under a general lease from the Territory, of agricultural or pastoral lands included in any homestead, to continue in possession of such lands after the expiration of the lease until such time as the homesteader takes actual possession thereof under any form of homestead agreement. The commissioner may fix in the contract or agreement such other terms and conditions as he deems advisable.”

For sec. 73 as it read before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 311. [Sec. 73 further amended — eleventh and twelfth paragraphs.] The eleventh and twelfth paragraphs of section 73 of the Hawaiian Organic Act are hereby amended by inserting “(p)” at the beginning of the eleventh paragraph and “(q)” at the beginning of the twelfth paragraph.

For sec. 73 before amendment see 3 Fed. Stat. Ann. (2d ed.) 511.

SEC. 312. [Sec. 80 amended — fourth paragraph — citizenship of officers.] The fourth paragraph of section 80 of the Hawaiian Organic Act is hereby amended to read as follows:

“All officers appointed under the provisions of this section shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment.”

For sec. 80 before amendment see 3 Fed. Stat. Ann. (2d ed.) 517.

SEC. 313. [Sec. 86 amended — federal court.] Section 86 of the Hawaiian Organic Act is hereby amended to read as follows:

“SEC. 86. (a) That there shall be established in the said Territory a district court, to consist of two judges, who shall reside therein and be called district judges, and who shall each receive an annual salary of \$7,500. The said court while in session shall be presided over by only one of said judges. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what class of cases each of them shall preside. The said two judges shall have the same powers in all matters coming before said court.” [sic]

“(b) The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein

for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President.

“(c) The said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States.

“(d) Writs of error and appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeal as provided by law, and appeals and writs of error may be taken to the Supreme Court of the United States from said district court in cases where appeals and writs of error are allowed from the district and circuit courts of the United States to the Supreme Court, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. The said district judges shall appoint a clerk of said court at a salary of \$4,200 per annum and shall appoint a reporter of said court at a salary of \$3,000 per annum. The clerk of the district court with the approval of the judges thereof may appoint two deputy clerks at salaries of \$2,500 each per annum.”

For sec. 86 before amendment see 3 Fed. Stat. Ann. (2d ed.) 521.

SEC. 314. [**Sec. 92 amended — salaries of officers.**] Section 92 of the Hawaiian Organic Act is hereby amended to read as follows:

“SEC. 92. That the following officers shall receive the following annual salaries, to be paid by the United States: The governor, \$10,000; the secretary of the Territory, \$5,400; the chief justice of the Supreme Court of the Territory, \$7,500; the associate judges of the Supreme Court, \$7,000 each; the judges of the circuit courts, \$6,000 each; the United States district attorney, \$5,000; the United States marshal, \$5,000. The governor shall receive annually from the United States, in addition to his salary, (1) the sum of \$1,000 for stationery, postage, and incidentals, and (2) his traveling expenses while absent from the capital on official business. The governor is authorized to employ a private secretary who shall receive an annual salary of \$3,000, to be paid by the United States.”

For sec. 92 before amendment see 3 Fed. Stat. Ann. (2d ed.) 525.

SEC. 315. [**Addition of secs. 105, 106, 107 at end of Act.**] The Hawaiian Organic Act is hereby further amended by adding at the end thereof three additional sections to read as follows:

“SEC. 105. [**Citizenship of employees on public works.**] That no person shall be employed as a mechanic or laborer upon any public work carried on in

the Territory of Hawaii by the Government of the United States, whether the work is done by contract or otherwise, unless such person is a citizen of the United States or eligible to become such a citizen.

“**SEC. 106. [Powers and duties of board of harbor commissioners.]** The board of harbor commissioners of the Territory of Hawaii shall have and exercise all the powers and shall perform all the duties which may lawfully be exercised by or under the Territory of Hawaii relative to the control and management of the shores, shore waters, navigable streams, harbors, harbor and water-front improvements, ports, docks, wharves, quays, bulkheads, and landings belonging to or controlled by the Territory, and the shipping using the same, and shall have the authority to use and permit and regulate the use of the wharves, piers, bulkheads, quays, and landings belonging to or controlled by the Territory for receiving or discharging passengers and for loading and landing merchandise, with a right to collect wharfage and demurrage thereon or therefor, and, subject to all applicable provisions of law, to fix and regulate from time to time rates for services rendered in mooring vessels, charges for the use of moorings belonging to or controlled by the Territory, rates or charges for the services of pilots, wharfage, and demurrage, rents or charges for warehouses or warehouse space, for office or office space, for storage of freight, goods, wares, and merchandise, for storage space for the use of donkey engines, derricks, or other equipment belonging to the Territory, under the control of the board, and to make other charges, including toll or tonnage charges on freight passing over or across wharves, docks, quays, bulkheads, or landings. The board shall likewise have power to appoint and remove clerks, wharfingers and their assistants, pilots and pilot-boat crews, and all such other employees as may be necessary, and to fix their compensation; to make rules and regulations pursuant to this section and not inconsistent with law; and generally shall have all powers necessary fully to carry out the provisions of this section.

“All moneys appropriated for harbor improvements, including new construction, reconstruction, repairs, salaries, and operating expenses, shall be expended under the supervision and control of the board, subject to the provisions of law. All contracts and agreements authorized by law to be entered into by the board shall be executed on its behalf by its chairman.

“The board shall prepare and submit annually to the governor a report of its official acts during the preceding year, together with its recommendations as to harbor improvements throughout the Territory.

“**SEC. 107. [Name of Act.]** That this Act may be cited as the ‘Hawaiian Organic Act.’”

TITLE 4.—MISCELLANEOUS PROVISIONS.

SEC. 401. [Repeal of inconsistent Acts.] All Acts or parts of Acts, either of the Congress of the United States or of the Territory of Hawaii, to the extent that they are inconsistent with the provisions of this Act, are hereby repealed.

SEC. 402. [Unconstitutionality of any provision — validity of remainder of Act.] If any provision of this Act, or the application of such provision to certain circumstances, is held unconstitutional, the remainder of the Act and the application of such provision to circumstances other than those as to which it is held unconstitutional shall not be held invalidated thereby.

HEALTH AND QUARANTINE

Act of Feb. 27, 1921, 89.

Vessels from Foreign Ports — Bill of Health from Consular Officer, etc.— Sec. 2 of Act of Feb. 15, 1893, Amended, 89.

Act of March 4, 1921 (Sundry Civil Appropriation Act), 90.

Sec. 1. Public Health Service — Limitation on Expenditures for Advertising, 90.

Act of June 16, 1921 ("Second Deficiency Act, Fiscal Year, 1921"), 90.

Vessels at Quarantine Stations — Fees Imposed by Secretary of Treasury, 90.

Act of Nov. 23, 1921, 90.

Sec. 1. Maternity and Infancy — Promotion of Welfare and Hygiene — Federal Aid, 90.

2. Apportionment of Moneys Among Different States, 91.

3. Board of Maternity and Infant Hygiene — Creation — Administration of Act by Children's Bureau of Department of Labor, 91.

4. How States May Secure Benefits of Act, 91.

5. Fund for Administration of Provisions of Act, 92.

6. Employees — Supplies — Travel and Other Expenses, 92.

7. Appropriation When Apportioned — Duties of Children's Bureau, 92.

8. Submission of Plans by State for Carrying Out Provisions of Act, 92.

9. Authority of Children's Bureau Over Children, 92.

10. Certificate to Secretary of Treasury of Amount to Which States Entitled, 92.

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13. Authority of Secretary of Labor — Supervision of Children's Bureau, 93.

14. Control by States of Administration of Act within Their Territory, 94.

CROSS-REFERENCE

See also *HOSPITALS AND ASYLUMS*

An Act To amend "An Act granting additional quarantine powers and imposing additional duties upon the Marine Hospital Service," approved February 15, 1893.

[*Act of Feb. 27, 1921.*]

[*Vessels from foreign ports — bill of health from consular officer, etc.— sec. 2 of Act of Feb. 15, 1893, amended.*] That first paragraph of section 2 of the Act granting additional quarantine powers and imposing additional duties upon the United States Public Health Service, approved February 15, 1893, to be amended to read as follows:

" SEC. 2. That any vessel at any foreign port clearing or departing for any port or place in the United States or its possessions or other dependencies or any vessel at any port in the possessions or other dependencies of the United States clearing or departing for any port or place in the United States or its possessions or other dependencies, shall be required to obtain from the consul, vice consul, or other consular officer of the United States at the port of departure, or from the medical officer where such officer has been detailed by the President for that purpose, a bill of health in duplicate, in the form prescribed by the Secretary of the Treasury, setting forth the sanitary history and condition of said vessel, and that it has in all respects complied with the rules and regulations in such cases prescribed for securing the best sanitary condition of the said vessel, its cargo, passengers, and crew; and said consular or medical officer is required, before granting such duplicate bill of health, to be satisfied that the matters and things therein stated are true; and for his services in that behalf he shall be entitled to demand and receive such fees as shall by lawful regulation be allowed, to be accounted for as is required in other cases."

For section 2 as originally enacted, see 3 Fed. Stat. Ann. (2d ed.) 549.

[SEC. 1.] * * * [Public Health Service — limitation on expenditures for advertising.] Appropriations herein or hereafter made for the Public Health Service shall not be expended for advertising in newspapers, magazines, or periodicals for any purpose other than the procurement of necessary employees and bids for necessary services, supplies, materials, and equipment.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

* * * [Vessels at quarantine stations — fees imposed by Secretary of Treasury.] On and after July 1, 1921, the Secretary of the Treasury is authorized and directed to promulgate such a schedule of fees to be charged vessels at each of the national quarantine stations as will be fair and reasonable for the services rendered by each station: *Provided*, That this authority shall not be applicable to any quarantine station where the fees are now fixed by law.

This is from the "Second Deficiency Act, Fiscal Year, 1921," approved June 16, 1921.

An Act For the promotion of the welfare and hygiene of maternity and infancy, and for other purposes.

[Act of Nov. 23, 1921.]

[SEC. 1.] [Maternity and infancy — promotion of welfare and hygiene — Federal aid.] That there is hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, the sums specified in section 2 of this Act, to be paid to the several States for the purpose of cooperating with them in promoting the welfare and hygiene of maternity and infancy as hereinafter provided.

SEC. 2. [Apportionment of moneys among different states.] For the purpose of carrying out the provisions of this Act, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for the current fiscal year \$480,000, to be equally apportioned among the several States, and for each subsequent year, for the period of five years, \$240,000, to be equally apportioned among the several States in the manner hereinafter provided: *Provided*, That there is hereby authorized to be appropriated for the use of the States, subject to the provisions of this Act, for the fiscal year ending June 30, 1922, an additional sum of \$1,000,000, and annually thereafter, for the period of five years, an additional sum not to exceed \$1,000,000: *Provided further*, That the additional appropriations herein authorized shall be apportioned \$5,000 to each State and the balance among the States in the proportion which their population bears to the total population of the States of the United States, according to the last preceding United States census: *And provided further*, That no payment out of the additional appropriation herein authorized shall be made in any year to any State until an equal sum has been appropriated for that year by the legislature of such State for the maintenance of the services and facilities provided for in this Act.

So much of the amount apportioned to any State for any fiscal year as remains unpaid to such State at the close thereof shall be available for expenditures in that State until the close of the succeeding fiscal year.

SEC. 3. [Board of Maternity and Infant Hygiene — creation — administration of Act by Children's Bureau of Department of Labor.] There is hereby created a Board of Maternity and Infant Hygiene, which shall consist of the Chief of the Children's Bureau, the Surgeon General of the United States Public Health Service, and the United States Commissioner of Education, and which is hereafter designated in this Act as the Board. The Board shall elect its own chairman and perform the duties provided for in this Act.

The Children's Bureau of the Department of Labor shall be charged with the administration of this Act, except as herein otherwise provided, and the Chief of the Children's Bureau shall be the executive officer. It shall be the duty of the Children's Bureau to make or cause to be made such studies, investigations, and reports as will promote the efficient administration of this Act.

For Act creating Children's Bureau see 6 Fed. Stat. Ann. (2d ed.) 295.

SEC. 4. [How states may secure benefits of Act.] In order to secure the benefits of the appropriations authorized in section 2 of this Act, any State shall, through the legislative authority thereof, accept the provisions of this Act and designate or authorize the creation of a State agency with which the Children's Bureau shall have all necessary powers to cooperate as herein provided in the administration of the provisions of this Act: *Provided*, That in any State having a child-welfare or child-hygiene division in its State agency of health, the said State agency of health shall administer the provisions of this Act through such divisions. If the legislature of any State has not made provision for accepting the provisions of this Act the governor of such State may in so far as he is authorized to do so by the laws of such State accept the provisions of this Act and designate or create a State agency to cooperate with the Children's Bureau until six months after the adjournment of the first regular session of the legislature in such State following the passage of this Act.

SEC. 5. [Fund for administration of provisions of Act.] So much, not to exceed 5 per centum, of the additional appropriations authorized for any fiscal year under section 2 of this Act, as the Children's Bureau may estimate to be necessary for administering the provisions of this Act, as herein provided, shall be deducted for that purpose, to be available until expended.

SEC. 6. [Employees — supplies — travel and other expenses.] Out of the amounts authorized under section 5 of this Act the Children's Bureau is authorized to employ such assistants, clerks, and other persons in the District of Columbia and elsewhere, to be taken from the eligible lists of the Civil Service Commission, and to purchase such supplies, material, equipment, office fixtures, and apparatus, and to incur such travel and other expense as it may deem necessary for carrying out the purposes of this Act.

SEC. 7. [Appropriation when apportioned — duties of Children's Bureau.] Within sixty days after any appropriation authorized by this Act has been made, the Children's Bureau shall make the apportionment herein provided for and shall certify to the Secretary of the Treasury the amount estimated by the bureau to be necessary for administering the provisions of this Act, and shall certify to the Secretary of the Treasury and to the treasurers of the various States the amount which has been apportioned to each State for the fiscal year for which such appropriation has been made.

SEC. 8. [Submission of plans by State for carrying out provisions of Act.] Any State desiring to receive the benefits of this Act shall, by its agency described in section 4, submit to the Children's Bureau detailed plans for carrying out the provisions of this Act within such State, which plans shall be subject to the approval of the board: *Provided*, That the plans of the States under this Act shall provide that no official, or agent, or representative in carrying out the provisions of this Act shall enter any home or take charge of any child over the objection of the parents, or either of them, or the person standing in loco parentis or having custody of such child. If these plans shall be in conformity with the provisions of this Act and reasonably appropriate and adequate to carry out its purposes they shall be approved by the board and due notice of such approval shall be sent to the State agency by the chief of the Children's Bureau.

SEC. 9. [Authority of Children's Bureau over children.] No official, agent, or representative of the Children's Bureau shall by virtue of this Act have any right to enter any home over the objection of the owner thereof, or to take charge of any child over the objection of the parents, or either of them, or of the person standing in loco parentis or having custody of such child. Nothing in this Act shall be construed as limiting the power of a parent or guardian or person standing in loco parentis to determine what treatment or correction shall be provided for a child or the agency or agencies to be employed for such purpose.

SEC. 10. [Certificate to Secretary of Treasury of amount to which states entitled.] Within sixty days after any appropriation authorized by this Act has been made, and as often thereafter while such appropriation remains unexpended as changed conditions may warrant, the Children's Bureau shall ascer-

tain the amounts that have been appropriated by the legislatures of the several States accepting the provisions of this Act and shall certify to the Secretary of the Treasury the amount to which each State is entitled under the provisions of this Act. Such certificate shall state (1) that the State has, through its legislative authority, accepted the provisions of this Act and designated or authorized the creation of an agency to cooperate with the Children's Bureau, or that the State has otherwise accepted this Act, as provided in section 4 hereof; (2) the fact that the proper agency of the State has submitted to the Children's Bureau detailed plans for carrying out the provisions of this Act, and that such plans have been approved by the board; (3) the amount, if any, that has been appropriated by the legislature of the State for the maintenance of the services and facilities of this Act, as provided in section 2 hereof; and (4) the amount to which the State is entitled under the provisions of this Act. Such certificate, when in conformity with the provisions hereof, shall, until revoked as provided in section 12 hereof, be sufficient authority to the Secretary of the Treasury to make payment to the State in accordance therewith.

SEC. 11. [Reports by states receiving Federal aid — withholding of certificate by Children's Bureau.] Each State agency cooperating with the Children's Bureau under this Act shall make such reports concerning its operations and expenditures as shall be prescribed or requested by the bureau. The Children's Bureau may, with the approval of the board, and shall, upon request of a majority of the board, withhold any further certificate provided for in section 10 hereof whenever it shall be determined as to any State that the agency thereof has not properly expended the money paid to it or the moneys herein required to be appropriated by such State for the purposes and in accordance with the provisions of this Act. Such certificate may be withheld until such time or upon such conditions as the Children's Bureau, with the approval of the board, may determine; when so withheld the State agency may appeal to the President of the United States who may either affirm or reverse the action of the Bureau with such directions as he shall consider proper: *Provided*, That before any such certificate shall be withheld from any State, the chairman of the board shall give notice in writing to the authority designated to represent the State, stating specifically wherein said State has failed to comply with the provisions of this Act.

SEC. 12. [Application of moneys apportioned to states — prohibited purposes.] No portion of any moneys apportioned under this Act for the benefit of the States shall be applied, directly or indirectly, to the purchase, erection, preservation, or repair of any building or buildings or equipment, or for the purchase or rental of any buildings or lands, nor shall any such moneys or moneys required to be appropriated by any State for the purposes and in accordance with the provisions of this Act be used for the payment of any maternity or infancy pension, stipend, or gratuity.

SEC. 13. [Authority of Secretary of Labor — supervision of Children's Bureau.] The Children's Bureau shall perform the duties assigned to it by this Act under the supervision of the Secretary of Labor, and he shall include in his

annual report to Congress a full account of the administration of this Act and expenditures of the moneys herein authorized.

SEC. 14. [Control by states of administration of act within their territory.] This Act shall be construed as intending to secure to the various States control of the administration of this Act within their respective States, subject only to the provisions and purposes of this Act.

HIGHWAYS

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An Act To amend the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended and supplemented, and for other purposes.

[Act of Nov. 9, 1921.]

[SEC. 1.] [Citation of act as "Federal Highway Act."] That this Act may be cited as the Federal Highway Act.

SEC. 2. [Terms used in act defined.] That, when used in this Act, unless the context indicates otherwise —

The term "Federal Aid Act" means the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended by sections 5 and 6 of an Act entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes," approved February 28, 1919, and all other Acts amendatory thereof or supplementary thereto.

The term "highway" includes rights of way, bridges, drainage structures, signs, guard rails, and protective structures in connection with highways, but shall not include any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart.

The term "State highway department" includes any State department, commission, board, or official having adequate powers and suitably equipped and organized to discharge to the satisfaction of the Secretary of Agriculture the duties herein required.

The term "maintenance" means the constant making of needed repairs to preserve a smooth surfaced highway.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction of a highway, except locating, surveying, mapping, and costs of rights of way.

The term "reconstruction" means a widening or a rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs.

The term "forest roads" means roads wholly or partly within or adjacent to and serving the national forests.

The term "State funds" includes for the purposes of this Act funds raised under the authority of the State, or any political or other subdivision thereof, and made available for expenditure under the direct control of the State highway department.

For Act of July 11, 1916, mentioned in the text, and amendments, see 1918 Supp. Fed. Stat. Ann. 639; 1919 Supp. Fed. Stat. Ann. 299.

SEC. 3. [Council of National Defense — powers respecting highways, etc., transferred to Secretary of Agriculture.] All powers and duties of the Council

of National Defense under the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, in relation to highway or highway transport, are hereby transferred to the Secretary of Agriculture, and the Council of National Defense is directed to turn over to the Secretary of Agriculture the equipment, material, supplies, papers, maps, and documents utilized in the exercise of such powers. The powers and duties of agencies dealing with highways in the national parks or in military or naval reservations under the control of the United States Army or Navy, or with highways used principally for military or naval purposes, shall not be taken over by the Secretary of Agriculture, but such highways shall remain under the control and jurisdiction of such agencies.

The Secretary of Agriculture is authorized to cooperate with the State highway departments, and with the Department of the Interior in the construction of public highways within Indian reservations, and to pay the amount assumed therefor from the funds allotted or apportioned under this Act to the State wherein the reservation is located.

For that part of the Act of Aug. 29, 1916, mentioned in the text, which has to do with the Council of National Defense, see 9 Fed. Stat. Ann. (2d ed.) 1342.

SEC. 4. [Accounting division — establishment.] That the Secretary of Agriculture shall establish an accounting division which shall devise and install a proper method of keeping the accounts.

SEC. 5. [Surplus supplies suitable for highways — transfer from War Department — distribution.] That the Secretary of War be, and he is hereby, authorized and directed to transfer to the Secretary of Agriculture, upon his request, all war material, equipment, and supplies now or hereafter declared surplus from stock now on hand and not needed for the purposes of the War Department but suitable for use in the improvement of highways, and that the same shall be distributed among the highway departments of the several States to be used in the construction, reconstruction, and maintenance of highways, such distribution to be upon the same basis as that hereinafter provided for in this Act in the distribution of Federal-aid fund: *Provided*, That the Secretary of Agriculture, in his discretion, may reserve from such distribution not to exceed 10 per centum of such material, equipment, and supplies for use in the construction, reconstruction, and maintenance of national forest roads or other roads constructed, reconstructed, or maintained under his direct supervision.

SEC. 6. [Projects receiving Federal aid — approval by Secretary of Agriculture.] That in approving projects to receive Federal aid under the provisions of this Act the Secretary of Agriculture shall give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character.

Before any projects are approved in any State, such State, through its State highway department, shall select or designate a system of highways not to exceed 7 per centum of the total highway mileage of such State as shown by the records of the State highway department at the time of the passage of this Act.

Upon this system all Federal-aid apportionments shall be expended.

Highways which may receive Federal aid shall be divided into two classes, one of which shall be known as primary or interstate highways, and shall not

exceed three-sevenths of the total mileage which may receive Federal aid, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, and shall consist of the remainder of the mileage which may receive Federal aid.

The Secretary of Agriculture shall have authority to approve in whole or in part the systems as designated or to require modifications or revisions thereof: *Provided*, That the States shall submit to the Secretary of Agriculture for his approval any proposed revisions of the designated systems of highways above provided for.

Not more than 60 per centum of all Federal aid allotted to any State shall be expended upon the primary or interstate highways until provision has been made for the improvement of the entire system of such highways: *Provided*, That with the approval of any State highway department the Secretary of Agriculture may approve the expenditure of more than 60 per centum of the Federal aid apportioned to such State upon the primary or interstate highways in such State.

The Secretary of Agriculture may approve projects submitted by the State highway departments prior to the selection, designation, and approval of the system of Federal-aid highways herein provided for if he may reasonably anticipate that such projects will become a part of such system.

Whenever provision has been made by any State for the completion and maintenance of a system of primary or interstate and secondary or intercounty highways equal to 7 per centum of the total mileage of such State, as required by this Act, said State, through its State highway department, by and with the approval of the Secretary of Agriculture, is hereby authorized to add to the mileage of primary or interstate and secondary or intercounty systems as funds become available for the construction and maintenance of such additional mileage.

SEC. 7. [Necessity that state set aside fund for Federal aid roads.] That before any project shall be approved by the Secretary of Agriculture for any State such State shall make provisions for State funds required each year of such States by this Act for construction, reconstruction, and maintenance of all Federal-aid highways within the State, which funds shall be under the direct control of the State highway department.

SEC. 8. [Types of surface and kinds of materials for construction, etc., of Federal aid roads.] That only such durable types of surface and kinds of materials shall be adopted for the construction and reconstruction of any highway which is a part of the primary or interstate and secondary or intercounty systems as will adequately meet the existing and probable future traffic needs and conditions thereon. The Secretary of Agriculture shall approve the types and width of construction and reconstruction and the character of improvement, repair, and maintenance in each case, consideration being given to the type and character which shall be best suited for each locality and to the probable character and extent of the future traffic.

SEC. 9. [Freedom from tolls of Federal aid roads — width of roads.] That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds.

That all highways in the primary or interstate system constructed after the passage of this Act shall have a right of way of ample width and a wearing surface of an adequate width which shall not be less than eighteen feet, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacles.

SEC. 10. [Payment to state of sum apportioned to it.] That when any State shall have met the requirements of this Act, the Secretary of the Treasury, upon receipt of certification from the governor of such State to such effect, approved by the Secretary of Agriculture, shall immediately make available to such State, for the purpose set forth in this Act, the sum apportioned to such State as herein provided.

SEC. 11. [Surveys, plans, specifications, and estimates — approval — setting aside state's share of Federal fund — public land states.] That any State having complied with the provisions of this Act, and desiring to avail itself of the benefits thereof, shall by its State highway department submit to the Secretary of Agriculture project statements setting forth proposed construction or reconstruction of any primary or interstate, or secondary or intercounty highway therein. If the Secretary of Agriculture approve the project, the State highway department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require; items included for engineering, inspection, and unforeseen contingencies shall not exceed 10 per centum of the total estimated cost of its construction.

That when the Secretary of Agriculture approves such surveys, plans, specifications, and estimates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this Act on account of such projects, which shall not exceed 50 per centum of the total estimated cost thereof, except that in the case of any State containing unappropriated public lands exceeding 5 per centum of the total area of all lands in the State, the share of the United States payable under this Act on account of such projects shall not exceed 50 per centum of the total estimated cost thereof plus a percentage of such setimated cost equal to one-half of the percentage which the area of the unappropriated public lands in such State bears to the total area of such State: *Provided*, That the limitation of payments not to exceed \$20,000 per mile, under existing law, which the Secretary of Agriculture may make be, and the same is hereby, increased in proportion to the increased percentage of Federal aid authorized by this section: *Provided further*, That these provisions relative to the public-land States shall apply to all unobligated or unmatched funds appropriated by the Federal Aid Act and payment for approved projects upon which actual building construction work had not begun on the 30th day of June, 1921.

SEC. 12. [State highway department — supervision of work on Federal aid roads — approval by Secretary of Agriculture.] That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications, and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work

and labor in each State shall be done in accordance with its laws and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act.

SEC. 13. [Payments to state on account of construction, etc., of Federal aid roads — how and when made.] That when the Secretary of Agriculture shall find that any project approved by him has been constructed or reconstructed in compliance with said plans and specifications, he shall cause to be paid to the proper authorities of said State the amount set aside for said project.

That the Secretary of Agriculture may, in his discretion, from time to time, make payments on such construction or reconstruction as the work progresses, but these payments, including previous payments, if any, shall not be more than the United States pro rata part of the value of the labor and materials which have been actually put into such construction or reconstruction in conformity to said plans and specifications. The Secretary of Agriculture and the State highway department of each State may jointly determine at what time and in what amounts payments as work progresses shall be made under this Act.

Such payments shall be made by the Secretary of the Treasury, on warrants drawn by the Secretary of Agriculture, to such official or officials or depository as may be designated by the State highway department and authorized under the laws of the State to receive public funds of the State.

SEC. 14. [Failure of state to maintain Federal aid road — duty of Secretary of Agriculture.] That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided.

Upon the reimbursement by the State of the amount expended by the Federal Government for such maintenance, said amount shall be paid into the Federal highway fund for reapportionment among all the States for the construction of roads under this Act, and the Secretary of Agriculture shall then approve further projects submitted by the State as in this Act provided.

Whenever it shall become necessary for the Secretary of Agriculture under the provisions of this Act to place any highway in a proper condition of maintenance the Secretary of Agriculture shall contract with some responsible party or parties for doing such work: *Provided, however,* That in case he is not able to secure a satisfactory contract he may purchase, lease, hire, or otherwise obtain all necessary supplies, equipment, and labor, and may operate and maintain such motor and other equipment and facilities as in his judgment are necessary for the proper and efficient performance of his functions.

SEC. 15. [Maps of Federal aid roads — preparation and distribution.] That within two years after this Act takes effect the Secretary of Agriculture shall prepare, publish, and distribute a map showing the highways and forest roads

that have been selected and approved as a part of the primary or interstate, and the secondary or intercounty systems, and at least annually thereafter shall publish supplementary maps showing his program and the progress made in selection, construction, and reconstruction.

SEC. 16. [Property of railroad or canal company acquired from United States — conveyance to state.] That for the purpose of this Act the consent of the United States is hereby given to any railroad or canal company to convey to the highway department of any State any part of its right of way or other property in that State acquired by grant from the United States.

SEC. 17. [Appropriation of public lands for highway or forest road purposes.] That if the Secretary of Agriculture determines that any part of the public lands or reservations of the United States is reasonably necessary for the right of way of any highway or forest road or as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands or reservations, the Secretary of Agriculture shall file with the Secretary of the department supervising the administration of such land or reservation a map showing the portion of such lands or reservations which it is desired to appropriate.

If within a period of four months after such filing the said Secretary shall not have certified to the Secretary of Agriculture that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department for such purposes and subject to the conditions so specified.

If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary of Agriculture, and such lands or materials shall immediately revert to the control of the Secretary of the department from which they had been appropriated.

SEC. 18. [Rules and regulations by Secretary of Agriculture — recommendations.] That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

SEC. 19. [Reports to Congress.] That on or before the first Monday in December of each year the Secretary of Agriculture shall make a report to Congress, which shall include a detailed statement of the work done, the status of each project undertaken, the allocation of appropriations, an itemized statement of the expenditures and receipts during the preceding fiscal year under this Act, an itemized statement of the traveling and other expenses, including a list of employees, their duties, salaries, and traveling expenses, if any, and his recommendations, if any, for new legislation amending or supplementing this Act. The Secretary of Agriculture shall also make such special reports as Congress may request.

SEC. 20. [Moneys available for carrying out provisions of act]. That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of the moneys in the Treasury not otherwise appropriated, \$75,000,000 for the fiscal year ending June 30, 1922, \$25,000,000 of which shall become immediately available, and \$50,000,000 of which shall become available January 1, 1922.

SEC. 21. [Expenditures for administering provisions of act and for research work — deduction from appropriation — apportionment of remainder to states — ratio of apportionment.] That so much, not to exceed $2\frac{1}{2}$ per centum, of all moneys hereby or hereafter appropriated for expenditure under the provisions of this Act, as the Secretary of Agriculture may deem necessary for administering the provisions of this Act and for carrying on necessary highway research and investigational studies independently or in cooperation with the State highway departments and other research agencies, and for publishing the results thereof, shall be deducted for such purposes, available until expended.

Within sixty days after the close of each fiscal year the Secretary of Agriculture shall determine what part, if any, of the sums theretofore deducted for such purposes will not be needed and apportion such part, if any, for the fiscal year then current in the same manner and on the same basis as are other amounts authorized by this Act apportioned among all the States, and shall certify such apportionment to the Secretary of the Treasury and to the State highway departments.

The Secretary of Agriculture, after making the deduction authorized by this section, shall apportion the remainder of the appropriation made for expenditure under the provision of the Act for the fiscal year among the several States in the following manner: One-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census; one-third in the ratio which the mileage of rural delivery routes and star routes in each State bears to the total mileage of rural delivery and star routes in all the States at the close of the next preceding fiscal year, as shown by certificate of the Postmaster General, which he is directed to make and furnish annually to the Secretary of Agriculture: *Provided*, That no State shall receive less than one-half of 1 per centum of each year's allotment. All moneys herein or hereafter appropriated for expenditure under the provisions of this Act shall be available until the close of the second succeeding fiscal year for which apportionment was made: *Provided further*, That any sums apportioned to any State under the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, and all Acts amendatory thereof and supplemental thereto, shall be available for expenditure in that State for the purpose set forth in such Acts until two years after the close of the respective fiscal years for which any such sums become available, and any amount so apportioned remaining unexpended at the end of the period during which it is available for expenditure under the terms of such Acts shall be reapportioned according to the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916: *And provided further*, That any amount apportioned under the pro-

visions of this Act unexpended at the end of the period during which it is available for expenditure under the terms of this section shall be reapportioned within sixty days thereafter to all the States in the same manner and on the same basis, and certified to the Secretary of the Treasury and the State highway departments in the same way as if it were being apportioned under this Act for the first time.

For Act of July 11, 1916, mentioned in the text, and amendments thereto, see 1918 Supp. Fed. Stat. Ann. 639; 1919 Supp. Fed. Stat. Ann. 299.

SEC. 22. [Certificate of disposition made of appropriations.] That within sixty days after the approval of this Act the Secretary of Agriculture shall certify to the Secretary of the Treasury and to each of the State highway departments the sum he has estimated to be deducted for administering the provisions of this Act and the sums which he has apportioned to each State for the fiscal year ending June 30, 1922, and on or before January 20 next preceding the commencement of each succeeding fiscal year, and shall make like certificates for each fiscal year.

SEC. 23. [Forest roads and trails — appropriation — construction, etc.— contracts.] That out of the moneys in the Treasury not otherwise appropriated, there is hereby appropriated for the survey, construction, reconstruction, and maintenance of forest roads and trails, the sum of \$5,000,000 for the fiscal year ending June 30, 1922, available immediately and until expended, and \$10,000,000 for the fiscal year ending June 30, 1923, available until expended.

(a) Fifty per centum, but not to exceed \$3,000,000 for any one fiscal year, of the appropriation made or that may hereafter be made for expenditure under the provisions of this section shall be expended under the direct supervision of the Secretary of Agriculture in the survey, construction, reconstruction, and maintenance of roads and trails of primary importance for the protection, administration, and utilization of the national forests, or when necessary, for the use and development of the resources upon which communities within or adjacent to the national forests are dependent, and shall be apportioned among the several States, Alaska, and Porto Rico by the Secretary of Agriculture, according to the relative needs of the various national forests, taking into consideration the existing transportation facilities, value of timber, or other resources served, relative fire danger, and comparative difficulties of road and trail construction.

The balance of such appropriations shall be expended by the Secretary of Agriculture in the survey, construction, reconstruction, and maintenance of forest roads of primary importance to the State, counties, or communities within, adjoining, or adjacent to the national forests, and shall be prorated and apportioned by the Secretary of Agriculture for expenditures in the several States, Alaska, and Porto Rico, according to the area and value of the land owned by the Government within the national forests therein as determined by the Secretary of Agriculture from such information, investigation, sources, and departments as the Secretary of Agriculture may deem most accurate.

(b) Cooperation of Territories, States, and civil subdivisions thereof may be accepted but shall not be required by the Secretary of Agriculture.

(c) The Secretary of Agriculture may enter into contracts with any Territory, State, or civil subdivision thereof for the construction, reconstruction, or maintenance of any forest road or trail or part thereof.

(d) Construction work, on forest roads or trails estimated to cost \$5,000 or more per mile, exclusive of bridges, shall be advertised and let to contract.

If such estimated cost is less than \$5,000 per mile, or if, after proper advertising, no acceptable bid is received, or the bids are deemed excessive, the work may be done by the Secretary of Agriculture on his own account; and for such purpose the Secretary of Agriculture may purchase, lease, hire, rent, or otherwise obtain all necessary supplies, materials, tools, equipment, and facilities required to perform the work.

The appropriation made in this section or that may hereafter be made for expenditure under the provisions of this section may be expended for the purpose herein authorized and for the payment of wages, salaries, and other expenses for help employed in connection with such work.

SEC. 24. [Approval of projects in states not permitted by Constitution, etc., to provide revenue for highways.] That in any State where the existing constitution or laws will not permit the State to provide revenues for the construction, reconstruction, or maintenance of highways, the Secretary of Agriculture shall continue to approve projects for said State until three years after the passage of this Act, if he shall find that said State has complied with the provisions of this Act in so far as its existing constitution and laws will permit.

SEC. 25. [Invalidity of any provision of Act — effect on remainder.] That if any provision of this Act, or the application thereof to any person or circumstances, shall be held invalid, the validity of the remainder of the Act and of the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 26. [Repeal of inconsistent Acts.] That all Acts or parts of Acts in any way inconsistent with the provisions of this Act are hereby repealed, and this Act shall take effect on its passage.

HOMESTEADS

See PUBLIC LANDS

HOSPITALS AND ASYLUMS

Act of March 4, 1921, 104.

*Additional Hospital Facilities for Persons Serving in World War
— Patients of Bureau of War Risk Insurance, Board for Vocational Education, etc., 104.*

CROSS-REFERENCES

See *ALASKA; SEAMEN; WAR DEPARTMENT AND MILITARY ESTABLISHMENT*

An Act Providing additional hospital facilities for patients of the Bureau of War Risk Insurance and of the Federal Board for Vocational Education, Division of Rehabilitation, and for other purposes.

[*Act of March 4, 1921.*]

[Additional hospital facilities for persons serving in World War — patients of Bureau of War Risk Insurance, Board for Vocational Education, etc.] That the Secretary of the Treasury is authorized, within the limits of appropriations made herein, to provide additional hospital and out-patient dispensary facilities for persons who served in the World War and are now or hereafter may be patients of the Bureau of War Risk Insurance or of the Federal Board for Vocational Education, Division of Rehabilitation, (1) by purchase, gift, or lease of existing plants, (2) by construction on sites now owned by the Government or on sites to be acquired, when approved by the President, by purchase, condemnation, gift, or otherwise, or (3) by such remodeling or extension of existing plants and their equipment, owned or acquired by the United States at places now being used or that have been used by the Public Health Service for hospital purposes, as may be necessary economically to adapt such plants to the uses and purposes herein provided. Such hospitals and out-patient dispensary facilities shall include the necessary buildings, and auxiliary structures, mechanical equipment, approach work, roads and track-age facilities leading thereto, vehicles, live stock, furniture, equipment and accessories, and also shall provide accommodations for officers, nurses, and attending personnel, and the Secretary of the Treasury is authorized to accept gifts or donations for any of the purposes named herein;

The Secretary of War is authorized and directed to transfer without charge to the Secretary of the Treasury for the use of the Public Health Service such mechanical, construction, and miscellaneous material, hospital furniture and equipment, hospital and medical supplies, motor trucks and other motor-driven vehicles, not required by the War Department, as may be required by the Public Health Service for its hospitals;

The Secretary of the Treasury is authorized in his discretion to employ technical and clerical assistants within or without the District of Columbia, without regard to civil-service laws, rules, and regulations, and to pay from the sum herein appropriated for construction purposes, at customary rates of compensation, exclusively to aid in the preparation of the plans and specifications for the above-named objects and for the supervision of the execution thereof, and for traveling expenses, field-office equipment, and supplies, commercial printing in or out of the District of Columbia, incident thereto, at a total limit of cost for such additional technical and clerical assistants and traveling expenses, and so forth, of not exceeding 3 per centum of the limit of cost for construction: *Provided*, That all of the above-mentioned work shall be under the direction and supervision of the Secretary of the Treasury;

In carrying out the purposes herein authorized the President is authorized and empowered, in his discretion, to assign for use of the Public Health Service, under the jurisdiction of the Secretary of the Treasury, such lands or buildings now owned or leased by the United States, not including property under the jurisdiction of the National Home for Disabled Volunteer Soldiers, which, in his judgment, can be used more efficiently for the care of patients of the Bureau of War Risk Insurance; and the Secretary of the Treasury is

authorized and directed to take over immediately Fort Mackenzie, Wyoming, Fort Walla Walla, Washington, and Fort Logan H. Roots, Arkansas, with all lands, buildings, and equipment belonging thereto for the uses contemplated herein and to expend from the appropriation in the following paragraph not to exceed \$600,000 at Forts Mackenzie and Walla Walla, and not to exceed \$250,000 at Fort Logan H. Roots, for providing and increasing hospital facilities thereat;

For carrying into effect the preceding paragraphs relating to additional hospital facilities there is hereby appropriated out of any money in the Treasury not otherwise appropriated, the sum of \$18,600,000, to be immediately available and to remain available until expended, of which sum not to exceed \$6,100,000 shall be used for remodeling or extending existing plants.

HOT SPRINGS RESERVATION

See PUBLIC PARKS

HYGIENE

See HEALTH AND QUARANTINE

IMMIGRATION

Act of March 4, 1921 (Sundry Civil Appropriation Act), 106.

Sec. 1. Immigration Officials—Inspection of Aliens in Foreign Contiguous Territory—Reimbursement, 106.

Act of May 19, 1921, 106.

Sec. 1. Act to Limit Immigration—Definitions—"United States"—"Alien"—"Immigration Act"—"Immigration Laws," 106.

2. (a) Admission of Aliens of Any Nationality on Percentage Basis—Excepted Classes, 106.

(b) Determination of Nationality, 107.

(c) Statement Showing Number of Persons of Various Nationalities—Preparation by Certain Cabinet Officers—Changes in Political Boundaries—Effect on Question of Nationality of Aliens, 107.

(d) Admission of Maximum Number of Any Nationality in Particular Year—Effect—Monthly Maximum—Preferential Classes, 107.

3. Commissioner General of Immigration—Duties—Rules and Regulations—Statements Relating to Admissions, 108.

4. Immigration Laws How Affected by This Act, 108.

5. Time of Taking Effect—Duration, 109.

Res. of Aug. 22, 1921, 109.

Aliens Sailing from Foreign Ports on or before June 8, 1921 — Admission, 109.

CROSS-REFERENCE

See also *CHINESE EXCLUSION*

[SEC. 1.] * * * [Immigration officials — inspection of aliens in foreign contiguous territory — reimbursement.] Nothing in the proviso contained in the Legislative, Executive and Judicial Appropriation Act of March 3, 1917, relative to augmenting salaries of Government officials from outside sources shall prevent receiving reimbursements for services of immigration officials incident to the inspection of aliens in foreign contiguous territory, and such reimbursement shall be credited to the appropriation, "Expenses of regulating immigration."

This is from the Sundry Civil Appropriation Act of March 4, 1921.

For proviso of Act of March 3, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 721.

An Act To limit the immigration of aliens into the United States.*

[Act of May 19, 1921.]

[SEC. 1.] [Act to limit immigration — definition — "United States" — "alien" — "Immigration Act" — "immigration laws."] The term "United States" means the United States, and any waters, territory, or other place subject to the jurisdiction thereof except the Canal Zone and the Philippine Islands; but if any alien leaves the Canal Zone or any insular possession of the United States and attempts to enter any other place under the jurisdiction of the United States nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens.

The word "alien" includes any person not a native-born or naturalized citizen of the United States, but this definition shall not be held to include Indians of the United States not taxed nor citizens of the islands under the jurisdiction of the United States.

The term "Immigration Act" means the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States"; and the term "immigration laws" includes such Act and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, or expulsion of aliens.

For Act of Feb. 5, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 212.

SEC. 2. (a) [Admission of aliens of any nationality on percentage basis — excepted classes.] That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons

* See Act of Aug. 22, 1921, which follows this Act.

of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act: (1) Government officials, their families, attendants, servants, and employees; (2) aliens in continuous transit through the United States; (3) aliens lawfully admitted to the United States who later go in transit from one part of the United States to another through foreign contiguous territory; (4) aliens visiting the United States as tourists or temporarily for business or pleasure; (5) aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration; (6) aliens from the so-called Asiatic barred zone, as described in section 3 of the Immigration Act; (7) aliens who have resided continuously for at least one year immediately preceding the time of their admission to the United States in the Dominion of Canada, Newfoundland, the Republic of Cuba, the Republic of Mexico, countries of Central or South America, or adjacent islands; or (8) aliens under the age of eighteen who are children of citizens of the United States.

(b) **[Determination of nationality.]** For the purposes of this Act nationality shall be determined by country of birth, treating as separate countries the colonies or dependencies for which separate enumeration was made in the United States census of 1910.

(c) **[Statement showing number of persons of various nationalities — preparation by certain cabinet officers — change in political boundaries — effect on question of nationality of aliens.]** The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, shall, as soon as feasible after the enactment of this Act, prepare a statement showing the number of persons of the various nationalities resident in the United States as determined by the United States census of 1910, which statement shall be the population basis for the purposes of this Act. In case of changes in political boundaries in foreign countries occurring subsequent to 1910 and resulting (1) in the creation of new countries, the Governments of which are recognized by the United States, or (2) in the transfer of territory from one country to another, such transfer being recognized by the United States, such officials, jointly, shall estimate the number of persons resident in the United States in 1910 who were born within the area included in such new countries or in such territory so transferred, and revise the population basis as to each country involved in such change of political boundary. For the purpose of such revision and for the purposes of this Act generally aliens born in the area included in any such new country shall be considered as having been born in such country, and aliens born in any territory so transferred shall be considered as having been born in the country to which such territory was transferred.

(d) **[Admission of maximum number of any nationality in particular year — effect — monthly maximum — preferential classes.]** When the maximum number of aliens of any nationality who may be admitted in any fiscal year under this Act shall have been admitted all other aliens of such nationality, except as otherwise provided in this Act, who may apply for admission during the same fiscal year shall be excluded: *Provided*, That the number of aliens of any nationality who may be admitted in any month shall not exceed 20

per centum of the total number of aliens of such nationality who are admissible in that fiscal year: *Provided further*, That aliens returning from a temporary visit abroad, aliens who are professional actors, artists, lecturers, singers, nurses, ministers of any religious denomination, professors for colleges or seminaries, aliens belonging to any recognized learned profession, or aliens employed as domestic servants, may, if otherwise admissible, be admitted notwithstanding the maximum number of aliens of the same nationality admissible in the same month or fiscal year, as the case may be, shall have entered the United States; but aliens of the classes included in this proviso who enter the United States before such maximum number shall have entered shall (unless excluded by subdivision (a) from being counted) be counted in reckoning the percentage limits provided in this Act: *Provided further*, That in the enforcement of this Act preference shall be given so far as possible to the wives, parents, brothers, sisters, children under eighteen years of age, and fiancées, (1) of citizens of the United States, (2) of aliens now in the United States who have applied for citizenship in the manner provided by law, or (3) of persons eligible to United States citizenship who served in the military or naval forces of the United States at any time between April 6, 1917, and November 11, 1918, both dates inclusive, and have been separated from such forces under honorable conditions.

SEC. 3. [Commissioner General of Immigration — duties — rules and regulations — statements relating to admissions.] That the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall, as soon as feasible after the enactment of this Act, and from time to time thereafter, prescribe rules and regulations necessary to carry the provisions of this Act into effect. He shall, as soon as feasible after the enactment of this Act, publish a statement showing the number of aliens of the various nationalities who may be admitted to the United States between the date this Act becomes effective and the end of the current fiscal year, and on June 30 thereafter he shall publish a statement showing the number of aliens of the various nationalities who may be admitted during the ensuing fiscal year. He shall also publish monthly statements during the time this Act remains in force showing the number of aliens of each nationality already admitted during the then current fiscal year and the number who may be admitted under the provisions of this Act during the remainder of such year, but when 75 per centum of the maximum number of any nationality admissible during the fiscal year shall have been admitted such statements shall be issued weekly thereafter. All statements shall be made available for general publication and shall be mailed to all transportation companies bringing aliens to the United States who shall request the same and shall file with the Department of Labor the address to which such statements shall be sent. The Secretary of Labor shall also submit such statements to the Secretary of State, who shall transmit the information contained therein to the proper diplomatic and consular officials of the United States, which officials shall make the same available to persons intending to emigrate to the United States and to others who may apply.

SEC. 4. [Immigration laws how affected by this act.] That the provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws.

SEC. 5. [Time of taking effect — duration.] That this Act shall take effect and be enforced 15 days after its enactment (except sections 1 and 3 and subdivisions (b) and (c) of section 2, which shall take effect immediately upon the enactment of this Act), and shall continue in force until June 30, 1922, and the number of aliens of any nationality who may be admitted during the remaining period of the current fiscal year, from the date when this Act becomes effective to June 30, shall be limited in proportion to the number admissible during the fiscal year 1922.

Joint Resolution Permitting the admission of certain aliens who sailed from foreign ports on or before June 8, 1921, and for other purposes.

[Res. of Aug. 22, 1921.]

[Aliens sailing from foreign ports on or before June 8, 1921 — admission.] That aliens of any nationality who are brought to the United States on vessels which departed from foreign ports on or before June 8, 1921, destined for the United States, and who apply in the month of June, 1921, for admission to the United States, may, if otherwise admissible, be admitted to the United States although the limit prescribed by section 5 of the Act entitled "An Act to limit the immigration of aliens into the United States," approved May 19, 1921, may have been reached before such application for admission. The number of aliens of any nationality so admitted shall be deducted, under such regulations as the Secretary of Labor may prescribe, from the number of aliens of that nationality admissible, during the fiscal year beginning July 1, 1921, under the provisions of such Act of May 19, 1921, but nothing in this resolution shall prohibit the admission of otherwise admissible aliens of any nationality during the month of July, 1921, up to 20 per centum of the number of aliens of that nationality admissible during such fiscal year under the provisions of such Act of May 19, 1921, as heretofore promulgated.

For Act of May 19, 1921, affected by this Resolution, see *supra*, this title, p. 106.

IMPORTS

See CUSTOMS DUTIES

INCOME TAX

See INTERNAL REVENUE; VIRGIN ISLANDS

INDIANS

Act of Feb. 24, 1921, 110.

*Five Civilized Tribes — Drainage of Allotments — Assessments
— Act of March 27, 1914, Amended, 110.*

Act of March 3, 1921 (Indian Appropriation Act), 111.

*Sec. 1. Boarding and Day Schools — Discontinuance — Disposition of
Moneys Appropriated, 111.*

Employees in Indian Service — Quarters — Heat and Light, 112.

*Indian Reservations — Unallotted Lands — Leases — Mining
Claims — Sec. 26 of Act of June 30, 1919, Amended, 112.*

*Restricted Allotments — Leases for Farming and Grazing Pur-
poses — Five Civilized Tribes Excepted, 112.*

*Five Civilized Tribes — Tribal Funds — Expenditures — Appro-
priation of Congress — Schools, 112.*

Act of Nov. 2, 1921, 113.

*Bureau of Indian Affairs — Expenditures for Specified Purposes,
113.*

An Act Amending an Act to provide for drainage of Indian allotments of the Five Civilized Tribes, approved March 27, 1914 (Thirty-eighth Statutes, 310, Public, Numbered 77).

[*Act of Feb. 24, 1921.*]

[**Five Civilized Tribes — drainage of allotments — assessments — Act of March 27, 1914, amended.**] That Public Act Numbered 77 (Thirty-eighth Statutes, 310), approved March 27, 1914, an Act to provide for drainage of Indian allotments of the Five Civilized Tribes, be and is hereby amended so as to read as follows:

“That whenever a drainage district is organized in any county in the Five Civilized Tribes of the State of Oklahoma, under the laws of that State, for the purpose of draining the lands within such district, the Secretary of the Interior is authorized, in his discretion, to pay from the funds or moneys arising from any source under his control or under the control of the United States, and which would be prorated to such allottee, the assessment for drainage purposes against any Indian allottee or upon the lands of any allottee who is not subject to taxation, or whose lands are exempt from taxation or from assessment for taxation under the treaties or agreements with the tribes to which such allottee may belong, or under any Act of Congress; and such amount so paid out shall be charged against such allottee's pro rata share of any funds to his credit under the control of the Secretary of the Interior: *Provided*, That the Secretary of the Interior, before paying out such funds, shall designate some person with a knowledge of the subject of drainage, to review the schedules of assessment against each tract of land and to review the land assessed to ascertain whether such Indian allottee, or his lands not subject to taxation, have been assessed more than their pro rata share as compared with other lands located in said district similarly situated and deriving like benefits. And if such Indian lands have been assessed justly when compared with other assessments, then, in that event, said funds shall be paid to the

proper county in which said drainage district may be organized, or, in the option of the Secretary of the Interior to the construction company or bondholder shown to be entitled to the funds arising from such assessment: *Provided further*, That nothing in this Act shall be so construed as to deprive any allottee of any right which he might otherwise have individually to apply to the courts for the purpose of having his rights adjudicated."

In the House of Representatives,

February 24, 1921.

The President of the United States having returned to the House of Representatives, in which it originated, the bill (H. R. 517) entitled "An Act amending an Act to provide for drainage of Indian allotments of the Five Civilized Tribes, approved March 27, 1914 (Thirty-eighth Statutes, 310, Public, Numbered 77)," with his objections thereto, the House proceeded in pursuance of the Constitution to reconsider the same; and

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

WM. TYLER PAGE
Clerk.

In the Senate of the United States.

February 24 (Calendar Day, March 2), 1921.

The Senate having proceeded to reconsider the bill (H. R. 517) "An Act amending an Act to provide for drainage of Indian allotments of the Five Civilized Tribes, approved March 27, 1914 (Thirty-eighth Statutes, 310, Public, numbered 77)," returned by the President of the United States to the House of Representatives, in which it originated, with his objections, and passed by the House on a reconsideration of the same, it was

Resolved, That the bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

GEORGE A. SANDERSON
Secretary.

An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1922.

[*Act of March 3, 1921.*]

[SEC. 1.] * * * [Boarding and day schools — discontinuance — disposition of moneys appropriated.] That all reservation and nonreservation boarding schools, with an average attendance of less than forty-five and eighty pupils, respectively, shall be discontinued on or before the beginning of the fiscal year 1922: *Provided*, That this limitation as to attendance shall not apply to the Hope Indian School for Girls at Springfield, South Dakota, which school is hereby reestablished and continued. The pupils in schools so discontinued shall be transferred first, if possible, to Indian day schools or State public schools; second, to adjacent reservation or nonreservation boarding schools, to

the limit of the capacity of said schools: *Provided further*, That all day schools with an average attendance of less than eight shall be discontinued on or before the beginning of the fiscal year 1922: *And provided further*, That all moneys appropriated for any school discontinued pursuant to this Act or for other cause shall be returned immediately to the Treasury of the United States: *Provided further*, That not more than \$200,000 of the amount herein appropriated may be expended for the tuition of Indian children enrolled in the public schools: *And provided further*, That no part of this appropriation shall be used for the support of Indian day and industrial schools where specific appropriation is made.

* * * **[Employees in Indian service — quarters — heat and light.]** That the Secretary of the Interior is authorized to allow employees in the Indian Service, who are furnished quarters, necessary heat and light for such quarters without charge, such heat and light to be paid for out of the fund chargeable with the cost of heating and lighting other buildings at the same place: *And provided further*, That the amount so expended for agency purposes shall not be included in the maximum amounts for compensation of employees prescribed by section 1, Act of August 24, 1912.

For Act of Aug. 24, 1912, sec. 1, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 763.

* * * **[Indian reservations — unallotted lands — leases — mining claims — sec. 26 of Act of June 30, 1919, amended.]** That section 26 of the Act entitled "An Act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1920," approved June 30, 1919 (Public, Numbered 3, Sixty-sixth Congress), be amended as follows:

"That wherever the term 'metalliferous' is used in said section 26 of the above-entitled Act, it shall be defined and construed by the Secretary of the Interior to include magnesite, gypsum, limestone, and asbestos."

For sec. 26 amended by the text, see 1919 Supp. Fed. Stat. Ann. 78.

* * * **[Restricted allotments — leases for farming and grazing purposes — Five Civilized Tribes excepted.]** That the restricted allotment of any Indian may be leased for farming and grazing purposes by the allottee or his heirs, subject only to the approval of the superintendent or other officer in charge of the reservation where the land is located, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That this provision shall not apply to the Five Civilized Tribes.

* * * **[Five Civilized Tribes — tribal funds — expenditures — appropriation by Congress — schools.]** That hereafter no money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes. tribal and other Indian schools for the current fiscal year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year at salaries at the rate heretofore paid, and one attorney each for

the Choctaw, Chickasaw, and Creek Tribes employed under contract approved by the President, under existing law, for the current fiscal year: *Provided further*, That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: *And provided further*, That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1922, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes.

An Act Authorizing appropriations and expenditures for the administration of Indian Affairs, and for other purposes.

[Act of Nov. 2, 1921.]

[Bureau of Indian Affairs — expenditures for specified purposes.] That the Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education.

For relief of distress and conservation of health.

For industrial assistance and advancement and general administration of Indian property.

For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects.

For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.

For the suppression of traffic in intoxicating liquor and deleterious drugs.

For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.

And for general and incidental expenses in connection with the administration of Indian affairs.

INFANT HYGIENE

See HEALTH AND QUARANTINE

INJUNCTIONS

See STOCKYARDS

INNKEEPERS

See DISTRICT OF COLUMBIA

INSULAR POSSESSIONS

See HAWAIIAN ISLANDS; PHILIPPINE ISLANDS; PORTO RICO; VIRGIN ISLANDS

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[SEC. 1.] * * * [Surveyors general—detail of clerks.] The Secretary of the Interior is authorized to detail temporarily clerks from the office of one surveyor general to another as the necessities of the service may require and to pay their actual necessary traveling expenses in going to and returning from such office out of the appropriation for surveying the public lands. A detailed statement of traveling expenses incurred hereunder shall be made to Congress at the beginning of each regular session thereof.

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An Act Authorizing the distribution of abandoned or forfeited tobacco, snuff, cigars, or cigarettes to hospitals maintained by the United States for the use of present or former members of the military or naval forces of the United States.

[*Act of Oct. 14, 1921.*]

[**Tobacco, snuff, cigars, and cigarettes abandoned or forfeited — distribution to United States hospitals — R. S. sec. 3369 amended.**] That the last proviso of section 3369 of the Revised Statutes is amended to read as follows:

“And provided further, That in case it shall appear that any abandoned, condemned, or forfeited tobacco, snuff, cigars, or cigarettes, when offered for sale, will not bring a price equal to the tax due and payable thereon, such goods shall not be sold for consumption in the United States; and upon application made to the Commissioner of Internal Revenue, he is authorized to order the destruction of such tobacco, snuff, cigars, or cigarettes by the officer in whose custody and control the same may be at the time, and in such manner and under such regulations as the Commissioner of Internal Revenue may prescribe, or he may, under such regulations, order delivery of such tobacco, snuff, cigars, or cigarettes, without payment of any tax, to any hospital maintained by the United States for the use of present or former members of the military or naval forces of the United States.”

For R. S. sec. 3369, here amended, see 4 Fed. Stat. Ann. (2d ed.) 145.

An Act To reduce and equalize taxation, to provide revenue, and for other purposes.

[*Act of Nov. 23, 1921.*]

TITLE I.—GENERAL DEFINITIONS.

SECTION 1. [Citation of Act as “Revenue Act of 1921.”] That this Act may be cited as the “Revenue Act of 1921.”

SEC. 2. [Terms used in Act defined.] That when used in this Act —

(1) The term “person” includes partnerships and corporations, as well as individuals;

(2) The term “corporation” includes associations, joint-stock companies, and insurance companies;

(3) The term “domestic” when applied to a corporation or partnership means created or organized in the United States;

(4) The term “foreign” when applied to a corporation or partnership means created or organized outside the United States;

(5) The term “United States” when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

(6) The term “Secretary” means the Secretary of the Treasury;

(7) The term “Commissioner” means the Commissioner of Internal Revenue;

(8) The term “collector” means collector of internal revenue;

(9) The term “taxpayer” includes any person, trust or estate subject to a tax imposed by this Act;

(10) The term “military or naval forces of the United States” includes the Marine Corps, the Coast Guard, the Army Nurse Corps, Female, and the Navy Nurse Corps, Female, but this shall not be deemed to exclude other units otherwise included within such terms; and

(11) The term “Government contract” means (a) a contract made with the United States, or with any department, bureau, officer, commission, board, or agency, under the United States and acting in its behalf, or with any agency controlled by any of the above if the contract is for the benefit of the United States, or (b) a subcontract made with a contractor performing such a contract if the products or services to be furnished under the subcontract are for the benefit of the United States. The term “Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive” when applied to a contract of the kind referred to in clause (a) of this subdivision, includes all such contracts which, although entered into during such period, were originally not enforceable, but which have been or may become enforceable by reason of subsequent validation in pursuance of law.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SEC. 200. Definitions. That when used in this title —

(1) [“Taxable year” — “fiscal year.”] The term “taxable year” means the calendar year, or the fiscal year ending during such calendar year, upon the

basis of which the net income is computed under section 212 or section 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921;

(2) ["**Fiduciary.**"] The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate;

(3) ["**Withholding agent.**"] The term "withholding agent" means any person required to deduct and withhold any tax under the provisions of section 221 or section 237;

(4) ["**Paid.**"] The term "paid," for the purposes of the deductions and credits under this title, means "paid or accrued" or "paid or incurred," and the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212; and

(5) ["**Personal service corporation.**"] The term "personal service corporation" means a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation and in which capital (whether invested or borrowed) is not a material income-producing factor; but does not include any foreign corporation, nor any corporation 50 per centum or more of whose gross income consists either (1) of gains, profits, or income derived from trading as a principal, or (2) of gains, profits, commissions, or other income, derived from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 201. Dividends. (a) That the term "dividend" when used in this title (except in paragraph (10) of subdivision (a) of section 234 and paragraph (4) of subdivision (a) of section 245) means any distribution made by a corporation to its shareholders or members, whether in cash or in other property, out of its earnings or profits accumulated since February 28, 1913, except a distribution made by a personal service corporation out of earnings or profits accumulated since December 31, 1917, and prior to January 1, 1922.

(b) For the purposes of this Act every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913; but any earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, may be distributed exempt from the tax, after the earnings and profits accumulated since February 28, 1913, have been distributed. If any such tax-free distribution has been made the distributee shall not be allowed as a deduction from gross income any loss sustained from the sale or other disposition of his stock or shares unless, and then only to the extent that, the basis provided in section 202 exceeds the sum of (1) the amount realized from the sale or other disposition of such stock or shares, and (2) the aggregate amount of such distributions received by him thereon.

(c) Any distribution (whether in cash or other property) made by a corporation to its shareholders or members otherwise than out of (1) earnings or profits

accumulated since February 28, 1913, or (2) earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, shall be applied against and reduce the basis provided in section 202 for the purpose of ascertaining the gain derived or the loss sustained from the sale or other disposition of the stock or shares by the distributee.

(d) A stock dividend shall not be subject to tax but if after the distribution of any such dividend the corporation proceeds to cancel or redeem its stock at such time and in such manner as to make the distribution and cancellation or redemption essentially equivalent to the distribution of a taxable dividend, the amount received in redemption or cancellation of the stock shall be treated as a taxable dividend to the extent of the earnings or profits accumulated by such corporation after February 28, 1913.

(e) For the purposes of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands.

(f) Any distribution made during the first sixty days of any taxable year shall be deemed to have been made from earnings or profits accumulated during preceding taxable years; but any distribution made during the remainder of the taxable year shall be deemed to have been made from earnings or profits accumulated between the close of the preceding taxable year and the date of distribution, to the extent of such earnings or profits, and if the books of the corporation do not show the amount of such earnings or profits, the earnings or profits for the accounting period within which the distribution was made shall be deemed to have been accumulated ratably during such period. This subdivision shall not be in effect after December 31, 1921.

SEC. 202. Basis for determining gain or loss. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that —

(1) In the case of such property, which should be included in the inventory, the basis shall be the last inventory value thereof;

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commission as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisi-

tion of such property interests as are specified in subdivision (c) or (e) of section 402.

(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but —

(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value;

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and

(3) If the amount realized therefor is more than such basis but not more than its fair market price or value as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income.

(c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized —

(1) When any such property held for investment, or for productive use in trade or business (not including stock-in-trade or other property held primarily for sale), is exchanged for property of a like kind or use;

(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word "reorganization," as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, (however effected); or

(3) When (A) a person transfers any property, real, personal or mixed, to a corporation, and immediately after the transfer is in control of such corporation, or (B) two or more persons transfer any such property to a corporation, and immediately after the transfer are in control of such corporation, and the amounts of stock, securities, or both, received by such persons are in substantially the same proportion as their interests in the property before such transfer. For the purposes of this paragraph, a person is, or two or more persons are, "in control" of a corporation when owning at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

(d) (1) Where property is exchanged for other property and no gain or loss is recognized under the provisions of subdivision (c), the property received shall, for the purposes of this section, be treated as taking the place of the property exchanged therefor, except as provided in subdivision (e);

(2) Where property is compulsorily or involuntarily converted into cash or its equivalent in the manner described in paragraph (12) of subdivision (a) of section 214 and paragraph (14) of subdivision (a) of section 234, and the

taxpayer proceeds in good faith to expend or set aside the proceeds of such conversion in the form and in the manner therein provided, the property acquired shall, for the purpose of this section, be treated as taking the place of a like proportion of the property converted.

(3) Where no deduction is allowed for a loss or a part thereof under the provisions of paragraph (5) of subdivision (a) of section 214 and paragraph (4) of subdivision (a) of section 234, that part of the property acquired with relation to which such loss is disallowed shall for the purposes of this section be treated as taking the place of the property sold or disposed of.

(e) Where property is exchanged for other property which has no readily realizable market value, together with money or other property which has a readily realizable market value, then the money or the fair market value of the property having such readily realizable market value received in exchange shall be applied against and reduce the basis, provided in this section, of the property exchanged, and if in excess of such basis, shall be taxable to the extent of the excess; but when property is exchanged for property specified in paragraphs (1), (2), and (3) of subdivision (c) as received in exchange, together with money or other property of a readily realizable market value other than that specified in such paragraphs, the money or the fair market value of such other property received in exchange shall be applied against and reduce the basis, provided in this section, of the property exchanged, and if in excess of such basis, shall be taxable to the extent of the excess.

(f) Nothing in this section shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received.

SEC. 203. Inventories. That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

SEC. 204. Net losses. (a) That as used in this section the term "net loss" means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business); and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) the gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the deple-

tion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

(c) The benefit of this section shall be allowed to the members of a partnership and the beneficiaries of an estate or trust, and to insurance companies subject to the tax imposed by section 243 or 246, under regulations prescribed by the Commissioner with the approval of the Secretary.

(d) If it appears, upon the production of evidence satisfactory to the Commissioner, that a taxpayer having a fiscal year beginning in 1920 and ending in 1921 has sustained a net loss during such fiscal year, such taxpayer shall be entitled to the benefits of this section in respect to the same proportion of such net loss which the portion of such fiscal year falling within the calendar year 1921 is of the entire fiscal year.

SEC. 205. Fiscal years 1920-1921 and 1921-1922. (a) That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of : (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period.

Any amount paid before or after the passage of this Act on account of the tax imposed for such fiscal year by Title II of the Revenue Act of 1918 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of section 252.

(b) If a taxpayer makes return for a fiscal year beginning in 1921 and ending in 1922, his tax under this title for the taxable year 1922 shall be the sum of: (1) the same proportion of a tax for the entire period computed under this title (as in force on December 31, 1921) at the rates for the calendar year 1921 which the portion of such period falling within the calendar year 1921 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title (as in force on January 1, 1922) at the rates for the calendar year 1922 which the portion of such period falling within the calendar year 1922 is of the entire period: *Provided*, That in the case of a personal service corporation the amount to be paid shall be only that specified in clause (2).

(c) If a fiscal year of a partnership begins in 1920 and ends in 1921, or begins in 1921 and ends in 1922, then (1) the rates for the calendar year during which

such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

SEC. 206. Capital gain. (a) That for the purpose of this title:

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

(2) The term "capital loss" means deductible loss resulting from the sale or exchange of capital assets consummated after December 31, 1921;

(3) The term "capital deductions" means such deductions as are allowed under this title for the purpose of computing net income and are properly allocable to or chargeable against items of capital gain as defined in this section;

(4) The term "capital net gain" means the excess of the total amount of capital gain over the sum of the capital deductions and capital losses;

(5) The term "ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions; and

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus $12\frac{1}{2}$ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than $12\frac{1}{2}$ per centum of the total net income. The total tax thus determined shall be computed, collected and paid in the same manner, at the same time and subject to the same provisions of law, including penalties, as other taxes under this title.

(c) In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.

PART II.—INDIVIDUALS.

SEC. 210. Normal Tax. That, in lieu of the tax imposed by section 210 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 8 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided*, That in the case of a citizen or resident of the United States the rate upon the first \$4,000 of such excess amount shall be 4 per centum.

For sec. 210 of the Revenue Act of 1918, see 1919 Supp. Fed. Stat. Ann. 94.

SEC. 211. Surtax. (a) That, in lieu of the tax imposed by section 211 of the Revenue Act of 1918, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual —

(1) For the calendar year 1921, a surtax equal to the sum of the following:

1 per centum of the amount by which the net income exceeds \$5,000 and does not exceed \$6,000;

2 per centum of the amount by which the net income exceeds \$6,000 and does not exceed \$8,000;

3 per centum of the amount by which the net income exceeds \$8,000 and does not exceed \$10,000;

4 per centum of the amount by which the net income exceeds \$10,000 and does not exceed \$12,000;

5 per centum of the amount by which the net income exceeds \$12,000 and does not exceed \$14,000;

6 per centum of the amount by which the net income exceeds \$14,000 and does not exceed \$16,000;

7 per centum of the amount by which the net income exceeds \$16,000 and does not exceed \$18,000;

8 per centum of the amount by which the net income exceeds \$18,000 and does not exceed \$20,000;

9 per centum of the amount by which the net income exceeds \$20,000 and does not exceed \$22,000;

10 per centum of the amount by which the net income exceeds \$22,000 and does not exceed \$24,000;

11 per centum of the amount by which the net income exceeds \$24,000 and does not exceed \$26,000;

12 per centum of the amount by which the net income exceeds \$26,000 and does not exceed \$28,000;

13 per centum of the amount by which the net income exceeds \$28,000 and does not exceed \$30,000;

14 per centum of the amount by which the net income exceeds \$30,000 and does not exceed \$32,000;

15 per centum of the amount by which the net income exceeds \$32,000 and does not exceed \$34,000;

16 per centum of the amount by which the net income exceeds \$34,000 and does not exceed \$36,000;

17 per centum of the amount by which the net income exceeds \$36,000 and does not exceed \$38,000;

18 per centum of the amount by which the net income exceeds \$38,000 and does not exceed \$40,000;

19 per centum of the amount by which the net income exceeds \$40,000 and does not exceed \$42,000;

20 per centum of the amount by which the net income exceeds \$42,000 and does not exceed \$44,000;

21 per centum of the amount by which the net income exceeds \$44,000 and does not exceed \$46,000;

22 per centum of the amount by which the net income exceeds \$46,000 and does not exceed \$48,000;

23 per centum of the amount by which the net income exceeds \$48,000 and does not exceed \$50,000;

24 per centum of the amount by which the net income exceeds \$50,000 and does not exceed \$52,000;

25 per centum of the amount by which the net income exceeds \$52,000 and does not exceed \$54,000;

26 per centum of the amount by which the net income exceeds \$54,000 and does not exceed \$56,000;

27 per centum of the amount by which the net income exceeds \$56,000 and does not exceed \$58,000;

28 per centum of the amount by which the net income exceeds \$58,000 and does not exceed \$60,000;

29 per centum of the amount by which the net income exceeds \$60,000 and does not exceed \$62,000;

30 per centum of the amount by which the net income exceeds \$62,000 and does not exceed \$64,000;

31 per centum of the amount by which the net income exceeds \$64,000 and does not exceed \$66,000;

32 per centum of the amount by which the net income exceeds \$66,000 and does not exceed \$68,000;

33 per centum of the amount by which the net income exceeds \$68,000 and does not exceed \$70,000;

34 per centum of the amount by which the net income exceeds \$70,000 and does not exceed \$72,000;

35 per centum of the amount by which the net income exceeds \$72,000 and does not exceed \$74,000;

36 per centum of the amount by which the net income exceeds \$74,000 and does not exceed \$76,000;

37 per centum of the amount by which the net income exceeds \$76,000 and does not exceed \$78,000;

38 per centum of the amount by which the net income exceeds \$78,000 and does not exceed \$80,000;

39 per centum of the amount by which the net income exceeds \$80,000 and does not exceed \$82,000;

40 per centum of the amount by which the net income exceeds \$82,000 and does not exceed \$84,000;

41 per centum of the amount by which the net income exceeds \$84,000 and does not exceed \$86,000;

42 per centum of the amount by which the net income exceeds \$86,000 and does not exceed \$88,000;

43 per centum of the amount by which the net income exceeds \$88,000 and does not exceed \$90,000;

44 per centum of the amount by which the net income exceeds \$90,000 and does not exceed \$92,000;

45 per centum of the amount by which the net income exceeds \$92,000 and does not exceed \$94,000;

46 per centum of the amount by which the net income exceeds \$94,000 and does not exceed \$96,000;

47 per centum of the amount by which the net income exceeds \$96,000 and does not exceed \$98,000;

48 per centum of the amount by which the net income exceeds \$98,000 and does not exceed \$100,000;

52 per centum of the amount by which the net income exceeds \$100,000 and does not exceed \$150,000;

56 per centum of the amount by which the net income exceeds \$150,000 and does not exceed \$200,000;

60 per centum of the amount by which the net income exceeds \$200,000 and does not exceed \$300,000;

63 per centum of the amount by which the net income exceeds \$300,000 and does not exceed \$500,000;

64 per centum of the amount by which the net income exceeds \$500,000 and does not exceed \$1,000,000;

65 per centum of the amount by which the net income exceeds \$1,000,000;

(2) For the calendar year 1922 and each calendar year thereafter, a surtax equal to the sum of the following:

1 per centum of the amount by which the net income exceeds \$6,000 and does not exceed \$10,000;

2 per centum of the amount by which the net income exceeds \$10,000 and does not exceed \$12,000;

3 per centum of the amount by which the net income exceeds \$12,000 and does not exceed \$14,000;

4 per centum of the amount by which the net income exceeds \$14,000 and does not exceed \$16,000;

5 per centum of the amount by which the net income exceeds \$16,000 and does not exceed \$18,000;

6 per centum of the amount by which the net income exceeds \$18,000 and does not exceed \$20,000;

8 per centum of the amount by which the net income exceeds \$20,000 and does not exceed \$22,000;

9 per centum of the amount by which the net income exceeds \$22,000 and does not exceed \$24,000;

10 per centum of the amount by which the net income exceeds \$24,000 and does not exceed \$26,000;

11 per centum of the amount by which the net income exceeds \$26,000 and does not exceed \$28,000;

12 per centum of the amount by which the net income exceeds \$28,000 and does not exceed \$30,000;

13 per centum of the amount by which the net income exceeds \$30,000 and does not exceed \$32,000;

15 per centum of the amount by which the net income exceeds \$32,000 and does not exceed \$36,000;

16 per centum of the amount by which the net income exceeds \$36,000 and does not exceed \$38,000;

17 per centum of the amount by which the net income exceeds \$38,000 and does not exceed \$40,000;

18 per centum of the amount by which the net income exceeds \$40,000 and does not exceed \$42,000;

19 per centum of the amount by which the net income exceeds \$42,000 and does not exceed \$44,000;

20 per centum of the amount by which the net income exceeds \$44,000 and does not exceed \$46,000;

21 per centum of the amount by which the net income exceeds \$46,000 and does not exceed \$48,000;

22 per centum of the amount by which the net income exceeds \$48,000 and does not exceed \$50,000;

23 per centum of the amount by which the net income exceeds \$50,000 and does not exceed \$52,000;

24 per centum of the amount by which the net income exceeds \$52,000 and does not exceed \$54,000;

25 per centum of the amount by which the net income exceeds \$54,000 and does not exceed \$56,000;

26 per centum of the amount by which the net income exceeds \$56,000 and does not exceed \$58,000;

27 per centum of the amount by which the net income exceeds \$58,000 and does not exceed \$60,000;

28 per centum of the amount by which the net income exceeds \$60,000 and does not exceed \$62,000;

29 per centum of the amount by which the net income exceeds \$62,000 and does not exceed \$64,000;

30 per centum of the amount by which the net income exceeds \$64,000 and does not exceed \$66,000;

31 per centum of the amount by which the net income exceeds \$66,000 and does not exceed \$68,000;

32 per centum of the amount by which the net income exceeds \$68,000 and does not exceed \$70,000;

33 per centum of the amount by which the net income exceeds \$70,000 and does not exceed \$72,000;

34 per centum of the amount by which the net income exceeds \$72,000 and does not exceed \$74,000;

35 per centum of the amount by which the net income exceeds \$74,000 and does not exceed \$76,000;

36 per centum of the amount by which the net income exceeds \$76,000 and does not exceed \$78,000;

37 per centum of the amount by which the net income exceeds \$78,000 and does not exceed \$80,000;

38 per centum of the amount by which the net income exceeds \$80,000 and does not exceed \$82,000;

39 per centum of the amount by which the net income exceeds \$82,000 and does not exceed \$84,000;

40 per centum of the amount by which the net income exceeds \$84,000 and does not exceed \$86,000;

41 per centum of the amount by which the net income exceeds \$86,000 and does not exceed \$88,000;

42 per centum of the amount by which the net income exceeds \$88,000 and does not exceed \$90,000;

43 per centum of the amount by which the net income exceeds \$90,000 and does not exceed \$92,000;

44 per centum of the amount by which the net income exceeds \$92,000 and does not exceed \$94,000;

45 per centum of the amount by which the net income exceeds \$94,000 and does not exceed \$96,000;

46 per centum of the amount by which the net income exceeds \$96,000 and does not exceed \$98,000;

47 per centum of the amount by which the net income exceeds \$98,000 and does not exceed \$100,000;

48 per centum of the amount by which the net income exceeds \$100,000 and does not exceed \$150,000;

49 per centum of the amount by which the net income exceeds \$150,000 and does not exceed \$200,000;

50 per centum of the amount by which the net income exceeds \$200,000.

(b) In the case of a bona fide sale of mines, oil or gas wells, or any interest therein, where the principal value of the property has been demonstrated by prospecting or exploration and discovery work done by the taxpayer, the portion of the tax imposed by this section attributable to such sale shall not exceed, for the calendar year 1921, 20 per centum, and for each calendar year thereafter 16 per centum, of the selling price of such property or interest.

For sec. 211 of the Revenue Act of 1918 mentioned in the text see 1919 Supp. Fed. Stat. Ann. 95.

SEC. 212. Net income of individuals defined. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(c) If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 213. Gross income defined. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income" —

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the

United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

(b) Does not include the following items, which shall be exempt from taxation under this title:

- (1) The proceeds of life insurance policies paid upon the death of the insured;
- (2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract;
- (3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);
- (4) Interest upon (a) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (b) securities issued under the provisions of the Federal Farm Loan Act of July 17, 1916; or (c) the obligations of the United States or its possessions; or (d) bonds issued by the War Finance Corporation. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), and in the case of bonds issued by the War Finance Corporation, the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income, war-profits and excess-profits taxes;
- (5) The income of foreign governments received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposits in banks in the United States of moneys belonging to such foreign governments, or from any other source within the United States;
- (6) Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness;
- (7) Income derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, or income accruing to the Government of any possession of the United States, or any political subdivision thereof.

Whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, prior to September 8, 1916, entered in good faith into a contract with any person, the object and purpose of which is to acquire, construct, operate, or maintain a public utility, no tax shall be levied under the provisions of this title upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such State, Territory, District of Columbia, or political subdivision; but this provision is not intended and shall not be construed to confer upon such person any financial gain or exemption or to relieve such person from the payment of a tax as provided for in this title upon the part or portion of such income to which such person is entitled under such contract;

(8) The income of a nonresident alien or foreign corporation which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States;

(9) Amounts received as compensation, family allotments and allowances under the provisions of the War Risk Insurance and the Vocational Rehabilitation Acts, or as pensions from the United States for service of the beneficiary or another in the military or naval forces of the United States in time of war;

(10) So much of the amount received by an individual after December 31, 1921, and before January 1, 1927, as dividends or interest from domestic building and loan associations, operated exclusively for the purpose of making loans to members, as does not exceed \$300;

(11) The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation;

(12) The receipts of shipowners' mutual protection and indemnity associations, not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or member but such corporations shall be subject as other persons to the tax upon their net income from interest, dividends, and rents.

(c) In the case of a nonresident alien individual, gross income means only the gross income from sources within the United States, determined under the provisions of section 217.

SEC. 214. Deductions allowed individuals. (a) That in computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;

(2) All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title;

(3) Taxes paid or accrued within the taxable year except (a) income, war-profits, and excess-profits taxes imposed by the authority of the United States, (b) so much of the income, war-profits and excess-profits taxes, imposed by the authority of any foreign country or possession of the United States, as is allowed as a credit under section 222, (c) taxes assessed against local benefits of a kind tending to increase the value of the property assessed, and (d) taxes imposed upon the taxpayer upon his interest as shareholder or member of a corporation, which are paid by the corporation without reimbursement from the taxpayer. For the purpose of this paragraph estate, inheritance, legacy, and succession taxes accrue on the due date thereof except as otherwise provided by the law of the jurisdiction imposing such taxes;

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a nonresident alien individual only if and to the extent that the profit, if such transaction had resulted in a profit, would be taxable under this title. No deduction shall be allowed under this paragraph for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities made after the passage of this Act where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition. If such acquisition is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed;

(6) Losses sustained during the taxable year of property not connected with the trade or business (but in the case of a nonresident alien individual only property within the United States) if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated for by insurance or otherwise. Losses allowed under paragraphs (4), (5), and (6) of this subdivision shall be deducted as of the taxable year in which sustained unless, in order to clearly reflect the income, the loss should, in the opinion of the Commissioner, be accounted for as of a different period. In case of losses arising from destruction of or damage to property, where the property so destroyed or damaged was acquired before March 1, 1913, the deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913;

(7) Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part;

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913;

(9) In the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the war against the German Government, and in the case of vessels constructed or acquired on or

after such date for the transportation of articles or men contributing to the prosecution of such war, there shall be allowed, for any taxable year ending before March 3, 1924 (if claim therefor was made at the time of filing return for the taxable year 1918, 1919, 1920, or 1921) a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer, but not again including any amount otherwise allowed under this title or previous Act of Congress as a deduction in computing net income. At any time before March 3, 1924, the Commissioner may, and at the request of the taxpayer shall, reexamine the return, and if he then finds as a result of an appraisal or from other evidence that the deduction originally allowed was incorrect, the income, war-profits, and excess-profits taxes for the year or years affected shall be redetermined; and the amount of tax due upon such redetermination, if any, shall be paid upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252;

(10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further*, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: *And provided further*, That such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made, except where such net income so computed is less than the depletion allowance based on cost or fair market value as of March 1, 1913; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

(11) Contributions or gifts made within the taxable year to or for the use of: (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including posts of the American Legion or the women's auxiliary units thereof, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; or (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act; to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this paragraph. In case of a nonresident alien individual this deduction shall be allowed only as to contributions or gifts made to domestic corporations, or to community chests, funds, or foundations, created

in the United States, or to such vocational rehabilitation fund. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary;

For the Vocational Rehabilitation Act, sec. 7, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 878.

(12) If property is compulsorily or involuntarily converted into cash or its equivalent as a result of (A) its destruction in whole or in part, (B) theft or seizure, or (C) an exercise of the power of requisition or condemnation, or the threat or imminence thereof; and if the taxpayer proceeds forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, to expend the proceeds of such conversion in the acquisition of other property of a character similar or related in service or use to the property so converted, or in the acquisition of 80 per centum or more of the stock or shares of a corporation owning such other property, or in the establishment of a replacement fund, then there shall be allowed as a deduction such portion of the gain derived as the portion of the proceeds so expended bears to the entire proceeds. The provisions of this paragraph prescribing the conditions under which a deduction may be taken in respect of the proceeds or gains derived from the compulsory or involuntary conversion of property into cash or its equivalent, shall apply so far as may be practicable to the exemption or exclusion of such proceeds or gains from gross income under prior income, war-profits and excess-profits tax acts.

(b) In the case of a nonresident alien individual, the deductions allowed in subdivision (a), except those allowed in paragraphs (5), (6), and (11), shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the United States shall be determined as provided in section 217 under rules and regulations prescribed by the Commissioner with the approval of the Secretary. In the case of a citizen entitled to the benefits of section 262 the deductions shall be the same and shall be determined in the same manner as in the case of a nonresident alien individual.

SEC. 215. Items not deductible. (a) That in computing net income no deduction shall in any case be allowed in respect of —

(1) Personal, living, or family expenses;

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

(3) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

(4) Premiums paid on any life insurance policy covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

(b) Amounts paid under the laws of any State, Territory, District of Columbia, possession of the United States, or foreign country as income to the holder of a life or terminable interest acquired by gift, bequest, or inheritance shall not be reduced or diminished by any deduction for shrinkage (by whatever name called) in the value of such interest due to the lapse of time, nor by any

deduction allowed by this Act for the purpose of computing the net income of an estate or trust but not allowed under the laws of such State, Territory, District of Columbia, possession of the United States, or foreign country for the purpose of computing the income to which such holder is entitled.

SEC. 216. Credits allowed individuals. That for the purpose of the normal tax only there shall be allowed the following credits:

(a) The amount received as dividends (1) from a domestic corporation other than a corporation entitled to the benefits of section 262, or (2) from a foreign corporation when it is shown to the satisfaction of the Commissioner that more than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 217;

(b) The amount received as interest upon obligations of the United States and bonds issued by the War Finance Corporation, which is included in gross income under section 213;

(c) In the case of a single person, a personal exemption of \$1,000; or in the case of the head of a family or a married person living with husband or wife, a personal exemption of \$2,500, unless the net income is in excess of \$5,000, in which case the personal exemption shall be \$2,000. A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be \$2,500, unless the aggregate net income of such husband and wife is in excess of \$5,000, in which case the amount of such personal exemption shall be \$2,000. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them. In no case shall the reduction of the personal exemption from \$2,500 to \$2,000 operate to increase the tax, which would be payable if the exemption were \$2,500, by more than the amount of the net income in excess of \$5,000;

(d) \$400 for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

(e) In the case of a nonresident alien individual or of a citizen entitled to the benefits of section 262, the personal exemption shall be only \$1,000, and he shall not be entitled to the credit provided in subdivision (d).

(f) The credits allowed by subdivisions (c), (d), and (e) of this section shall be determined by the status of the taxpayer on the last day of the period for which the return of income is made; but in the case of an individual who dies during the taxable year, such credits shall be determined by his status at the time of his death, and in such case full credits shall be allowed to the surviving spouse, if any, according to his or her status at the close of the period for which such survivor makes return of income.

SEC. 217. Net income of nonresident alien individuals. (a) That in the case of a nonresident alien individual or of a citizen entitled to the benefits of section 262, the following items of gross income shall be treated as income from sources within the United States:

(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, not including (A) interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, or (B) interest received from a resident alien individual or a resident foreign corporation when it is shown to the satisfaction of the Commissioner that less than 20 per centum of the gross income of such resident payor has been derived from sources within the United States, as determined under the provisions of this section, for the three-year period ending with the close of the taxable year of such payor, or for such part of such period immediately preceding the close of such taxable year as may be applicable;

(2) The amount received as dividends (A) from a domestic corporation other than a corporation entitled to the benefits of section 262, or (B) from a foreign corporation unless less than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of this section;

(3) Compensation for labor or personal services performed in the United States;

(4) Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) Gains, profits, and income from the sale of real property located in the United States.

(b) From the items of gross income specified in subdivision (a) there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the United States.

(c) The following items of gross income shall be treated as income from sources without the United States:

(1) Interest other than that derived from sources within the United States as provided in paragraph (1) of subdivision (a);

(2) Dividends other than those derived from sources within the United States as provided in paragraph (2) of subdivision (a);

(3) Compensation for labor or personal service performed without the United States;

(4) Rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) Gains, profits, and income from the sale of real property located without the United States;

(d) From the items of gross income specified in subdivision (c) there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be treated in full as net income from sources without the United States.

(e) Items of gross income, expenses, losses and deductions, other than those specified in subdivisions (a) and (c), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary. Where items of gross income are separately allocated to sources within the United States, there shall be deducted (for the purpose of computing the net income therefrom) the expenses, losses and other deductions properly apportioned or allocated thereto and a ratable part of other expenses, losses or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the United States. In the case of gross income derived from sources partly within and partly without the United States, the net income may first be computed by deducting the expenses, losses or other deductions apportioned or allocated thereto and a ratable part of any expenses, losses or other deductions which can not definitely be allocated to some item or class of gross income; and the portion of such net income attributable to sources within the United States may be determined by processes or formulas of general apportionment prescribed by the Commissioner with the approval of the Secretary. Gains, profits and income from (1) transportation or other services rendered partly within and partly without the United States, or (2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from the country in which sold.

(f) As used in this section the words "sale" or "sold" include "exchange" or "exchanged"; and the word "produced" includes "created," "fabricated," "manufactured," "extracted," "processed," "cured," or "aged."

(g) A nonresident alien individual or a citizen entitled to the benefits of section 262 shall receive the benefit of the deductions and credits allowed in this title only by filing or causing to be filed with the collector a true and accurate return of his total income received from all sources corporate or otherwise in the United States, in the manner prescribed in this title; including therein all the information which the Commissioner may deem necessary for the calculation of such deductions and credits: *Provided*, That the benefit of the credit allowed in subdivision (e) of section 216 may, in the discretion of the Commissioner, be received by filing a claim therefor with the withholding agent. In case of failure to file a return, the collector shall collect the tax on such income, and all property belonging to such nonresident alien individual or foreign trader shall be liable to distraint for the tax.

SEC. 218. Partnerships and personal service corporations. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

(b) The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

(c) The net income of the partnership shall be computed in the same manner and on the same basis as provided in section 212 except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed.

(d) Personal service corporations shall not be subject to taxation under this title, but the individual stockholders thereof shall be taxed in the same manner as the members of partnerships. All the provisions of this title relating to partnerships and the members thereof shall so far as practicable apply to personal service corporations and the stockholders thereof: *Provided*, That for the purpose of this subdivision amounts distributed by a personal service corporation during its taxable year shall be accounted for by the distributees; and any portion of the net income remaining undistributed at the close of its taxable year shall be accounted for by the stockholders of such corporation at the close of its taxable year in proportion to their respective shares.

This subdivision shall not be in effect after December 31, 1921. In the case of a personal service corporation having a fiscal year beginning in 1921 and ending in 1922, amounts distributed prior to January 1, 1922, to its stockholders out of earnings or profits accumulated after December 31, 1920, shall be taxed to the distributees; and the stockholders of record on December 31, 1921, shall be taxed upon their distributive shares of the difference (if any) between such distributive profits and the portion of the corporation's net income assignable to the calendar year 1921, determined in the manner provided in clause (1) of subdivision (c) of section 205 of this Act.

SEC. 219. Estates and trusts. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including —

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

(e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net

income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary.

(f) A trust created by an employer as a part of a stock bonus or profit-sharing plan for the exclusive benefit of some or all of his employees, to which contributions are made by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, shall not be taxable under this section, but the amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amounts paid in by him. Such distributees shall for the purpose of the normal tax be allowed as credits that part of the amount so distributed or made available as represents the items specified in subdivisions (a) and (b) of section 216.

SEC. 220. Evasion of surtaxes by incorporation. That if any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its stockholders or members through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 25 per centum of the amount thereof, which shall be in addition to the tax imposed by section 230 of this title and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax: *Provided*, That if all the stockholders or members of such corporation agree thereto, the Commissioner may, in lieu of all income, war-profits and excess-profits taxes imposed upon the corporation for the taxable year, tax the stockholders or members of such corporation upon their distributive shares in the net income of the corporation for the taxable year in the same manner as provided in subdivision (a) of section 218 in the case of members of a partnership. The fact that any corporation is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the tax in such case unless the Commissioner certifies that in his opinion such accumulation is unreasonable for the purposes of the business. When requested by the Commissioner, or any collector, every corporation shall forward to him a correct statement of such gains and profits and the names and addresses of the individuals or shareholders who would be entitled to the same if divided or distributed, and of the amounts that would be payable to each.

SEC. 221. Payment of individual's tax at source. (a) That all individuals, corporations, and partnerships, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), rent,

salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, of any nonresident alien individual or partnership composed in whole or in part of nonresident aliens (other than income received as dividends of the class allowed as a credit by subdivision (a) of section 216) shall (except in the cases provided for in subdivision (b) and except as otherwise provided in regulations prescribed by the Commissioner under section 217) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 8 per centum thereof: *Provided*, That the Commissioner may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent.

(b) In any case where bonds, mortgages, or deeds of trust, or other similar obligations of a corporation contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee, or to reimburse the obligee for any portion of the tax, or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon, or to retain therefrom under any law of the United States, the obligor shall deduct and withhold a tax equal to 2 per centum of the interest upon such bonds, mortgages, deeds of trust, or other obligations, whether such interest is payable annually or at shorter or longer periods and whether payable to a nonresident alien individual or to an individual citizen or resident of the United States or to a partnership: *Provided*, That the Commissioner may authorize such tax to be deducted and withheld in the case of interest upon any such bonds, mortgages, deeds of trust, or other obligations, the owners of which are not known to the withholding agent. Such deduction and withholding shall not be required in the case of a citizen or resident entitled to receive such interest, if he files with the withholding agent on or before February 1 a signed notice in writing claiming the benefit of the credits provided in subdivisions (c) and (d) of section 216; nor in the case of a nonresident alien individual if so provided for in regulations prescribed by the Commissioner under subdivision (g) of section 217.

(c) Every individual, corporation, or partnership required to deduct and withhold any tax under this section shall make return thereof on or before March 1 of each year and shall on or before June 15 pay the tax to the official of the United States Government authorized to receive it. Every such individual, corporation, or partnership is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation, or partnership for the amount of any payments made in accordance with the provisions of this section.

(d) Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(e) If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be re-collected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

SEC. 222. Credit for taxes in case of individuals. (a) That the tax computed under Part II of this title shall be credited with:

(1) In the case of a citizen of the United States the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country or to any possession of the United States; and

(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

(3) In the case of an alien resident of the United States, the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; and

(4) In the case of any such individual who is a member of a partnership or a beneficiary of an estate or trust, his proportionate share of such taxes of the partnership or the estate or trust paid during the taxable year to a foreign country or to any possession of the United States, as the case may be.

(5) The above credits shall not be allowed in the case of a citizen entitled to the benefits of section 262; and in no other case shall the amount of credit taken under this subdivision exceed the same proportion of the tax, against which such credit is taken, which the taxpayer's net income (computed without deduction for any income, war-profits and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to his entire net income (computed without such deduction) for the same taxable year.

(b) If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the Commissioner, who shall redetermine the amount of the tax due under Part II of this title for the year or years affected, and the amount of tax due upon such redetermination, if any, shall be paid by the taxpayer upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. In the case of such a tax accrued but not paid, the Commissioner as a condition precedent to the allowance of this credit may require the taxpayer to give a bond with sureties satisfactory to and to be approved by the Commissioner in such penal sum as the Commissioner may require, conditioned for the payment by the taxpayer of any amount of tax found due upon any such redetermination; and the bond herein prescribed shall contain such further conditions as the Commissioner may require.

(c) These credits shall be allowed only if the taxpayer furnishes evidence satisfactory to the Commissioner showing the amount of income derived from sources without the United States, and all other information necessary for the verification and computation of such credits.

(d) If the taxpayer makes a return for a fiscal year beginning in 1920 and ending in 1921, the credit for the entire fiscal year shall, notwithstanding any provision of this Act, be determined under the provisions of this section; and the Commissioner is authorized to disallow, in whole or part, any such credit which he finds has already been taken by the taxpayer.

SEC. 223. Individual returns. (a) That the following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title —

(1) Every individual having a net income for the taxable year of \$1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$2,000 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of \$2,000 or over, or an aggregate gross income for such year of \$5,000 or over —

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

SEC. 224. Partnership returns. That every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

SEC. 225. Fiduciary returns. (a) That every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title —

(1) Every individual having a net income for the taxable year of \$1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$2,000 or over, if married and living with husband or wife;

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income;

(4) Every estate or trust the net income of which for the taxable year is \$1,000 or over; and

(5) Every estate or trust of which any beneficiary is a nonresident alien.

(b) Under such regulations as the Commissioner with the approval of the Secretary may prescribe a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be sufficient compliance with the above requirement. Such fiduciary shall make oath (1) that he has sufficient knowledge of the affairs of the individual, estate or trust for which the return is made, to enable him to make the return, and (2) that the return is, to the best of his knowledge and belief, true and

correct. Any fiduciary required to make a return under this Act shall be subject to all the provisions of this Act which apply to individuals.

SEC. 226. Returns for a period of less than twelve months. (a) That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December 31. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year.

(b) In all cases where a separate return is made for a part of a taxable year the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included.

(c) In the case of a return for a period of less than one year the net income shall be placed on an annual basis by multiplying the amount thereof by twelve and dividing by the number of months included in such period; and the tax shall be such part of a tax computed on such annual basis as the number of months in such period is of twelve months.

SEC. 227. Time and place for filing individual, partnership, and fiduciary returns. (a) That returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March. In the case of a nonresident alien individual returns shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of June. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(b) Returns shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland.

SEC. 228. Understatement in returns. That if the collector or deputy collector has reason to believe that the amount of any income returned is understated, he shall give due notice to the taxpayer making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated, may increase the same accordingly. Such taxpayer may furnish sworn testimony to prove any relevant facts and if dissatisfied with the decision of the collector may appeal to the Commissioner for his decision, under such rules of procedure as may be prescribed by the Commissioner with the approval of the Secretary.

SEC. 229. Incorporation of individual or partnership business. That in the case of the organization as a corporation within four months after the passage of this act of any trade or business in which capital is a material income-producing factor, and which was previously owned by a partnership or individual, the net income of such trade or business from January 1, 1921, to the date of such organization may at the option of the individual or partnership be taxed as the net income of a corporation is taxed under Titles II and III; in which event the net income and invested capital of such trade or business shall be computed as if such corporation had been in existence on and after January 1, 1921, and the undistributed profits or earnings of such trade or business shall not be subject to the surtaxes imposed in section 211, but amounts distributed on and after January 1, 1921, from the earnings or profits of such trade or business accumulated after December 31, 1920, shall be taxed to the recipients as dividends; and all the provisions of Titles II and III relating to corporations shall so far as practicable apply to such trade or business: *Provided*, That this section shall not apply to any trade or business, the net income of which for the taxable year 1921 was less than 20 per centum of its invested capital for such year: *Provided further*, That any taxpayer who takes advantage of this section shall pay the tax imposed by section 1000 of the Revenue Act of 1918 as if such taxpayer had been a corporation on and after January 1, 1921.

For sec. 1000 of the Revenue Act of 1918 mentioned in the text see 1919 Supp. Fed. Stat. Ann. 165.

PART III.—CORPORATIONS.

SEC. 230. Tax on corporations. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

- (a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and
- (b) For each calendar year thereafter, 12½ per centum of such excess amount.

SEC. 231. Conditional and other exemptions of corporations. That the following organizations shall be exempt from taxation under this title —

- (1) Labor, agricultural, or horticultural organizations;
- (2) Mutual savings banks not having a capital stock represented by shares;
- (3) Fraternal beneficiary societies, orders, or associations, (a) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system; and (b) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents;
- (4) Domestic building and loan associations substantially all the business of which is confined to making loans to members; and co-operative banks without capital stock organized and operated for mutual purposes and without profit;
- (5) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose,

no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(7) Business leagues, chambers of commerce, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare;

(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member;

(10) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting expenses;

(11) Farmers', fruit growers', or like associations, organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them; or organized and operated as purchasing agents for the purpose of purchasing supplies and equipment for the use of members and turning over such supplies and equipment to such members at actual cost, plus necessary expenses;

(12) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title;

(13) Federal land banks and national farm-loan associations as provided in section 26 of the Act approved July 17, 1916, entitled "An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes";

(14) Personal service corporations. This subdivision shall not be in effect after December 31, 1921.

SEC. 232. Net income of corporations defined. That in the case of a corporation subject to the tax imposed by section 230 the term "net income" means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the computation shall also be made in the manner provided in section 217.

SEC. 233. Gross income of corporations defined. (a) That in the case of a corporation subject to the tax imposed by section 230 the term "gross income" means the gross income as defined in sections 213 and 217, except that mutual marine insurance companies shall include in gross income the gross premiums collected and received by them less amounts paid for reinsurance.

(b) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by sections 243 or 246) in the manner provided in section 217.

SEC. 234. Deductions allowed corporations. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;

(2) All interest paid or accrued within the taxable year on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title;

(3) Taxes paid or accrued within the taxable year except (a) income, war-profits, and excess-profits taxes imposed by the authority of the United States, (b) so much of the income, war-profits and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit under section 238, and (c) taxes assessed against local benefits of a kind tending to increase the value of the property assessed. In the case of obligors specified in subdivision (b) of section 221 no deduction for the payment of the tax imposed by this title, or any other tax paid pursuant to the contract or provision referred to in that subdivision, shall be allowed nor shall such tax be included in the gross income of the obligee. The deduction allowed by this paragraph shall be allowed in the case of taxes imposed upon a shareholder or member of a corporation upon his interest as shareholder or member, which are paid by the corporation without reimbursement from the shareholder or member, but in such cases no deduction shall be allowed the shareholder or member for the amount of such taxes. For the purpose of this paragraph, estate, inheritance, legacy, and succession taxes accrue on the due date thereof except as otherwise provided by the law of the jurisdiction imposing such taxes;

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise; unless, in order to clearly reflect the income, the loss should in the opinion of the Commissioner be accounted for as of a different period. No deduction shall be allowed for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities made after the passage of this Act where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) substantially identical property, and the prop-

erty so acquired is held by the taxpayer for any period after such sale or other disposition, unless such claim is made by a dealer in stock or securities and with respect to a transaction made in the ordinary course of its business. If such acquisition is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed. In case of losses arising from destruction of or damage to property, where the property so destroyed or damaged was acquired before March 1, 1913, the deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913;

(5) Debts ascertained to be worthless and charged off within the taxable year (or in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part;

(6) The amount received as dividends (A) from a domestic corporation other than a corporation entitled to the benefits of section 262, or (B) from any foreign corporation when it is shown to the satisfaction of the Commissioner that more than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the foreign corporation has been in existence) was derived from sources within the United States as determined under section 217;

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913;

(8) In the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the war against the German Government, and in the case of vessels constructed or acquired on or after such date for the transportation of articles or men contributing to the prosecution of such war, there shall be allowed, for any taxable year ending before March 3, 1924 (if claim therefor was made at the time of filing return for the taxable year 1918, 1919, 1920, or 1921) a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer, but not again including any amount otherwise allowed under this title or previous Acts of Congress as a deduction in computing net income. At any time before March 3, 1924, the Commissioner may, and at the request of the taxpayer shall, reexamine the return, and if he then finds as a result of an appraisal or from other evidence that the deduction originally allowed was incorrect, the income, war-profits, and excess-profits taxes for the year or years affected shall be redetermined and the amount of tax due upon such redetermination, if any, shall be paid upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252;

(9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu

of cost up to that date: *Provided further*, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: *And provided further*, That such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made, except where such net income so computed is less than the depletion allowance based on cost or fair market value as of March 1, 1913; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee:

(10) In the case of insurance companies (other than life insurance companies), in addition to the above (unless otherwise allowed): (A) The net addition required by law to be made within the taxable year to reserve funds (including in the case of assessment insurance companies the actual deposit of sums with State or Territorial officers pursuant to law as additions to guarantee or reserve funds); and (B) the sums other than dividends paid within the taxable year on policy and annuity contracts. After December 31, 1921, this subdivision shall apply only to mutual insurance companies other than life insurance companies;

(11) In the case of corporations (except those taxed under section 243) issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan continuing for life and not subject to cancellation, in addition to the above, such portion of the net addition (not required by law) made within the taxable year to reserve funds as the Commissioner finds to be required for the protection of the holders of such policies only. This subdivision shall not be in effect after December 31, 1921;

(12) In the case of mutual marine insurance companies, there shall be allowed, in addition to the deductions allowed in paragraphs (1) to (10), inclusive, and paragraph (14), unless otherwise allowed, amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment and the payment thereof;

(13) In the case of mutual insurance companies (including interinsurers and reciprocal underwriters, but not including mutual life or mutual marine insurance companies) requiring their members to make premium deposits to provide for losses and expenses, there shall be allowed, in addition to the deductions allowed in paragraphs (1) to (10), inclusive, and paragraph (14), unless otherwise allowed, the amount of premium deposits returned to their policyholders and the amount of premium deposits retained for the payment of losses, expenses, and reinsurance reserves;

(14) If property is compulsorily or involuntarily converted into cash or its equivalent as a result of (A) its destruction in whole or in part, (B) theft or seizure, or (C) an exercise of the power of requisition or condemnation, or the threat or imminence thereof; and if the taxpayer proceeds forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, to expend the proceeds of such conversion in the acquisition of

other property of a character similar or related in service or use to the property so converted, or in the acquisition of 80 per centum or more of the stock or shares of a corporation owning such other property, or in the establishment of a replacement fund, then there shall be allowed as a deduction such portion of the gain derived as the portion of the proceeds so expended bears to the entire proceeds. The provisions of this paragraph prescribing the conditions under which a deduction may be taken in respect of the proceeds or gains derived from the compulsory or involuntary conversion of property into cash or its equivalent, shall apply so far as may be practicable to the exemption or exclusion of such proceeds or gains from gross income under prior income, war-profits and excess-profits tax Acts.

(b) In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the deductions allowed in subdivision (a) shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in section 217 under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

SEC. 235. Items not deductible by corporations. That in computing net income no deduction shall in any case be allowed in respect of any of the items specified in section 215.

SEC. 236. Credits allowed corporations. That for the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

(a) The amount received as interest upon obligations of the United States and bonds issued by the War Finance Corporation, which is included in gross income under section 233;

(b) In the case of a domestic corporation the net income of which is \$25,000 or less, a specific credit of \$2,000; but if the net income is more than \$25,000 the tax imposed by section 230 shall not exceed the tax which would be payable if the \$2,000 credit were allowed, plus the amount of the net income in excess of \$25,000; and

(c) The amount of any war-profits and excess-profits taxes imposed by Act of Congress for the same taxable year. The credit allowed by this subdivision shall be determined as follows:

(1) In the case of a corporation which makes return for a fiscal year beginning in 1920 and ending in 1921, in computing the income tax as provided in subdivision (a) of section 205, the portion of the war-profits and excess-profits tax computed for the entire period under clause (1) of subdivision (a) of section 335 shall be credited against the net income computed for the entire period as provided in clause (1) of subdivision (a) of section 205, and the portion of the war-profits and excess-profits tax computed for the entire period under clause (2) of subdivision (a) of section 335 shall be credited against the net income computed for the entire period as provided in clause (2) of subdivision (a) of section 205.

(2) In the case of a corporation which makes return for a fiscal year beginning in 1921 and ending in 1922, in computing the income tax as provided in subdivision (b) of section 205, the war-profits and excess-profits tax computed

under subdivision (b) of section 335 shall be credited against the net income computed for the entire period as provided in clause (1) of subdivision (b) of section 205.

SEC. 237. Payment of corporation income tax at source. That in the case of foreign corporations subject to taxation under this title not engaged in trade or business within the United States and not having any office or place of business therein, there shall be deducted and withheld at the source in the same manner and upon the same items of income as is provided in section 221 a tax equal to 12½ per centum thereof (but during the calendar year 1921 only 10 per centum), and such tax shall be returned and paid in the same manner and subject to the same conditions as provided in that section: *Provided*, That in the case of interest described in subdivision (b) of that section the deduction and withholding shall be at the rate of 2 per centum.

SEC. 238. Credit for taxes in case of corporations. (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: *Provided*, That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit is taken, which the taxpayer's net income (computed without deduction for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. In the case of domestic insurance companies subject to the tax imposed by section 243 or 246, the term "net income", as used in this subdivision means net income as defined in sections 245 and 246, respectively.

(b) If accrued taxes when paid differ from the amounts claimed as credits by the corporation, or if any tax paid is refunded in whole or in part, the corporation shall at once notify the Commissioner, who shall redetermine the amount of the income, war-profits and excess-profits taxes for the year or years affected, and the amount of taxes due upon such redetermination, if any, shall be paid by the corporation upon notice and demand by the collector, or the amount of taxes overpaid, if any, shall be credited or refunded to the corporation in accordance with the provisions of section 252. In the case of such a tax accrued but not paid, the Commissioner as a condition precedent to the allowance of this credit may require the corporation to give a bond with sureties satisfactory to and to be approved by him in such penal sum as he may require, conditioned for the payment by the taxpayer of any amount of taxes found due upon any such redetermination; and the bond herein prescribed shall contain such further conditions as the Commissioner may require.

(c) These credits shall be allowed only if the taxpayer furnishes evidence satisfactory to the Commissioner showing the amount of income derived from sources without the United States, and all other information necessary for the verification and computation of such credit.

(d) If a domestic corporation makes a return for a fiscal year beginning in 1920 and ending in 1921, the credit for the entire fiscal year shall, notwithstanding

ing any provision of this Act, be determined under the provisions of this section; and the Commissioner is authorized to disallow, in whole or in part, any such credit which he finds has already been taken by the taxpayer.

(e) For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided*, That the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term "accumulated profits" when used in this subdivision in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, and excess-profits taxes of which are determined on the basis of an accounting period of less than one year, the word "year" as used in this subdivision shall be construed to mean such accounting period.

(f) For the purposes of this section a corporation entitled to the benefits of section 262 shall be treated as a foreign corporation.

SEC. 239. Corporation returns. (a) That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. If any foreign corporation has no office or place of business in the United States but has an agent in the United States, the return shall be made by the agent. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

(b) Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (b) of section 236 shall be reduced to an amount which bears the same ratio to the full credit therein provided as the number of months in the period for which such return is made bears to twelve months.

(c) There shall be included in the return or appended thereto a statement of such facts as will enable the Commissioner to determine the portion of the earnings or profits of the corporation (including gains, profits and income not taxed) accumulated during the taxable year for which the return is made, which have been distributed or ordered to be distributed, respectively, to its stockholders or members during such year.

SEC. 240. Consolidated returns of corporations. (a) That corporations which are affiliated within the meaning of this section may, for any taxable year beginning on or after January 1, 1922, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.

(d) For the purposes of this section a corporation entitled to the benefits of section 262 shall be treated as a foreign corporation: *Provided*, That in any case of two or more related trades or businesses (whether unincorporated or incorporated and whether organized in the United States or not) owned or controlled directly or indirectly by the same interests, the Commissioner may consolidate the accounts of such related trades and businesses, in any proper case, for the purpose of making an accurate distribution or apportionment of gains, profits, income, deductions, or capital between or among such related trades or businesses.

(e) Corporations which are affiliated within the meaning of this section shall make consolidated returns for any taxable year beginning prior to January 1, 1922, in the same manner and subject to the same conditions as provided by the Revenue Act of 1918.

For Revenue Act of 1918 mentioned in the text see 1919 Supp. Fed. Stat. Ann. 90.

SEC. 241. Time and place for filing corporate returns. (a) That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227, except that in the case of foreign corporations not having any office or place of business in the United States returns shall be made at the same time as provided in section 227 in the case of a nonresident alien individual.

(b) Returns shall be made to the collector of the district in which is located

the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Maryland.

Taxes on Insurance Companies.

SEC. 242. [**“Life insurance company” defined.**] That when used in this title the term “life insurance company” means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.

SEC. 243. [**Rate of tax on life insurance company.**] That in lieu of the taxes imposed by sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows:

- (1) In the case of a domestic life insurance company, the same percentage of its net income as is imposed upon other corporations by section 230;
- (2) In the case of a foreign life insurance company, the same percentage of its net income from sources within the United States as is imposed upon the net income of other corporations by section 230.

SEC. 244. [**Definitions — “gross income” — “reserve funds required by law.”**] (a) That in the case of a life insurance company the term “gross income” means the gross amount of income received during the taxable year from interest, dividends, and rents.

(b) The term “reserve funds required by law” includes, in the case of assessment insurance, sums actually deposited by any company or association with State or Territorial officers pursuant to law as guaranty or reserve funds, and any funds maintained under the charter or articles of incorporation of the company or association exclusively for the payment of claims arising under certificates of membership or policies issued upon the assessment plan and not subject to any other use.

SEC. 245. [**“Net income” of life insurance companies — what constitutes deductions.**] (a) That in case of a life insurance company the term “net income” means the gross income less —

(1) The amount of interest received during the taxable year which under paragraph (4) of subdivision (b) of section 213 is exempt from taxation under this title;

(2) An amount equal to the excess, if any, over the deduction specified in paragraph (1) of this subdivision, of 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year, plus (in case of life insurance companies issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan, continuing for life and not subject to cancellation) 4 per centum of the mean of such reserve funds (not required by law) held at the beginning and end of the taxable year, as the Commissioner finds to be necessary for the protection of the holders of such policies only;

(3) The amount received as dividends (A) from a domestic corporation other than a corporation entitled to the benefits of section 262, or (B) from any foreign corporation when it is shown to the satisfaction of the Commissioner that more than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the foreign corporation has been in existence) was derived from sources within the United States as determined under section 217;

(4) An amount equal to 2 per centum of any sums held at the end of the taxable year as a reserve for dividends (other than dividends payable during the year following the taxable year) the payment of which is deferred for a period of not less than five years from the date of the policy contract;

(5) Investment expenses paid during the taxable year: *Provided*, That if any general expenses are in part assigned to or included in the investment expenses, the total deduction under this paragraph shall not exceed one-fourth of 1 per centum of the book value of the mean of the invested assets held at the beginning and end of the taxable year;

(6) Taxes and other expenses paid during the taxable year exclusively upon or with respect to the real estate owned by the company, not including taxes assessed against local benefits of a kind tending to increase the value of the property assessed, and not including any amount paid out for new buildings, or for permanent improvements or betterments made to increase the value of any property. The deduction allowed by this paragraph shall be allowed in the case of taxes imposed upon a shareholder or member of a company upon his interest as shareholder or member, which are paid by the company without reimbursement from the shareholder or member, but in such cases no deduction shall be allowed the shareholder or member for the amount of such taxes;

(7) A reasonable allowance for the exhaustion, wear and tear of property, including a reasonable allowance for obsolescence. In the case of property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913;

(8) All interest paid or accrued within the taxable year on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title;

(9) In the case of a domestic life insurance company, the net income of which (computed without the benefit of this paragraph) is \$25,000 or less, the sum of \$2,000; but if the net income is more than \$25,000 the tax imposed by section 243 shall not exceed the tax which would be payable if the \$2,000 credit were allowed, plus the amount of the net income in excess of \$25,000.

(b) No deduction shall be made under paragraphs (6) and (7) of subdivision (a) on account of any real estate owned and occupied in whole or in part by a life insurance company unless there is included in the return of gross income the rental value of the space so occupied. Such rental value shall be not less than a sum which in addition to any rents received from other tenants shall provide a net income (after deducting taxes, depreciation, and all other expenses) at the rate of 4 per centum per annum of the book value at the end of the taxable year of the real estate so owned or occupied.

(c) In the case of a foreign life insurance company the amount of its net income for any taxable year from sources within the United States shall be the same proportion of its net income for the taxable year from sources within and without the United States, which the reserve funds required by law and held by it at the end of the taxable year upon business transacted within the United States is of the reserve funds held by it at the end of the taxable year upon all business transacted.

SEC. 246. [Insurance companies other than life and mutual — rate of tax — terms defined.] (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

(2) In the case of such a foreign insurance company the same percentage of its net income from sources within the United States as is imposed upon the net income of other corporations by section 230.

(b) In the case of an insurance company subject to the tax imposed by this section —

(1) The term “gross income” means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term “net income” means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term “investment income” means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year:

(4) The term “underwriting income” means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

(5) The term “premiums earned on insurance contracts during the taxable year” means an amount computed as follows:

From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

(6) The term “losses incurred” means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the

result so obtained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

(7) The term "expenses incurred" means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by section 247.

SEC. 247. [Deductions affecting insurance companies other than life and mutual.] (a) That in computing the net income of an insurance company subject to the tax imposed by section 246 there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in paragraph (1) of subdivision (a) of section 234;

(2) All interest as provided in paragraph (2) of subdivision (a) of section 234;

(3) Taxes as provided in paragraph (3) of subdivision (a) of section 234;

(4) Losses incurred;

(5) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;

(6) The amount received as dividends from corporations as provided in paragraph (6) of subdivision (a) of section 234;

(7) The amount of interest earned during the taxable year which under paragraph (4) of subdivision (b) of section 213 is exempt from taxation under this title, and the amount of interest allowed as a credit under subdivision (a) of section 236;

(8) A reasonable allowance, for the exhaustion, wear and tear of property, as provided in paragraph (7) of subdivision (a) of section 234;

(9) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is \$25,000 or less, the sum of \$2,000; but if the net income is more than \$25,000 the tax imposed by section 246 shall not exceed the tax which would be payable if the \$2,000 credit were allowed, plus the amount of the net income in excess of \$25,000.

(b) In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in subdivision (b) of section 234.

(c) Nothing in this section or in section 246 shall be construed to permit the same item to be twice deducted.

PART IV.—ADMINISTRATIVE PROVISIONS.

SEC. 250. Payment of taxes. (a) That except as otherwise provided in this section and sections 221 and 237 the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment

on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return. Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. In any case in which the time for the payment of any installment is at the request of the taxpayer thus postponed, there shall be added as a part of such installment interest thereon at the rate of one-half of 1 per centum per month from the time it would have been due if no extension had been granted, until paid. If any installment is not paid when due, the whole amount of the tax unpaid shall become due and payable upon notice and demand by the collector.

The tax may at the option of the taxpayer be paid in a single payment instead of installments, in which case the total amount shall be paid on or before the time fixed by law for filing the return, or, where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension.

(b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called "deficiency"), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due (or, if paid on the installment basis, on the deficiency of each installment from the time the installment was due), shall be paid upon notice and demand by the collector. If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of 1 per centum per month on the amount of such deficiency in the tax from the time it was due (or, if paid on the installment basis, on the amount of the deficiency in each installment from the time the installment was due), which penalty and interest shall become due and payable upon notice and demand by the collector. If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector.

For R. S. see 3176, above mentioned, see 3 Fed. Stat. Ann. (2d ed.) 1006.

(c) If the return is made pursuant to section 3176 of the Revised Statutes as amended, the amount of tax determined to be due under such return shall be paid upon notice and demand by the collector.

For R. S. see 3176, above mentioned, see 3 Fed. Stat. Ann. (2d ed.) 1006.

(d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided*, That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: *Provided further*, That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: *Provided further*, That in cases coming within the scope of paragraph (9) of subdivision (a) of section 214, or of paragraph (8) of subdivision (a) of section 234, or in cases of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible, the amount of tax or deficiency in tax due may be determined, assessed, and collected at any time; but prior to the assessment thereof the taxpayer shall be notified and given a period of not less than thirty days in which to file an appeal and be heard as hereinafter provided in this subdivision.

If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: *Provided*, That in cases where the Commissioner believes that the collection of the amount due will be jeopard-

ized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.

For sec. 38 of the Act of Aug. 5, 1909, above mentioned, see 4 Fed. Stat. Ann. (2d ed.) 255.

For the different revenue Acts here mentioned see 1918 Supp. 270; 1919 Supp. 82.

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided*, That as to any such amount which is the subject of a bona fide claim for abatement filed within ten days after notice and demand by the collector, where the taxpayer has not had the benefit of the provisions of subdivision (d), such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of one-half of 1 per centum per month on that part of the claim rejected.

In the case of the first installment provided for in subdivision (a) the instructions printed on the return shall be sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of the tax on the return shall be sufficient notice of the amount due. In the case of each subsequent installment the collector may, within thirty days and not later than ten days before the installment becomes due, mail to the taxpayer notice of the amount of the installment and the date on which it is due for payment. Such notice of the collector shall be sufficient notice and sufficient demand under this section.

(f) In the case of any deficiency (except where the deficiency is due to negligence or to fraud with intent to evade tax) where it is shown to the satisfaction of the Commissioner that the payment of such deficiency would result in undue hardship to the taxpayer, the Commissioner may, with the approval of the Secretary, extend the time for the payment of such deficiency or any part thereof for such period not in excess of eighteen months from the passage of this Act as the Commissioner may determine. In such case the Commissioner may require the taxpayer to furnish a bond with sufficient sureties conditioned upon the payment of the deficiency in accordance with the terms of the extension granted. There shall be added in lieu of other interest provided by law, as a part of such deficiency, interest thereon at the rate of two-thirds of 1 per centum per month from the time such extension is granted; except where such other interest provided by law is in excess of interest at the rate of two-thirds of 1 per centum per month. If the deficiency or any part thereof is not paid in accordance with the terms of the extension granted, there shall be added as part of the deficiency, in lieu of other interest and penalties provided by law, the sum of 5 per centum of the deficiency and interest on the deficiency at the rate of 1 per centum per month from the time it becomes payable in accordance with the terms of such extension.

(g) If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceed-

ings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any action or suit brought to enforce payment of taxes made due and payable by virtue of the provisions of this subdivision the finding of the Commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design. A taxpayer who is not in default in making any return or paying income, war-profits, or excess-profits tax under any Act of Congress may furnish to the United States, under regulations to be prescribed by the Commissioner with the approval of the Secretary, security approved by the Commissioner that he will duly make the return next thereafter required to be filed and pay the tax next thereafter required to be paid. The Commissioner may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this subdivision, provided the taxpayer has paid in full all other income, war-profits, or excess-profits taxes due from him under any Act of Congress. If security is approved and accepted pursuant to the provisions of this subdivision and such further or other security with respect to the tax or taxes covered thereby is given as the Commissioner shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this subdivision prior to the expiration of the time otherwise allowed for paying such respective taxes. In the case of a citizen of the United States about to depart from the United States the Commissioner may, at his discretion, waive any or all of the requirements placed on the taxpayer by this subdivision. No alien shall depart from the United States unless he first secures from the collector or agent in charge a certificate that he has complied with all the obligations imposed upon him by the income, war-profits, and excess-profits tax laws. If a taxpayer violates or attempts to violate this subdivision there shall, in addition to all other penalties, be added as part of the tax 25 per centum of the total amount of the tax or deficiency in the tax, together with interest at the rate of 1 per centum per month from the time the tax became due.

(h) The provisions of subdivisions (e), (f) and (g) of this section shall apply to the assessment and collection of taxes which have accrued or may accrue under the Revenue Act of 1917, the Revenue Act of 1918 or this Act.

SEC. 251. Receipts for taxes. That every collector to whom any payment of any tax is made under the provisions of this title shall upon request give to the person making such payment a full written or printed receipt, stating the amount paid and the particular account for which such payment was made; and whenever any debtor pays taxes on account of payments made or to be made by him to separate creditors the collector shall, if requested by such debtor, give a separate receipt for the tax paid on account of each creditor in such form that the debtor can conveniently produce such receipts separately to his several creditors in satisfaction of their respective demands up to the

amounts stated in the receipts; and such receipt shall be sufficient evidence in favor of such debtor to justify him in withholding from his next payment to his creditor the amount therein stated; but the creditor may, upon giving to his debtor a full written receipt acknowledging the payment to him of any sum actually paid and accepting the amount of tax paid as aforesaid (specifying the same) as a further satisfaction of the debt to that amount, require the surrender to him of such collector's receipt.

SEC. 252. Refunds. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further*, That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further*, That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under section 252 of the Revenue Act of 1918.

For R. S. sec. 3228, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 1037.

For the different revenue Acts mentioned in the text, see 1918 Supp. 270; 1919 Supp. 82.

SEC. 253. Penalties. That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than \$1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

SEC. 254. Returns of payments of dividends. That every corporation subject to the tax imposed by this title and every personal service corporation shall, when required by the Commissioner, render a correct return, duly verified under oath, of its payments of dividends, stating the name and address of each stockholder, the number of shares owned by him, and the amount of dividends paid to him.

SEC. 255. Returns of brokers. That every individual, corporation, or partnership doing business as a broker shall, when required by the Commissioner, render a correct return duly verified under oath, under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, showing the names of customers for whom such individual, corporation, or partnership has transacted any business, with such details as to the profits, losses, or other information which the Commissioner may require, as to each of such customers, as will enable the Commissioner to determine whether all income tax due on profits or gains of such customers has been paid.

SEC. 256. Information at source. That all individuals, corporations, and partnerships, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another individual, corporation, or partnership, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in sections 254 and 255), of \$1,000 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

Such returns may be required, regardless of amounts, (1) in the case of payments of interest upon bonds, mortgages, deeds of trust, or other similar obligations of corporations, and (2) in the case of collections of items (not payable in the United States) of interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by individuals, corporations, or partnerships, undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks or bills of exchange.

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the individual, corporation, or partnership paying the income.

The provisions of this section shall apply to the calendar year 1921 and each calendar year thereafter, but shall not apply to the payment of interest on obligations of the United States.

SEC. 257. Returns to be public records. That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the Presi-

dent: *Provided*, That the proper officers of any State imposing an income tax may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the corporation, at such times and in such manner as the Secretary may prescribe: *Provided further*, That all bona fide stockholders of record owning 1 per centum or more of the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and of its subsidiaries. Any stockholder who pursuant to the provisions of this section is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and be punished by a fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both.

The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, lists containing the names and the post-office addresses of all individuals making income-tax returns in such district.

SEC. 258. Publication of statistics. That the Commissioner, with the approval of the Secretary, shall prepare and publish annually statistics reasonably available with respect to the operation of the income, war-profits and excess-profits tax laws, including classifications of taxpayers and of income, the amounts allowed as deductions, exemptions, and credits, and any other facts deemed pertinent and valuable.

SEC. 259. Collection of foreign items. That all individuals, corporations, or partnerships undertaking as a matter of business or for profit the collection of foreign payments of interest or dividends by means of coupons, checks, or bills of exchange shall obtain a license from the Commissioner and shall be subject to such regulations enabling the Government to obtain the information required under this title as the Commissioner, with the approval of the Secretary, shall prescribe; and whoever knowingly undertakes to collect such payments without having obtained a license therefor, or without complying with such regulations, shall be guilty of a misdemeanor and shall be fined not more than \$5,000, or imprisoned for not more than one year, or both.

SEC. 260. Citizens of possessions of the United States. That any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States, shall be subject to taxation under this title only as to income derived from sources within the United States, and in such case the tax shall be computed and paid in the same manner and subject to the same conditions as in the case of other persons who are taxable only as to income derived from such sources.

Nothing in this section shall be construed to alter or amend the provisions of the Act entitled "An Act making appropriations for the naval service for the fiscal year ending June 30, 1922, and for other purposes," approved July 12, 1921, relating to the imposition of income taxes in the Virgin Islands of the United States.

For Act of July 12, 1921, mentioned in the text, see *infra*, this volume, title VIRGIN ISLANDS.

SEC. 261. Porto Rico and Philippine Islands. That in Porto Rico and the Philippine Islands the income tax shall be levied, assessed, collected, and paid as provided by law prior to the passage of this Act.

The Porto Rican or Philippine Legislature shall have power by due enactment to amend, alter, modify, or repeal the income tax laws in force in Porto Rico or the Philippine Islands, respectively.

SEC. 262. Income from sources within the possessions of the United States.

(a) That in the case of citizens of the United States or domestic corporations, satisfying the following conditions, gross income means only gross income from sources within the United States —

(1) If 80 per centum or more of the gross income of such citizen or domestic corporation (computed without the benefit of this section) for the three-year period immediately preceding the close of the taxable year (or for such part of such period immediately preceding the close of such taxable year as may be applicable) was derived from sources within a possession of the United States; and

(2) If, in the case of such corporation, 50 per centum or more of its gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States; or

(3) If, in the case of such citizen, 50 per centum or more of his gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States either on his own account or as an employee or agent of another.

(b) Notwithstanding the provisions of subdivision (a) there shall be included in gross income all amounts received by such citizens or corporations within the United States, whether derived from sources within or without the United States.

(c) As used in this section the term "possession of the United States" does not include the Virgin Islands of the United States.

SEC. 263. Effective date of title. That this title shall take effect as of January 1, 1921.

TITLE III.—WAR-PROFITS AND EXCESS-PROFITS TAX FOR 1921.

PART I.—GENERAL DEFINITIONS.

SEC. 300. [Terms used in title defined.] That when used in this title the terms "taxable year," "fiscal year," "personal service corporation," "paid or accrued," and "dividends" shall have the same meaning as provided for the purposes of income tax in sections 200 and 201.

PART II.—IMPOSITION OF TAX.

SEC. 301. [Rate of tax.] (a) That in lieu of the tax imposed by Title III of the Revenue Act of 1918, but in addition to the other taxes imposed by this Act, there shall be levied, collected and paid for the calendar year 1921 upon the net income of every corporation (except corporations taxable under subdivision (b) of this section) a tax equal to the sum of the following:

First Bracket.

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

Second Bracket.

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

(b) For the calendar year 1921 there shall be levied, collected, and paid upon the net income of every corporation which derives in such year a net income of more than \$10,000 from any Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive, a tax equal to the sum of the following:

(1) Such a portion of a tax computed at the rates specified in subdivision (a) of section 301 of the Revenue Act of 1918, as the part of the net income attributable to such Government contract or contracts bears to the entire net income. In computing such tax the excess-profits credit and the war-profits credit which would be applicable to such calendar year under the Revenue Act of 1918 if it had been continued in force, shall be used;

(2) Such a portion of a tax computed at the rates specified in subdivision (a) of this section as the part of the net income not attributable to such Government contract or contracts bears to the entire net income.

For the purpose of determining the part of the net income attributable to such Government contract or contracts, the proper apportionment and allocation of the deductions with respect to gross income derived from such Government contract or contracts and from other sources, respectively, shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(c) In any case where the full amount of the excess-profits credit is not allowed under the first bracket of subdivision (a), by reason of the fact that such credit is in excess of 20 per centum of the invested capital, the part not so allowed shall be deducted from the amount in the second bracket.

For Revenue Act of 1918 mentioned in the text, see 1919 Supp. 90.

SEC. 302. [Tax limitations.] That the tax imposed by subdivision (a) of section 301 shall in no case be more than 20 per centum of the amount of the net income in excess of \$3,000 and not in excess of \$20,000, plus 40 per centum of the amount of the net income in excess of \$20,000; and the limitations imposed by section 302 of the Revenue Act of 1918 (upon taxes computed under subdivision (c) of section 301 of that Act) are hereby made applicable to taxes computed under subdivision (b) of section 301 of this Act. Nothing in this section shall be construed in such manner as to increase the tax imposed by section 301 of this Act.

SEC. 303. [Net income derived from different sources — computation.] That if part of the net income of a corporation is derived (1) from a trade or business (or a branch of a trade or business) in which the employment of capital is necessary, and (2) a part (constituting not less than 30 per centum of its total net income) is derived from a separate trade or business (or a dis-

tinctly separate branch of the trade or business) which if constituting the sole trade or business would bring it within the class of "personal service corporations," then (under regulations prescribed by the Commissioner with the approval of the Secretary) the tax upon the first part of such net income shall be separately computed (allowing in such computation only the same proportionate part of the credits authorized in section 312), and the tax upon the second part shall be the same percentage thereof as the tax so computed upon the first part is of such first part: *Provided*, That the tax upon such second part shall in no case be less than 20 per centum thereof, unless the tax upon the entire net income, if computed without benefit of this section, would constitute less than 20 per centum of such entire net income, in which event the tax shall be determined upon the entire net income, without reference to this section, as other taxes are determined under this title. The total tax computed under this section shall be subject to the limitations provided in section 302.

SEC. 304. [Corporations when exempt from taxation under this title.]

(a) That the corporations enumerated in section 231 shall, to the extent that they are exempt from income tax under Title II, be exempt from taxation under this title.

(b) Any corporation whose net income for the taxable year is less than \$3,000 shall be exempt from taxation under this title.

(c) In the case of any corporation engaged in the mining of gold, the portion of the net income derived from the mining of gold shall be exempt from the tax imposed by this title or any tax imposed by Title II of the Revenue Act of 1917, and the tax on the remaining portion of the net income shall be the same proportion of a tax computed without the benefit of this subdivision which such remaining portion of the net income bears to the entire net income.

For Revenue Act of 1917, see 1918 Supp. 270.

SEC. 305. [Period of computation as affecting amount of exemption.] That if a tax is computed under this title for a period of less than twelve months, the specific exemption of \$3,000, wherever referred to in this title, shall be reduced to an amount which is the same proportion of \$3,000 as the number of months in the period is of twelve months.

PART III.—EXCESS-PROFITS CREDIT.

SEC. 312. [Elements of credit — foreign corporation.] That the excess-profits credit shall consist of a specific exemption of \$3,000 plus an amount equal to 8 per centum of the invested capital for the taxable year.

A foreign corporation or a corporation entitled to the benefits of section 262 shall not be entitled to the specific exemption of \$3,000.

PART IV.—NET INCOME.

SEC. 320. [Basis of ascertainment.] That for the purpose of this title the net income of a corporation shall be ascertained and returned for the taxable year upon the same basis and in the same manner as provided for income tax purposes in Title II of this Act.

PART V.—INVESTED CAPITAL.

SEC. 325. [Terms in title defined.] (a) That as used in this title —

The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trade-marks, trade-brands, franchises, and other like property;

The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdivision (a) of section 326 and section 331.

(b) For the purposes of this title the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares.

SEC. 326. [Invested capital—meaning and scope of term.] (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivision (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided*, That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided*, That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall be the same fractional part of such average invested capital.

SEC. 327. [Enumeration of cases specially considered for purposes of taxation.] That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation or of a corporation entitled to the benefits of section 262;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corpora-

tion earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. [Determination of tax of specially considered cases.] (a) That in the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of \$3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of \$3,000) for such year. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the tax shall be computed without deducting the specific exemption of \$3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

PART VI.—REORGANIZATIONS.

SEC. 331. [Reorganizations, etc., after March 3, 1917 — determination of invested capital — transferred assets.] That in the case of the reorganization, consolidation, or change of ownership of a trade or business, or change of ownership of property, after March 3, 1917, if an interest or control in such trade or business or property of 50 per centum or more remains in the same persons, or any of them, then no asset transferred or received from the previous owner shall, for the purpose of determining invested capital, be allowed a greater value than would have been allowed under this title in computing the invested capital of such previous owner if such asset had not been so transferred or received: *Provided*, That if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when acquired by such previous owner) with proper allowance for depreciation, impairment, betterment or development, but no

addition to the original cost shall be made for any charge or expenditure deducted as expense or otherwise on or after March 1, 1913, in computing the net income of such previous owner for purposes of taxation.

PART VII.— MISCELLANEOUS.

SEC. 335. [Period covered by return of corporation as affecting amount of tax — refund of tax.] (a) That if a corporation (other than a personal service corporation) makes return for a fiscal year beginning in 1920 and ending in 1921, the war-profits and excess-profits tax for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under the Revenue Act of 1918, which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title, which the portion of such period falling within the calendar year 1921 is of the entire period. Any amount heretofore or hereafter paid on account of the tax imposed for such taxable year by the Revenue Act of 1918 shall be credited towards the payment of the tax as above computed, and if the amount so paid exceeds the amount of such tax, the excess shall be credited or refunded to the corporation in accordance with the provisions of section 252 of this Act.

(b) If a corporation (other than a personal service corporation) makes a return for a fiscal year beginning in 1921 and ending in 1922, the war-profits and excess-profits tax for the portion of the year falling within the calendar year 1921 shall be an amount equivalent to the same proportion of a tax for the entire period computed under this title, which the portion of such period falling within the calendar year 1921 is of the entire period.

For Revenue Act of 1918 mentioned in the text, see 1919 Supp. 90.

SEC. 336. [Corporations required to make return under title — laws affecting returns and payment of taxes.] That every corporation, not exempt under section 304, shall make a return for the purposes of this title. Such returns shall be made, and the taxes imposed by this title shall be paid, at the same times and places, in the same manner, and subject to the same conditions, as is provided in the case of returns and payment of income tax by corporations for the purposes of Title II, and all the provisions of that title not inapplicable, including penalties, are hereby made applicable to the taxes imposed by this title.

SEC. 337. [Sales of mines, oil or gas wells — amount of tax.] That in the case of a bona fide sale of mines, oil or gas wells, or any interest therein, where the principal value of the property has been demonstrated by prospecting or exploration and discovery work done by the taxpayer, the portion of the tax imposed by this title attributable to such sale shall not exceed 20 per centum of the selling price of such property or interest.

SEC. 338. Effective date of title. That this title shall take effect as of January 1, 1921.

TITLE IV.— ESTATE TAX.

SEC. 400. [Terms defined — “ executor ” — “ net estate ” — “ month ” — “ collector.”] That when used in this title —

The term “ executor ” means the executor or administrator of the decedent, or, if there is no executor or administrator, any person in actual or constructive possession of any property of the decedent;

The term "net estate" means the net estate as determined under the provisions of section 403;

The term "month" means calendar month; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

SEC. 401. [Imposition of tax—amount—persons dying in military or naval services.] That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

1 per centum of the amount of the net estate not in excess of \$50,000;

2 per centum of the amount by which the net estate exceeds \$50,000 and does not exceed \$150,000;

3 per centum of the amount by which the net estate exceeds \$150,000 and does not exceed \$250,000;

4 per centum of the amount by which the net estate exceeds \$250,000 and does not exceed \$450,000;

6 per centum of the amount by which the net estate exceeds \$450,000 and does not exceed \$750,000;

8 per centum of the amount by which the net estate exceeds \$750,000 and does not exceed \$1,000,000;

10 per centum of the amount by which the net estate exceeds \$1,000,000 and does not exceed \$1,500,000;

12 per centum of the amount by which the net estate exceeds \$1,500,000 and does not exceed \$2,000,000;

14 per centum of the amount by which the net estate exceeds \$2,000,000 and does not exceed \$3,000,000;

16 per centum of the amount by which the net estate exceeds \$3,000,000 and does not exceed \$4,000,000;

18 per centum of the amount by which the net estate exceeds \$4,000,000 and does not exceed \$5,000,000;

20 per centum of the amount by which the net estate exceeds \$5,000,000 and does not exceed \$8,000,000;

22 per centum of the amount by which the net estate exceeds \$8,000,000 and does not exceed \$10,000,000; and

25 per centum of the amount by which the net estate exceeds \$10,000,000.

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3,

1917) or by Title IX of the Revenue Act of 1917, or by Title IV of the Revenue Act of 1918, shall not apply to the transfer of the net estate of any decedent who has died or may die from injuries received or disease contracted in line of duty while serving in the military or naval forces of the United States in the war against the German Government, or to the transfer of the net estate of any citizen of the United States who has died or may die from injuries received or disease contracted in line of duty while serving in the military or naval forces of any country while associated with the United States in the prosecution of such war, or prior to the entrance therein of the United States, and any tax collected upon such transfer shall be refunded to the estate of such decedent.

For different revenue Acts mentioned in the text, see 1918 Supp. 270; 1919 Supp. 90.

SEC. 402. [Value of gross estate—determination.] That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated —

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

SEC. 403. [Value of net estate—determination.] That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property (except, in the case of a resident decedent, where such property is not situated in the United States), losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy or inheritance taxes;

(2) An amount equal to the value of any property forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received: *Provided*, That this deduction shall be allowed only where an estate tax under this or any prior Act of Congress was paid by or on behalf of the estate of such prior decedent, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate and not deducted under paragraphs (1) or (3) of subdivision (a) of this section. This deduction shall be made in case of the estates of all decedents who have died since September 8, 1916;

(3) The amount of all bequests, legacies, devises, or transfers, except bona fide sales for a fair consideration in money or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stock-

holder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of \$50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States —

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value of any property forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received: *Provided*, That this deduction shall be allowed only where an estate tax under this or any prior Act of Congress was paid by or on behalf of the estate of such prior decedent, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gross estate of such prior decedent, and only to the extent that the value of such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States and not deducted under paragraphs (1) or (3) of subdivision (b) of this section. This deduction shall be made in case of the estates of all decedents who have died since September 8, 1916; and

(3) The amount of all bequests, legacies, devises, or transfers, except bona fide sales for a fair consideration, in money, or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917.

No deduction shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section 404 the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of sec-

tion 402, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of this title, be deemed property within the United States.

Missionaries duly commissioned and serving under boards of foreign missions of the various religious denominations in the United States, dying while in the foreign missionary service of such boards, shall not, by reason merely of their intention to permanently remain in such foreign service, be deemed nonresidents of the United States, but shall be presumed to be residents of the State, the District of Columbia, or the Territories of Alaska or Hawaii wherein they respectively resided at the time of their commission and their departure for such foreign service.

In the case of any estate in respect to which the tax has been paid, if necessary to allow the benefit of the deduction under paragraphs (2) and (3) of subdivision (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor.

SEC. 404. [Duty of executor — notice — return — assessment of tax.] That the executor, within two months after the decedent's death, or within a like period after qualifying as such, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section 403; (c) the value of the net estate of the decedent as defined in section 403; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases where the gross estate at the death of the decedent exceeds \$50,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

SEC. 405. [Return when required to be made by collector.] That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section 404, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner shall assess the tax thereon.

SEC. 406. [Payment of tax — time — interest.] That the tax shall be due and payable one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within such period would impose undue hardship upon the estate, he may grant an extension or extensions of time for payment not to exceed three years from the due date.

The executor shall pay the tax to the collector or deputy collector, and to such portion of the tax, not paid within one year and six months after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after such death shall be added as part of the tax irrespective of any extension or extensions of time that may have been granted for the payment of the tax, or any portion thereof.

SEC 407. [Payment of tax — to whom made — amount undetermined.] That where the amount of tax shown upon a return made in good faith has been fully paid, or time for payment has been extended, as provided in section 406, beyond one year and six months after the decedent's death, and an additional amount of tax is, after the expiration of such period of one year and six months, found to be due, then such additional amount shall be paid upon notice and demand by the collector, and if it remains unpaid for one month after such notice and demand there shall be added as part of the tax interest on such additional amount at the rate of 10 per centum per annum from the expiration of such period until paid, and such additional tax and interest shall, until paid, be and remain a lien upon the entire gross estate.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

If the executor files a complete return and makes written application to the Commissioner for determination of the amount of the tax and discharge from personal liability therefor, the Commissioner, as soon as possible and in any event within one year after receipt of such application, shall notify the executor of the amount of the tax, and upon payment thereof the executor shall be discharged from personal liability for any additional tax thereafter found to be due, and shall be entitled to receive a receipt or writing showing such discharge: *Provided, however,* That such discharge shall not operate to release the gross estate from the lien of any additional tax that may thereafter be found to be due while the title to such gross estate remains in the heirs, devisees, or distributees thereof; but no part of such gross estate shall be subject to such lien or to any claim or demand for any such tax if the title thereto has passed to a bona fide purchaser for value.

SEC. 408. [Unpaid taxes — collection — satisfaction of tax out of distributed portion of estate — proceeds of insurance policies.] That if the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first

paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of \$40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

SEC. 409. [Unpaid tax as lien — transfers of property in anticipation of death — innocent purchasers for value.] That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

SEC. 410. [Violations of Act — penalties.] That whoever knowingly makes any false statement in any notice or return required to be filed under this title shall be liable to a penalty of not exceeding \$5,000, or imprisonment not exceeding one year, or both.

Whoever fails to comply with any duty imposed upon him by section 404, or, having in his possession or control any record, file, or paper, containing or

supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding \$500, to be recovered, with costs of suit, in a civil action in the name of the United States.

SEC. 411. [Property situated in China — collection of tax — repeal of proviso in Act of June 4, 1920.] (a) That the term "resident" as used in this title includes a citizen of the United States with respect to whose property any probate or administration proceedings are had in the United States Court for China. Where no part of the gross estate of such decedent is situated in the United States at the time of his death, the total amount of tax due under this title shall be paid to or collected by the clerk of such court, but where any part of the gross estate of such decedent is situated in the United States at the time of his death, the tax due under this title shall be paid to or collected by the collector of the district in which is situated the part of the gross estate in the United States, or, if such part is situated in more than one district, then the collector of such district as may be designated by the Commissioner.

(b) For the purpose of this section the clerk of the United States Court for China shall be a collector for the territorial jurisdiction of such court, and taxes shall be collected by and paid to him in the same manner and subject to the same provisions of law, including penalties, as the taxes collected by and paid to a collector in the United States.

(c) The proviso in the Act entitled "An Act making appropriation for the Diplomatic and Consular Service for the fiscal year ending June 30, 1921," approved June 4, 1920, which reads as follows: "*Provided*, That in probate and administration proceedings there shall be collected by said clerk, before entering the order of final distribution, to be paid into the Treasury of the United States, the same inheritance taxes from time to time collected under the laws enacted by the Congress of the United States from the estates of decedents residing within the territorial jurisdiction of the United States," is hereby repealed.

For proviso in Act of June 4, 1920, here repealed, see 1920 Supp. 133.

TITLE V.—TAX ON TELEGRAPH AND TELEPHONE MESSAGES.

SEC. 500. [Amount of tax.] That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1918 —

(a) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(b) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit

special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct, by a common carrier or telegraph or telephone company, of its business as such;

(c) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

(d) Under regulations prescribed by the Commissioner with the approval of the Secretary, refund shall be made of the proportionate part of the tax collected under subdivision (c) or (d) of section 500 of the Revenue Act of 1918 on tickets or mileage books purchased and only partially used before January 1, 1922.

For sec. 500 of Revenue Act of 1918 mentioned in the text, see 1919 Supp. 136.

SEC. 501. [Tax by whom paid.] That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

SEC. 502. [Collection of tax — refunds — returns — penalty for nonpayment.] (a) That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located.

(b) Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return.

(c) The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

(d) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

TITLE VI.—TAX ON BEVERAGES AND CONSTITUENT PARTS THEREOF.

SEC. 600. [Distilled spirits — amount of tax — when due — sec. 600 (a) of Revenue Act of 1918 amended.] That subdivision (a) of section 600 of the Revenue Act of 1918 is amended by striking out the period at the end thereof and inserting a colon and the following: "*Provided, That on all distilled spirits on which tax is paid at the nonbeverage rate of \$2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of \$4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion.*"

For sec. 600 of Revenue Act of 1918 here amended, see 1918 Supp. Fed. Stat. Ann. 600.

SEC. 601. [Distilled spirits and wines hereafter rectified, etc.—additional tax—floor tax—cordials and liquors—blends—rectifiers—sec. 605 of Revenue Act of 1918 amended.] That section 605 of the Revenue Act of 1918 is amended by adding at the end thereof the following: “The process of extraction of water from high-proof spirits for the production of absolute alcohol shall not be deemed to be rectification within the meaning of section 3244 of the Revised Statutes, and absolute alcohol shall not be subject to the tax imposed by this section, but the production of such absolute alcohol shall be under such regulations as the Commissioner, with the approval of the Secretary, may prescribe.”

For sec. 605 of Revenue Act of 1918 here amended, see 1919 Supp. 144.

For R. S. sec. 3244, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed) 1045.

SEC. 602. [Soft drinks.] That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by sections 628 and 630 of the Revenue Act of 1918—

For secs. 628 and 630 of the Revenue Act of 1918, see 1919 Supp. 153, 154.

(a) **[Cereal drinks.]** Upon all beverages derived wholly or in part from cereals or substitutes therefor, containing less than one-half of 1 per centum of alcohol by volume, sold by the manufacturer, producer, or importer, a tax of 2 cents per gallon.

(b) **[Fruit juices.]** Upon all unfermented fruit juices, in natural or slightly concentrated form, or such fruit juices to which sugar has been added (as distinguished from finished or fountain sirups), intended for consumption as beverages with the addition of water or water and sugar, and upon all imitations of any such fruit juices, and upon all carbonated beverages, commonly known as soft drinks (except those described in subdivision (a), manufactured, compounded, or mixed by the use of concentrate, essence, or extract, instead of a finished or fountain sirup, sold by the manufacturer, producer or importer, a tax of 2 cents per gallon.

(c) **[Still drinks.]** Upon all still drinks, containing less than one-half of 1 per centum of alcohol by volume, intended for consumption as beverages in the form in which sold (except natural or artificial mineral and table waters and imitations thereof, and pure apple cider), sold by the manufacturer, producer or importer, a tax of 2 cents per gallon.

(d) **[Minerals and other table waters.]** Upon all natural or artificial mineral waters or table waters, whether carbonated or not, and all imitations thereof, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 12½ cents per gallon, a tax of 2 cents per gallon.

(e) **[Fountain sirups.]** Upon all finished or fountain sirups of the kinds used in manufacturing, compounding, or mixing drinks commonly known as soft drinks, sold by the manufacturer, producer, or importer, a tax of 9 cents per gallon; except that in the case of any such sirups intended to be used in the manufacture of carbonated beverages sold in bottles or other closed containers the rate shall be 5 cents per gallon. Where any person conducting a soda fountain, ice cream parlor, or other similar place of business manufactures any sirups of the kinds described in this subdivision, there shall be levied, assessed, collected, and paid on each gallon manufactured and used in the preparation of soft drinks a tax of 9 cents per gallon; and where any person

manufacturing carbonated beverages manufactures and uses any such sirups in the manufacture of carbonated beverages sold in bottles or other closed containers there shall be levied, assessed, collected, and paid on each gallon of such sirups a tax of 5 cents per gallon. The taxes imposed by this subdivision shall not apply to finished or fountain sirups sold for use in the manufacture of a beverage subject to tax under subdivision (a) or (c).

(f) **[Carbonic acid gas.]** Upon all carbonic acid gas sold by the manufacturer, producer, or importer to a manufacturer of any carbonated beverages, or to any person conducting a soda fountain, ice cream parlor, or other similar place of business, and upon all carbonic acid gas used by the manufacturer, producer, or importer thereof in the preparation of soft drinks, a tax of 4 cents per pound.

SEC. 603. [Returns — payment of taxes — penalties — registration of persons subject to tax.] (a) That each manufacturer, producer, or importer of any of the articles enumerated in section 602 and each person who sells carbonic acid gas to a manufacturer of carbonated beverages or to a person conducting a soda fountain, ice cream parlor, or other similar place of business, shall make monthly returns under oath in duplicate and pay the tax imposed in respect to the articles enumerated in section 602 to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month from the time when the tax became due.

(b) Each person required to pay any tax imposed by section 602 shall procure and keep posted a certificate of registry in accordance with regulations to be prescribed by the Commissioner, with the approval of the Secretary. Any person who fails to register or keep posted any certificate of registry in accordance with such regulations, shall be subject to a penalty of not more than \$1,000 for each such offense.

TITLE VII.—TAX ON CIGARS, TOBACCO, AND MANUFACTURES THEREOF.

SEC. 700. (a) [Cigars and cigarettes — amount of tax.] That upon cigars and cigarettes manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid under the provisions of existing law, in lieu of the internal-revenue taxes now imposed thereon by section 700 of the Revenue Act of 1918, the following taxes, to be paid by the manufacturer or importer thereof —

On cigars of all descriptions made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, \$1.50 per thousand;

On cigars made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, if manufactured or imported to retail at not more than 5 cents each, \$4 per thousand;

If manufactured or imported to retail at more than 5 cents each and not more than 8 cents each, \$6 per thousand;

If manufactured or imported to retail at more than 8 cents each and not more than 15 cents each, \$9 per thousand;

If manufactured or imported to retail at more than 15 cents each and not more than 20 cents each, \$12 per thousand;

If manufactured or imported to retail at more than 20 cents each, \$15 per thousand;

On cigarettes made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, \$3 per thousand;

Weighing more than three pounds per thousand, \$7.20 per thousand.

For sec. 700 of the Revenue Act of 1918 mentioned in the text, see 1919 Supp. 154.

(b) **[Price of cigars, how fixed.]** Whenever in this section reference is made to cigars manufactured or imported to retail at not over a certain price each, then in determining the tax to be paid regard shall be had to the ordinary retail price of a single cigar.

(c) **[Labels on boxes, etc.]** The Commissioner may, by regulation, require the manufacturer or importer to affix to each box, package, or container a conspicuous label indicating the clause of this section under which the cigars therein contained have been tax-paid, which must correspond with the tax-paid stamp on such box or container.

(d) **[Cigarettes and small cigars — packing and stamping.]** Every manufacturer of cigarettes (including small cigars weighing not more than three pounds per thousand) shall put up all the cigarettes and such small cigars that he manufactures or has manufactured for him, and sells or removes for consumption or sale, in packages or parcels containing five, eight, ten, twelve, fifteen, sixteen, twenty, twenty-four, forty, fifty, eighty, or one hundred cigarettes each, and shall securely affix to each of such packages or parcels a suitable stamp denoting the tax thereon and shall properly cancel the same prior to such sale or removal for consumption or sale under such regulations as the Commissioner, with the approval of the Secretary, shall prescribe; and all cigarettes imported from a foreign country shall be packed, stamped, and the stamps canceled in a like manner, in addition to the import stamp indicating inspection of the custom-house before they are withdrawn therefrom.

SEC. 701. (a) [Tobacco and snuff — amount of tax.] That upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid, in lieu of the internal-revenue taxes now imposed thereon by section 701 of the Revenue Act of 1918, a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof.

For sec. 701 of the Revenue Act of 1918 mentioned in the text, see 1919 Supp. 155.

(b) **[Tobacco and snuff, how put up and prepared — R. S. sec. 3362 re-enacted.]** Section 3362 of the Revised Statutes, as amended by section 701 of the Revenue Act of 1918, is re-enacted without change, as follows:

“SEC. 3362. All manufactured tobacco shall be put up and prepared by the manufacturer for sale, or removal for sale or consumption, in packages of the following description and in no other manner:

“All smoking tobacco, snuff, fine-cut chewing tobacco, all cut and granulated tobacco, all shorts, the refuse of fine-cut chewing, which has passed through a

riddle of thirty-six meshes to the square inch, and all refuse scraps, clippings, cuttings, and sweepings of tobacco, and all other kinds of tobacco not otherwise provided for, in packages containing one-eighth of an ounce, three-eighths of an ounce, and further packages with a difference between each package and the one next smaller of one-eighth of an ounce up to and including two ounces, and further packages with a difference between each package and the one next smaller of one-fourth of an ounce up to and including four ounces, and packages of five ounces, six ounces, seven ounces, eight ounces, ten ounces, twelve ounces, fourteen ounces, and sixteen ounces: *Provided*, That snuff may, at the option of the manufacturer, be put up in bladders and in jars containing not exceeding twenty pounds.

"All cavendish, plug, and twist tobacco, in wooden packages not exceeding two hundred pounds net weight.

"And every such wooden package shall have printed or marked thereon the manufacturer's name and place of manufacture, the registered number of the manufactory, and the gross weight, the tare, and the net weight of the tobacco in each package: *Provided*, That these limitations and descriptions of packages shall not apply to tobacco and snuff transported in bond for exportation and actually exported: *And provided further*, That perique tobacco, snuff flour, fine-cut shorts, the refuse of fine-cut chewing tobacco, refuse scraps, clippings, cuttings, and sweepings of tobacco, may be sold in bulk as material, and without the payment of tax, by one manufacturer directly to another manufacturer, or for export, under such restrictions, rules, and regulations as the Commissioner of Internal Revenue may prescribe: *And provided further*, That wood, metal, paper, or other materials may be used separately or in combination for packing tobacco, snuff, and cigars, under such regulations as the Commissioner of Internal Revenue may establish."

For R. S. sec. 3362, before the amendment made by the Revenue Act of 1918, see 4 Fed. Stat. Ann. (2d ed.) 141.

SEC. 703. [Cigarette paper — amount of tax — bond — records — return.] That there shall be levied, collected, and paid, in lieu of the taxes imposed by section 703 of the Revenue Act of 1918, upon cigarette paper made up into packages, books, sets, or tubes, made up in or imported into the United States and hereafter sold by the manufacturer or importer to any person (other than to a manufacturer of cigarettes for use by him in the manufacture of cigarettes) the following taxes, to be paid by the manufacturer or importer: On each package, book, or set, containing more than twenty-five but not more than fifty papers, $\frac{1}{2}$ cent; containing more than fifty but not more than one hundred papers, 1 cent; containing more than one hundred papers, $\frac{1}{2}$ cent for each fifty papers or fractional part thereof; and upon tubes, 1 cent for each fifty tubes or fractional part thereof.

Every manufacturer of cigarettes purchasing any cigarette paper made up into tubes (a) shall give bond in an amount and with sureties satisfactory to the Commissioner that he will use such tubes in the manufacture of cigarettes or pay thereon a tax equivalent to the tax imposed by this section, and (b) shall keep such records and render under oath such returns as the Commissioner finds necessary to show the disposition of all tubes purchased or imported by such manufacturer of cigarettes.

For sec. 703 of the Revenue Act of 1918, mentioned in the text, see 1919 Supp. 156.

SEC. 704. [Leaf tobacco — requirements imposed on dealers — R. S. sec. 3360 re-enacted.] That section 3360 of the Revised Statutes, as amended by section 704 of the Revenue Act of 1918, is re-enacted without change, as follows:

“SEC. 3360. (a) Every dealer in leaf tobacco shall file with the collector of the district in which his business is carried on a statement in duplicate, subscribed under oath, setting forth the place, and, if in a city, the street and number of the street, where his business is to be carried on, and the exact location of each place where leaf tobacco is held by him on storage, and, whenever he adds to or discontinues any of his leaf tobacco storage places, he shall give immediate notice to the collector of the district in which he is registered.

“Every such dealer shall give a bond with surety, satisfactory to, and to be approved by, the collector of the district, in such penal sum as the collector may require, not less than \$500; and a new bond may be required in the discretion of the collector, or under instructions of the Commissioner.

“Every such dealer shall be assigned a number by the collector of the district, which number shall appear in every inventory, invoice and report rendered by the dealer, who shall also obtain certificates from the collector of the district setting forth the place where his business is carried on and the places designated by the dealer as the places of storage of his tobacco, which certificates shall be posted conspicuously within the dealer's registered place of business, and within each designated place of storage.

“(b) Every dealer in leaf tobacco shall make and deliver to the collector of the district a true inventory of the quantity of the different kinds of tobacco held or owned, and where stored by him, on the 1st day of January of each year, or at the time of commencing and at the time of concluding business, if before or after the 1st day of January, such inventory to be made under oath and rendered in such form as may be prescribed by the Commissioner.

“Every dealer in leaf tobacco shall render such invoices and keep such records as shall be prescribed by the Commissioner, and shall enter therein, day by day, and upon the same day on which the circumstance, thing or act to be recorded is done or occurs, an accurate account of the number of hogsheads, tierces, cases and bales, and quantity of leaf tobacco contained therein, purchased or received by him, on assignment, consignment, for storage, by transfer or otherwise, and of whom purchased or received, and the number of hogsheads, tierces, cases and bales, and the quantity of leaf tobacco contained therein, sold by him, with the name and residence in each instance of the person to whom sold, and if shipped, to whom shipped, and to what district; such records shall be kept at his place of business at all times and preserved for a period of two years, and the same shall be open at all hours for the inspection of any internal-revenue officer or agent.

“Every dealer in leaf tobacco on or before the tenth day of each month, shall furnish to the collector of the district a true and complete report of all purchases, receipts, sales and shipments of leaf tobacco made by him during the month next preceding, which report shall be verified and rendered in such form as the Commissioner, with the approval of the Secretary, shall prescribe.

“(c) Sales or shipments of leaf tobacco by a dealer in leaf tobacco shall be in quantities of not less than a hogshead, tierce, case, or bale, except loose leaf tobacco comprising the breaks on warehouse floors, and except to a duly registered manufacturer of cigars for use in his own manufactory exclusively.

“Dealers in leaf tobacco shall make shipments of leaf tobacco only to other dealers in leaf tobacco, to registered manufacturers of tobacco, snuff, cigars or cigarettes, or for export.

“(d) Upon all leaf tobacco sold, removed or shipped by any dealer in leaf tobacco in violation of the provisions of subdivision (c), or in respect to which no report has been made by such dealer in accordance with the provisions of subdivision (b), there shall be levied, assessed, collected and paid a tax equal to the tax then in force upon manufactured tobacco, such tax to be assessed and collected in the same manner as the tax on manufactured tobacco.

“(e) Every dealer in leaf tobacco —

“(1) who neglects or refuses to furnish the statement, to give bond, to keep books, to file inventory or to render the invoices, returns or reports required by the Commissioner, or to notify the collector of the district of additions to his places of storage; or

“(2) who ships or delivers leaf tobacco, except as herein provided; or

“(3) who fraudulently omits to account for tobacco purchased, received, sold, or shipped;
shall be fined not less than \$100 or more than \$500, or imprisoned not more than one year, or both.

“(f) For the purposes of this section a farmer or grower of tobacco shall not be regarded as a dealer in leaf tobacco in respect to the leaf tobacco produced by him.”

For R. S. see 3360, before its amendment by the Revenue Act of 1918, see 4 Fed. Stat. Ann. (2d ed.) 140.

TITLE VIII.—TAX ON ADMISSIONS AND DUES.

SEC. 800. [Admissions — amount of tax — places affected.] (a) That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 800 of the Revenue Act of 1918 —

(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission; but where the amount paid for admission is 10 cents or less, no tax shall be imposed;

(2) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner and subject to the penalties and interest provided in section 903, by the person selling such tickets;

(3) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in

the manner and subject to the penalties and interest provided in section 903, by the person selling such tickets;

(4) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; and

(5) A tax of $1\frac{1}{2}$ cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise.

(b) No tax shall be levied under this title in respect to (1) any admissions all the proceeds of which inure (A) exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, any post of the American Legion or the women's auxiliary units thereof, societies for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any city, town, village, or other municipality, or of maintaining a cooperative or community center moving-picture theater—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual; or (B) exclusively to the benefit of persons in the military or naval forces of the United States; or (C) exclusively to the benefit of persons who have served in such forces and are in need; or (2) any admissions to agricultural fairs if no part of the net earnings thereof inures to the benefit of any stockholders or members of the association conducting the same, or admissions to any exhibit, entertainment, or other pay feature conducted by such association as part of any such fair,—if the proceeds therefrom are used exclusively for the improvement, maintenance and operation of such agricultural fairs.

(c) The term "admission" as used in this title includes seats and tables, reserved or otherwise, and other similar accommodations, and the charges made therefor.

(d) The price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket or card is sold shall be conspicuously and indelibly printed, stamped, or written on the face or back of that part of the ticket which is to be taken up by the management of the theater, opera, or other place of amusement, together with the name of the vendor if sold other than at the ticket office of the theater, opera, or other place of amusement. Whoever sells an admission ticket or card on which the name of the vendor and price is not so printed, stamped, or written, or at a price in excess of the price so printed, stamped, or written thereon, is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than \$100.

For sec. 800 of the Revenue Act of 1918, mentioned in the text, see 1919 Supp. 158.

SEC. 801. [Club dues and fees.] That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 801 of the Revenue Act of 1918, a tax equivalent to 10 per centum of any amount paid on or after such date, for any period after such date, (a) as dues or membership fees (where the dues or fees of an active resident annual member are in excess of \$10 per year) to any social, athletic, or sporting club or organization; or (b) as initiation fees to such a club or organization, if such fees amount to more than \$10, or if the dues or membership fees (not including initiation fees) of an active resident annual member are in excess of \$10 per year; such taxes to be paid by the person paying such dues or fees: *Provided*, That there shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member, but shall pay no tax upon the amount paid for life membership.

For sec. 801 of the Revenue Act of 1918, see 1919 Supp. 160.

SEC. 802. [Collection of tax on admissions, dues and fees.] That every person receiving any payments for such admission, dues, or fees, shall collect the amount of the tax imposed by section 800 or 801 from the person making such payments. Every club or organization having life members, shall collect from such members the amount of the tax imposed by section 801. In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner and subject to the same penalties and interest as provided in section 502.

TITLE IX.—EXCISE TAXES.

SEC. 900. [Enumeration of articles taxed—amount of tax.] That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased —

- (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof) 3 per centum;
- (2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
- (3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;
- (4) Cameras, weighing not more than 100 pounds, and lenses for such cameras, 10 per centum;
- (5) Photographic films and plates (other than moving-picture films), 5 per centum;
- (6) Candy, 3 per centum;

(7) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, 10 per centum;

(8) Hunting and bowie knives, 10 per centum;

(9) Dirk knives, daggers, sword canes, stilettos, and brass or metallic knuckles, 100 per centum;

(10) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(11) Automatic slot-device vending machines, 5 per centum, and automatic slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(12) Liveries and livery boots and hats, 10 per centum;

(13) Hunting and shooting garments and riding habits, 10 per centum;

(14) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than \$100, 10 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 900 of the Revenue Act of 1918, be in lieu of such tax.

SEC. 901. [Articles subject to tax sold or leased at less than fair market value — effect.] That if any person who manufactures, produces or imports any article enumerated in section 900, or leases or licenses for exhibition any positive motion-picture film containing a picture ready for projection, (a) sells, leases, or licenses such article to a corporation affiliated with such person within the meaning of section 240 of this Act, at less than the fair market price obtainable therefor, the tax thereon shall be computed on the basis of the price at which such article is sold, leased or licensed by such affiliated corporation; and (b) if any such person sells, leases, or licenses such article whether through any agreement, arrangement, or understanding, or otherwise, at less than the fair market price obtainable therefor, either (1) in such manner as directly or indirectly to benefit such person or any person directly or indirectly interested in the business of such person, or (2) with intent to cause such benefit, the amount for which such article is sold, leased or licensed shall be taken to be the amount which would have been received from the sale, lease or license of such article if sold, leased or licensed at the fair market price.

SEC. 902. [Sculpture and other art articles.] That there shall be levied, assessed, collected, and paid upon sculpture, paintings, statuary, art porcelains, and bronzes, sold by any person other than the artist, a tax equivalent to 5 per centum of the price for which so sold. This section shall not apply to the sale

of any such article (1) to an educational institution or public art museum, or (2) by any dealer in such articles to another dealer in such articles for resale.

SEC. 903. [Returns — payment of tax — penalty for nonpayment.] That every person liable for any tax imposed by section 900, 902, or 904, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

SEC. 904. [Luxury taxes — articles affected.] That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 904 of the Revenue Act of 1918, upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to 5 per centum of so much of the price for which so sold or leased as is in excess of the price hereinafter specified as to each such article —

(1) Carpets and rugs, including fiber, on the amount in excess of \$4.50 per square yard in the case of carpets and \$6 per square yard in the case of rugs;

(2) Trunks, on the amount in excess of \$35 each;

(3) Valises, traveling bags, suit cases, hat boxes used by travelers, and fitted toilet cases, on the amount in excess of \$25 each;

(4) Purses, pocketbooks, shopping and hand bags, on the amount in excess of \$5 each;

(5) Portable lighting fixtures, including lamps of all kinds and lamp shades, on the amount in excess of \$10 each;

(6) Fans, on the amount in excess of \$1 each.

SEC. 905. [Tax on jewelry, etc.— watches and clocks — glasses — returns — payment of tax.] (a) That on and after January 1, 1922, there shall be levied, assessed, collected, and paid (in lieu of the tax imposed by section 905 of the Revenue Act of 1918) upon all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with, precious metals or imitations thereof or ivory (not including surgical instruments, eyeglasses, and spectacles); watches; clocks; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars; upon any of the above when sold by or for a dealer or his estate for consumption or use, a tax equivalent to 5 per centum of the price for which so sold.

(b) Every person selling any of the articles enumerated in this section shall make returns under oath in duplicate (monthly or quarterly as the Commissioner, with the approval of the Secretary, may prescribe) and pay the taxes imposed in respect to such articles by this section to the collector for the district in which is located the principal place of business. Such returns shall contain

such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

(c) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

For sec. 905 of the Revenue Act of 1918, mentioned in the text, see 1919 Supp. 163.

SEC. 906. [Executory contracts of sales made prior to Aug. 15, 1921 — payment of taxes — refunds.] (a) That if (1) any person has, prior to August 15, 1921, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed by section 900 or 904, or by this subdivision, and in respect to which no corresponding tax was imposed by section 900 of the Revenue Act of 1918, and (2) such contract does not permit the adding, to the amount to be paid thereunder, of the whole of the tax imposed by section 900 or 904 of this Act or by this subdivision; then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of the tax imposed by section 900 or 904 of this Act or by this subdivision as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, no tax shall be collected under this Act.

(b) If (1) any person has, prior to August 15, 1921, made a bona fide contract with any other person for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed by section 900 of this Act, and in respect to which a corresponding but greater tax was imposed by section 900 of the Revenue Act of 1918, (2) the contract price includes the amount of the tax imposed by section 900 of the Revenue Act of 1918, and (3) such contract does not permit the deduction, from the amount to be paid thereunder, of the whole of the difference between the corresponding tax imposed by section 900 of the Revenue Act of 1918 and the tax imposed by section 900 of this Act; then the vendor or lessor shall refund to the vendee or lessee so much of the amount of such difference as is not so permitted to be deducted from the contract price.

(c) If (1) any person has, prior to August 15, 1921, made a bona fide contract with any other person for the sale or lease, after December 31, 1921, of any article in respect to which a tax was imposed by section 900 of the Revenue Act of 1918, and in respect to which no corresponding tax is imposed by section 900 of this Act, (2) the contract price includes the amount of the tax imposed by section 900 of the Revenue Act of 1918, and (3) such contract does not permit deduction, from the amount to be paid thereunder, of the tax imposed by section 900 of the Revenue Act of 1918; then the vendor or lessor shall refund to the vendee or lessee so much of the amount of such tax as is not so permitted to be deducted from the contract price.

(d) The taxes payable by the vendee or lessee under subdivision (a), shall be paid to the vendor or lessor at the time the sale or lease is consummated, and collected, returned, and paid to the United States by such vendor or lessor in the same manner and subject to the same penalties and interest as provided by section 903.

(e) Any refund by the vendor or lessor under subdivision (b) or (c) shall be made at the time the sale or lease is consummated. Upon the failure of the vendor or lessor so to refund, he shall be liable to the vendee or lessee for damages in the amount of three times the amount of such refund, and the court shall include in any judgment in favor of the vendee or lessee in any suit for the recovery of such damages, costs of the suit and a reasonable attorney's fee to be fixed by the court.

(f) A vendee who purchases any article with intent to use it in the manufacture or production of another article intended for sale shall be included in the term "dealer," as used in this section.

For sec. 900 of the Revenue Act of 1918, mentioned in the text, see 1919 Supp. 163.

TITLE X.—SPECIAL TAXES.

SEC. 1000. Capital stock tax. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918 —

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to \$1 for each \$1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June 30.

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231, nor to any insurance company subject to the tax imposed by section 243 or 246.

(c) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section.

For sec. 1000 of the Revenue Act of 1918, mentioned in the text, see 1919 Supp. 165.

MISCELLANEOUS OCCUPATIONAL TAXES.

SEC. 1001. (a) [**Occupations enumerated.**] That on and after July 1, 1922, there shall be levied, collected, and paid annually the following special taxes —

(1) **Brokers** shall pay \$50. Every person whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, other securities, produce or merchandise, for others, shall be regarded as a broker. If a broker is a member of a stock exchange, or if he is a member of any produce exchange, board of trade, or similar organization, where produce or merchandise is sold, he shall pay an additional amount as follows: If the average value, during the preceding year ending June 30, of a seat or membership in such exchange or organization was \$2,000 or more but not more than \$5,000, \$100; if such value was more than \$5,000, \$150.

(2) **Pawnbrokers** shall pay \$100. Every person whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money loaned thereon, shall be regarded as a pawnbroker.

(3) *Ship brokers* shall pay \$50. Every person whose business it is as a broker to negotiate freights and other business for the owners of vessels or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded as a ship broker.

(4) *Customhouse brokers* shall pay \$50. Every person whose occupation it is, as the agent of others, to arrange entries and other customhouse papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise, shall be regarded as a customhouse broker.

(5) *Proprietors of theaters*, museums, and concert halls, where a charge for admission is made, having a seating capacity of not more than two hundred and fifty, shall pay \$50; having a seating capacity of more than two hundred and fifty and not exceeding five hundred, shall pay \$100; having a seating capacity exceeding five hundred and not exceeding eight hundred, shall pay \$150; having a seating capacity of more than eight hundred, shall pay \$200. Every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money is received, not including halls or armories rented or used occasionally for concerts or theatrical representations, and not including edifices owned by religious, educational or charitable institutions, societies or organizations where all the proceeds from admissions inure exclusively to the benefit of such institutions, societies or organizations or exclusively to the benefit of persons in the military or naval forces of the United States, shall be regarded as a theater: *Provided*, That in cities, towns, or villages of five thousand inhabitants or less the amount of such payment shall be one-half of that above stated: *Provided further*, That whenever any such edifice is under lease at the time the tax is due, the tax shall be paid by the lessee, unless otherwise stipulated between the parties to the lease.

(6) *The proprietor or proprietors of circuses* shall pay \$100. Every building, space, tent, or area, where feats of horsemanship or acrobatic sports or theatrical performances not otherwise provided for in this section are exhibited shall be regarded as a circus: *Provided*, That no special tax paid in one State, Territory, or the District of Columbia, shall exempt exhibitions from the tax in another State, Territory, or the District of Columbia, and but one special tax shall be imposed for exhibitions within any one State, Territory, or District.

(7) *Proprietors or agents of all other public exhibitions* or shows for money not enumerated in this section shall pay \$15: *Provided*, That a special tax paid in one State, Territory, or the District of Columbia shall not exempt exhibitions from the tax in another State, Territory, or the District of Columbia, and but one special tax shall be required for exhibitions within any one State, Territory, or the District of Columbia: *Provided further*, That this paragraph shall not apply to Chautauquas, lecture lyceums, agricultural or industrial fairs, or exhibitions held under the auspices of religious or charitable associations: *Provided further*, That an aggregation of entertainments, known as a street fair, shall not pay a larger tax than \$100 in any State, Territory, or in the District of Columbia.

(8) *Proprietors of bowling alleys and billiard rooms* shall pay \$10 for each alley or table. Every building or place where bowls are thrown or where games of billiards or pool are played, except in private homes, shall be regarded as a bowling alley or a billiard room, respectively.

(9) *Proprietors of shooting galleries* shall pay \$20. Every building, space, tent, or area, where a charge is made for the discharge of firearms at any form of target shall be regarded as a shooting gallery.

(10) *Proprietors of riding academies* shall pay \$100. Every building, space, tent, or area, where a charge is made for instruction in horsemanship or for facilities for the practice of horsemanship shall be regarded as a riding academy: *Provided*, That this tax shall not be collected from associations composed exclusively of members of units of the Federalized National Guard or the Organized Reserve and whose receipts are used exclusively for the benefit of such units.

(11) *Persons carrying on the business of operating or renting passenger automobiles* for hire shall pay \$10 for each such automobile having a seating capacity of more than two and not more than seven, and \$20 for each such automobile having a seating capacity of more than seven.

(12) [*Brewers, distillers, liquor dealers, etc.*] Every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law, shall pay, in addition to all other taxes, special or otherwise, imposed by existing law or by this Act, \$1,000.

For R. S. sec. 3244, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 1045.

For R. S. sec. 1047, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 18.

(b) [**Payment of tax as exempting from state laws.**] The payment of the tax imposed by this subdivision shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

(c) [**Tax imposed in lieu of tax in Revenue Act of 1918.**] The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 1001 of the Revenue Act of 1918, be in lieu of such tax.

For sec. 1001 of the Revenue Act of 1918, mentioned in the text, see 1919 Supp. 165.

Sec. 1002. Special tobacco manufacturers' tax. That on and after July 1, 1922, there shall be levied, collected, and paid annually, in lieu of the taxes imposed by section 1002 of the Revenue Act of 1918, the following special taxes, the amount of such taxes to be computed on the basis of the sales for the preceding year ending June 30—

Manufacturers of tobacco whose annual sales do not exceed fifty thousand pounds shall each pay \$6;

Manufacturers of tobacco whose annual sales exceed fifty thousand and do not exceed one hundred thousand pounds shall each pay \$12;

Manufacturers of tobacco whose annual sales exceed one hundred thousand and do not exceed two hundred thousand pounds shall each pay \$24;

Manufacturers of tobacco whose annual sales exceed two hundred thousand pounds shall each pay \$24, and at the rate of 16 cents per thousand pounds, or fraction thereof, in respect to the excess over two hundred thousand pounds;

Manufacturers of cigars whose annual sales do not exceed fifty thousand cigars shall each pay \$4;

Manufacturers of cigars whose annual sales exceed fifty thousand and do not exceed one hundred thousand cigars shall each pay \$6;

Manufacturers of cigars whose annual sales exceed one hundred thousand and do not exceed two hundred thousand cigars shall each pay \$12;

Manufacturers of cigars whose annual sales exceed two hundred thousand and do not exceed four hundred thousand cigars shall each pay \$24;

Manufacturers of cigars whose annual sales exceed four hundred thousand cigars shall each pay \$24, and at the rate of 10 cents per thousand cigars, or fraction thereof, in respect to the excess over four hundred thousand cigars;

Manufacturers of cigarettes, including small cigars weighing not more than three pounds per thousand, shall each pay at the rate of 6 cents for every ten thousand cigarettes, or fraction thereof.

In arriving at the amount of special tax to be paid under this section, and in the levy and collection of such tax, each person engaged in the manufacture of more than one of the classes of articles specified in this section shall be considered and deemed a manufacturer of each class separately.

In computing under this section the amount of annual sales no account shall be taken of tobacco, cigars, or cigarettes, sold for export and in due course so exported.

For sec. 1002 of the Revenue Act of 1918, mentioned in the text, see 1919 Supp. 168.

SEC. 1003. Special tax on use of boats. That on and after July 1, 1922, and thereafter on July 1 in each year, and also at the time of the original purchase of a new boat by a user, if on any other date than July 1, there shall be levied, assessed, collected, and paid, in lieu of the tax imposed by section 1003 of the Revenue Act of 1918, upon the use of yachts, pleasure boats, power boats, sailing boats, and motor boats with fixed engines, of over five net tons and over thirty-two feet in length, not used exclusively for trade, fishing, or national defense, or not built according to plans and specifications approved by the Navy Department, a special excise tax to be based on each yacht or boat, at rates as follows: Yachts, pleasure boats, power boats, motor boats with fixed engines, and sailing boats, of over five net tons, length over thirty-two feet and not over fifty feet, \$1 for each foot; length over fifty feet, and not over one hundred feet, \$2 for each foot; length over one hundred feet, \$4 for each foot.

In determining the length of such yachts, pleasure boats, power boats, motor boats with fixed engines, and sailing boats, the measurement of over-all length shall govern.

In the case of a tax imposed at the time of the original purchase of a new boat on any other date than July 1, the amount to be paid shall be the same number of twelfths of the amount of the tax as the number of calendar months (including the month of sale) remaining prior to the following July 1.

This section shall not apply to vessels or boats used without profit by any benevolent, charitable, or religious organizations, exclusively for furnishing aid, comfort, or relief to seamen.

For sec. 1003 of the Revenue Act of 1918, see 1919 Supp. 169.

SEC. 1004. Penalty for nonpayment of special taxes. That any person who carries on any business or occupation for which a special tax is imposed by sections 1000, 1001 or 1002, without having paid the special tax therein pro-

vided, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than \$1,000 or to imprisonment for not more than one year, or both.

TAX ON NARCOTICS.

SEC. 1005. [Opium, coca leaves and preparations therefrom — regulation of traffic — registration — amount of tax — collection — Harrison Act.] That section 1 of the Act entitled "An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes," approved December 17, 1914, as amended by section 1006 of the Revenue Act of 1918, is re-enacted without change, as follows:

"SECTION 1. That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided;

"Every person who on January 1, 1919, is engaged in any of the activities above enumerated, or who between such date and the passage of this Act first engaged in any of such activities, shall within thirty days after the passage of this Act make like registration, and shall pay the proportionate part of the tax for the period ending June 30, 1919; and

"Every person who first engages in any of such activities after the passage of this Act shall immediately make like registration and pay the proportionate part of the tax for the period ending on the following June 30th;

"Importers, manufacturers, producers, or compounders, \$24 per annum; wholesale dealers, \$12 per annum; retail dealers, \$6 per annum; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, shall pay \$3 per annum.

"Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer, or producer.

"Every person who sells or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer.

"Every person who sells or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer: *Provided*, That the office, or if none, the residence, of any person shall be considered for the purpose of this Act his place of business; but no employee of any person who has registered and paid special tax as herein required, acting within the scope of his employment, shall be required to register and pay special tax provided by this section: *Provided further*, That officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, nor stamp the aforesaid drugs as hereinafter prescribed, but their right to this exemption shall be evi-

denced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe.

“ It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section.

“ That the word ‘ person ’ as used in this Act shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, as far as necessary, are hereby extended and made applicable to this section.

“ That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

“ The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

“ It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absent of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: *Provided*, That the provisions of this paragraph shall not apply to any person having in his or her possession any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under this Act; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or to the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this Act of the drugs so dispensed, administered, distributed, or given away.

“ And all the provisions of existing laws relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal-revenue laws are, in so far as necessary, hereby extended and made to apply to stamps provided by this section.

" That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal-revenue laws relating to searches, seizures, and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed.

" Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations require.

" The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect."

For Act of Dec. 17, 1914, sec. 1, see 4 Fed. Stat. Ann. (2d ed.) 177.

SEC. 1006. [Preparations containing limited quantities of opium, morphine, etc.—application of Harrison Act—record of sales, etc.—registration—decocainized coca leaves and preparations therefrom.] That section 6 of such Act of December 17, 1914, as amended by section 1007 of the Revenue Act of 1918, is re-enacted without change, as follows:

" **SEC. 6.** That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta uaine or any of their salts or any synthetic substitute for them: *Provided*, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act: *Provided further*, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act and, if he is not paying a tax under this Act, he shall pay a special tax of \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine."

For Act of Dec. 17, 1914, sec. 6, see 4 Fed. Stat. Ann. (2d ed.) 183.

SEC. 1007. [Confiscation and forfeiture of seized opium, coca leaves, etc.—disposition of forfeited drugs.] That all opium, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, which may now be under seizure or which may hereafter be seized by the United States Government from any person or persons charged with any violation of the Act of October 1, 1890, as amended by the Acts of March 3, 1897, February 9, 1909, and January 17, 1914, or the Act of December 17, 1914, as amended, shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States; and the Secretary is hereby authorized to deliver for medical or scientific purposes to any department, bureau, or other agency of the United States Government, upon proper application therefor under such regulations as may be prescribed by the Commissioner, with the approval of the Secretary, any of the drugs so seized, confiscated, and forfeited to the United States.

The provisions of this section shall also apply to any of the aforesaid drugs seized or coming into the possession of the United States in the enforcement of any of the above-mentioned Acts where the owner or owners thereof are unknown. None of the aforesaid drugs coming into possession of the United States under the operation of said Acts, or the provisions of this section, shall be destroyed without certification by a committee appointed by the Commissioner, with the approval of the Secretary, that they are of no value for medical or scientific purposes.

For the different Opium Acts, now in force and mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 173.

TITLE XI.—STAMP TAXES.

SEC. 1100. [Instruments, matters and things affected by title.] That on and after January 1, 1922, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lien of such tax.

SEC. 1101. [Instruments, etc., not affected by title.] That there shall not be taxed under this title any bond, note, or other instrument, issued by the United States, or by any foreign Government, or by any State, Territory, or the District of Columbia, or local subdivision thereof, or municipal or other corporation exercising the taxing power; or any bond of indemnity required to be filed by any person to secure payment of any pension, allowance, allotment, relief, or insurance by the United States, or to secure a duplicate for, or the payment of, any bond, note, certificate of indebtedness, war-savings certificate, warrant or check, issued by the United States; or stocks and bonds issued by cooperative building and loan associations which are organized and operated exclusively for the benefit of their members and make loans only to their shareholders, or by mutual ditch or irrigation companies.

SEC. 1102. [Offenses — failure to pay tax or cancel stamps.] That whoever —

(a) Makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever without the full amount of tax thereon being duly paid;

(b) Manufactures or imports and sells, or offers for sale, or causes to be manufactured or imported and sold, or offered for sale, any playing cards, package, or other article without the full amount of tax being duly paid;

(c) Makes use of any adhesive stamp to denote any tax imposed by this title without canceling or obliterating such stamp as prescribed in section 1104;

Is guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than \$100 for each offense.

SEC. 1103. [Offenses — fraud — tampering with stamped instrument — insufficient stamping — used stamps — reuse and possession — counterfeit stamps.] That whoever —

(a) Fraudulently cuts, tears, or removes from any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title, any adhesive stamp or the impression of any stamp, die, plate, or other article provided, made, or used in pursuance of this title;

(b) Fraudulently uses, joins, fixes, or places to, with, or upon any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title, (1) any adhesive stamp, or the impression of any stamp, die, plate, or other article, which has been cut, torn, or removed from any other vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title; or (2) any adhesive stamp or the impression of any stamp, die, plate, or other article of insufficient value; or (3) any forged or counterfeited stamp, or the impression of any forged or counterfeited stamp, die, plate, or other article;

(c) Willfully removes, or alters the cancellation, or defacing marks of, or otherwise prepares, any adhesive stamp, with intent to use, or cause the same to be used, after it has been already used, or knowingly or willfully buys, sells, offers for sale, or gives away, any such washed or restored stamp to any person for use, or knowingly uses the same;

(d) Knowingly and without lawful excuse (the burden of proof of such excuse being on the accused) has in possession any washed, restored, or altered stamp, which has been removed from any vellum, parchment, paper, instrument, writing, package, or article;

Is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than five years, or both, and any such reused, canceled, or counterfeit stamp and the vellum, parchment, document, paper, package, or article upon which it is placed or impressed shall be forfeited to the United States.

SEC. 1104. [Cancellation of stamps — method.] That whenever an adhesive stamp is used for denoting any tax imposed by this title, except as hereinafter provided, the person using or affixing the same shall write or stamp or cause to be written or stamped thereupon the initials of his or its name and the date

upon which the same is attached or used, so that the same may not again be used: *Provided*, That the Commissioner may prescribe such other method for the cancellation of such stamps as he may deem expedient.

SEC. 1105. [Preparation and distribution of stamps — collection of stamp taxes omitted from instrument, etc.] (a) That the Commissioner shall cause to be prepared and distributed for the payment of the taxes prescribed in this title suitable stamps denoting the tax on the document, articles, or thing to which the same may be affixed, and shall prescribe such method for the affixing of said stamps in substitution for or in addition to the method provided in this title, as he may deem expedient.

(b) All internal revenue laws relating to the assessment and collection of taxes are hereby extended to and made a part of this title, so far as applicable, for the purpose of collecting stamp taxes omitted through mistake or fraud from any instrument, document, paper, writing, parcel, package, or article named herein.

SEC. 1106. [Distribution of stamps to postmaster.] That the Commissioner shall furnish to the Postmaster General without prepayment a suitable quantity of adhesive stamps to be distributed to and kept on sale by the various postmasters in the United States. The Postmaster General may require each such postmaster to give additional or increased bond as postmaster for the value of the stamps so furnished, and each such postmaster shall deposit the receipts from the sale of such stamps to the credit of and render accounts to the Postmaster General at such times and in such form as he may by regulations prescribe. The Postmaster General shall at least once monthly transfer all collections from this source to the Treasury as internal-revenue collections.

SEC. 1107. [Distribution of stamps to assistant treasurer, etc.] (a) That each collector shall furnish, without prepayment, to any assistant treasurer or designated depository of the United States, located in the district of such collector, a suitable quantity of adhesive stamps to be kept on sale by such assistant treasurer or designated depository.

(b) Each collector shall furnish, without prepayment, to any person who is (1) located in the district of such collector, (2) duly appointed and acting as agent of any State for the sale of stock transfer stamps of such State, and (3) designated by the Commissioner for the purpose, a suitable quantity of such adhesive stamps as are required by subdivisions 2; 3, and 4 of Schedule A of this title, to be kept on sale by such person.

(c) In such cases the collector may require a bond, with sufficient sureties, in a sum to be fixed by the Commissioner, conditioned for the faithful return, whenever so required, of all quantities or amounts undisposed of, and for the payment monthly of all quantities or amounts sold or not remaining on hand. The Secretary may from time to time make such regulations as he may find necessary to insure the safe-keeping or prevent the illegal use of all such adhesive stamps.

SCHEDULE A.—STAMP TAXES.

1. *Bonds of indebtedness*: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued

by any corporation with interest coupons or in registered form, known generally as corporate securities, on each \$100 of face value or fraction thereof, 5 cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue: *Provided further*, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured.

2. *Capital stock, issued*: On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each \$100 of face value or fraction thereof, 5 cents: *Provided*, That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of \$100 per share, in which case the tax shall be 5 cents on each \$100 of actual value or fraction thereof, or unless the actual value is less than \$100 per share, in which case the tax shall be 1 cent on each \$20 of actual value, or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

3. *Capital stock, sales or transfers*: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each \$100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further*, That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto with intent to evade the fore-

going provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding \$1,000, or be imprisoned not more than six months, or both.

4. *Produce, sales of, on exchange:* Upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery, for each \$100 in value of the merchandise covered by said sale or agreement of sale or agreement to sell, 2 cents, and for each additional \$100 or fractional part thereof in excess of \$100, 2 cents: *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale: *Provided further*, That sellers of commodities described herein, having paid the tax provided by this subdivision, may transfer such contracts to a clearing-house corporation or association, and such transfer shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the provisions of this Act, provided that such transfer shall not vest any beneficial interest in such clearing-house association but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts of the members of such clearing-house association on their several contracts. Every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale or agreement of sale, or agreement to sell, or who, in pursuance of any such sale, agreement of sale, or agreement to sell, delivers any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who delivers such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding \$1,000 or be imprisoned not more than six months, or both.

No bill, memorandum, agreement, or other evidence of such sale, or agreement of sale, or agreement to sell, in case of cash sales of products or merchandise for immediate or prompt delivery which in good faith are actually intended to be delivered shall be subject to this tax.

This subdivision shall not affect but shall be in addition to the provisions of the "United States cotton futures Act," approved August 11, 1916, as amended, and "The Future Trading Act," approved August 24, 1921.

For "United States Cotton Futures Act," mentioned in the text, see 1918 Supp. 359.

For "The Future Trading Act," mentioned in the text, see *supra*, p. 5.

5. [*Drafts, checks and notes.*] Drafts or checks (payable otherwise than at sight or on demand) upon their acceptance or delivery within the United States whichever is prior, promissory notes, except bank notes issued for circulation, and for each renewal of the same, for a sum not exceeding \$100, 2 cents; and for each additional \$100, or fractional part thereof, 2 cents.

This subdivision shall not apply to a promissory note secured by the pledge of bonds or obligations of the United States issued after April 24, 1917, or

secured by the pledge of a promissory note which itself is secured by the pledge of such bonds or obligations: *Provided*, That in either case the par value of such bonds or obligations shall be not less than the amount of such note.

6. *Conveyances*: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds \$100 and does not exceed \$500, 50 cents; and for each additional \$500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt.

7. *Entry of any goods, wares, or merchandise* at any customhouse, either for consumption or warehousing, not exceeding \$100 in value, 25 cents; exceeding \$100 and not exceeding \$500 in value, 50 cents; exceeding \$500 in value, \$1.

8. *Entry for the withdrawal of any goods or merchandise* from customs bonded warehouse, 50 cents.

9. *Passage ticket*, one way or round trip, for each passenger, sold or issued in the United States for passage by any vessel to a port or place not in the United States, Canada, or Mexico, if costing not exceeding \$30, \$1; costing more than \$30 and not exceeding \$60, \$3; costing more than \$60, \$5. This subdivision shall not apply to passage tickets costing \$10 or less.

10. *Proxy* for voting at any election for officers, or meeting for the transaction of business, of any corporation, except religious, educational, charitable, fraternal, or literary societies, or public cemeteries, 10 cents.

11. *Power of attorney* granting authority to do or perform some act for or in behalf of the grantor, which authority is not otherwise vested in the grantee, 25 cents. This subdivision shall not apply to any papers necessary to be used for the collection of claims from the United States or from any State for pensions, back pay, bounty, or for property lost in the military or naval service, nor to powers of attorney required in bankruptcy cases nor to powers of attorney contained in the application of those who become members of or policyholders in mutual insurance companies doing business on the interinsurance or reciprocal indemnity plan through an attorney in fact.

12. *Playing cards*: Upon every pack of playing cards containing not more than fifty-four cards, manufactured or imported, and sold, or removed for consumption or sale, a tax of 8 cents per pack.

13. [*Insurance policies.*] On each policy of insurance, or certificate, binder, covering note, memorandum, cablegram, letter, or other instrument by whatever name called whereby insurance is made or renewed upon property within the United States (including rents and profits) against peril by sea or on inland waters or in transit on land (including transshipments and storage at termini or way points) or by fire, lightning, tornado, wind-storm, bombardment, invasion, insurrection or riot, issued to or for or in the name of a domestic corporation or partnership or an individual resident of the United States by any foreign corporation or partnership or any individual not a resident of the United States, when such policy or other instrument is not signed or countersigned by an officer or agent of the insurer in a State, Territory, or District of the United States within which such insurer is authorized to do business, a tax of 3 cents on each

dollar, or fractional part thereof of the premium charged: *Provided*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision.

Any person to or for whom or in whose name any such policy or other instrument is issued, or any solicitor or broker acting for or on behalf of such person in the procurement of any such policy or other instrument, shall affix the proper stamps to such policy or other instrument, and for failure to affix such stamps with intent to evade the tax shall, in addition to other penalties provided therefor, pay a fine of double the amount of the tax.

TITLE XII.—TAX ON EMPLOYMENT OF CHILD LABOR.

SEC. 1200. [**Kind of employment affected by title — hours of employment — amount of tax — net profits.**] That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law (but in lieu of the tax imposed by section 1200 of the Revenue Act of 1918), an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.

For sec. 1200 of the Revenue Act of 1918, see 1919 Supp. 179.

SEC. 1201. [**Computation of net profits.**] That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such products manufactured within the United States the following items:

- (a) The cost of raw materials entering into the production;
- (b) Running expenses, including rentals, cost of repairs, and maintenance, heat, power, insurance, management, and a reasonable allowance for salaries or other compensations for personal services actually rendered, and for depreciation;
- (c) Interest paid within the taxable year on debts or loans contracted to meet the needs of the business, and the proceeds of which have been actually used to meet such needs;
- (d) Taxes of all kinds paid during the taxable year with respect to the business or property relating to the production; and
- (e) Losses actually sustained within the taxable year in connection with the business of producing such products, including losses from fire, flood, storm, or other casualties, and not compensated for by insurance or otherwise.

SEC. 1202. [Sale of products at less than fair market price — collusion.] That if any such person during any taxable year or part thereof, whether under any agreement, arrangement, or understanding or otherwise, sells or disposes of any product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment at less than the fair market price obtainable therefor either (a) in such manner as directly or indirectly to benefit such person or any person directly or indirectly interested in the business of such person; or (b) with intent to cause such benefit; the gross amount received or accrued for such year or part thereof from the sale or disposition of such product shall be taken to be the amount which would have been received or accrued from the sale or disposition of such product if sold at the fair market price.

SEC. 1203. [Good faith as relieving employer from tax — employment certificate — mistake as to age.] (a) That no person subject to the provisions of this title shall be liable for the tax herein imposed if the only employment or permission to work which but for this section would subject him to the tax has been of a child as to whom such person has in good faith procured at the time of employing such child or permitting him to work, and has since in good faith relied upon and kept on file a certificate, issued in such form, under such conditions and by such persons as may be prescribed by a board consisting of the Secretary, the Commissioner, and the Secretary of Labor, showing the child to be of such age as not to subject such person to the tax imposed by this title. Any person who knowingly makes a false statement or presents false evidence in or in relation to any such certificate or application therefor shall be punished by a fine of not less than \$100, nor more than \$1,000, or by imprisonment for not more than three months, or by both such fine and imprisonment, in the discretion of the court.

In any State designated by such board an employment certificate or other similar paper as to the age of the child, issued under the laws of that State, and not inconsistent with the provisions of this title, shall have the same force and effect as a certificate herein provided for.

(b) The tax imposed by this title shall not be imposed in the case of any person who proves to the satisfaction of the Secretary that the only employment or permission to work which but for this section would subject him to the tax, has been of a child employed or permitted to work under a mistake of fact as to the age of such child, and without intention to evade the tax.

SEC. 1204. [Returns.] That on or before the first day of the third month following the close of each taxable year, a true and accurate return under oath shall be made by each person subject to the provisions of this title to the collector for the district in which such person has his principal office or place of business, in such form as the Commissioner, with the approval of the Secretary, shall prescribe, setting forth specifically the gross amount of income received or accrued during such year from the sale or disposition of the product of any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment, in which children have been employed subjecting him to the tax imposed by this title, and from the total thereof deducting the aggregate items of allowance authorized by this title, and such other particulars as to the gross receipts and items of allowance as the Commissioner, with the approval of the Secretary, may require.

SEC. 1205. [Assessment and collection of tax.] That all such returns shall be transmitted forthwith by the collector to the Commissioner, who shall, as soon as practicable, assess the tax found due and notify the person making such return of the amount of tax for which such person is liable, and such person shall pay the tax to the collector on or before thirty days from the date of such notice.

SEC. 1206. [Inspection of mines, factories, etc.—penalty for obstructing inspection.] That for the purposes of this Act the Commissioner, or any person duly authorized by him, shall have authority to enter and inspect at any time any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment. The Secretary of Labor, or any person duly authorized by him, shall, for the purpose of complying with a request of the Commissioner to make such an inspection, have like authority, and shall make report to the Commissioner of inspections made under such authority in such form as may be prescribed by the Commissioner with the approval of the Secretary of the Treasury.

Any person who refuses or obstructs entry or inspection authorized by this section shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or both.

SEC. 1207. [“Taxable year” — meaning.] That as used in this title the term “taxable year” shall have the same meaning as provided for the purposes of income tax in section 200.

TITLE XIII.—GENERAL ADMINISTRATIVE PROVISIONS.

SEC. 1300. Laws made applicable. That all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act, and every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

SEC. 1301. Method of collecting tax. That whether or not the method of collecting any tax imposed by Titles V, VI, VII, VIII, IX, or X of this Act is specifically provided therein, any such tax may, under regulations prescribed by the Commissioner with the approval of the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax. All administrative and penalty provisions of Title XI, in so far as applicable, shall apply to the collection of any tax which the Commissioner determines or prescribes shall be collected in such manner.

SEC. 1302. Penalties. (a) That any person required under Titles V, VI, VII, VIII, IX, X, or XII, to pay, or to collect, account for and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment, or collection of any such tax, who fails to pay, collect, or truly account for and pay over any such tax, make any such return or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than \$1,000.

(b) Any person who willfully refuses to pay, collect, or truly account for and pay over any such tax, make such return or supply such information at the time or times required by law or regulation, or who willfully attempts in any manner to evade such tax, shall be guilty of a misdemeanor and in addition to other penalties provided by law shall be fined not more than \$10 000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person who willfully refuses to pay, collect, or truly account for and pay over any such tax shall in addition to other penalties provided by law be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected: *Provided, however,* That no penalty shall be assessed under this subdivision for any offense for which a penalty may be assessed under authority of section 3176 of the Revised Statutes, as amended, or for any offense for which a penalty has been recovered under section 3256 of the Revised Statutes.

(d) The term " person " as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

For R. S. sec. 3176, mentioned in the text, as amended, see 1918 Supp. 280.

For R. S. sec. 3256, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 22.

SEC. 1303. Rules and regulations. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

The Commissioner, with such approval may by regulation provide that any return required by Titles V, VI, VII, VIII, IX, or X to be under oath may, if the amount of the tax covered thereby is not in excess of \$10, be signed or acknowledged before two witnesses instead of under oath.

SEC. 1304. Overpayments and overcollections. That in the case of any overpayment or overcollection of any tax imposed by section 602 or by Title V, Title VIII, or Title IX, the person making such overpayment or overcollection may take credit therefor against taxes due upon any monthly return, and shall make refund of any excessive amount collected by him upon proper application by the person entitled thereto.

SEC. 1305. Articles exported. That under such rules and regulations as the Commissioner with the approval of the Secretary may prescribe, the taxes imposed under the provisions of Titles VI, VII or IX shall not apply in respect to articles sold or leased for export and in due course so exported. Under such rules and regulations the amount of any internal-revenue tax erroneously or illegally collected in respect to exported articles may be refunded to the exporter of the article, instead of to the manufacturer, if the manufacturer waives any claim for the amount so to be refunded.

SEC. 1306. Fractional parts of a cent. That in the payment of any tax under this Act not payable by stamp a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

SEC. 1307. Returns. That whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax.

SEC. 1308. Examination of books and witnesses. That the Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

SEC. 1309. Unnecessary examinations. That no taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

SEC. 1310. Jurisdiction of courts. (a) That if any person is summoned under this Act to appear, to testify, or to produce books, papers or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(b) The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions.

(c) Paragraph Twentieth of section 24 of the Judicial Code is amended by adding at the end thereof the following new paragraph:

"Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds \$10,000, if the collector of internal-revenue by whom such tax, penalty, or sum was collected is dead at the time such suit or proceeding is commenced."

For Jud. Code, sec. 24, par. 20, see 4 Fed. Stat. Ann. (2d ed.) 841.

AMENDMENTS TO REVISED STATUTES.

SEC. 1311. [R. S. secs. 3164, 3165, 3167, 3172, 3173, and 3176 amended.] That sections 3164, 3165, 3167, 3172, 3173, and 3176 of the Revised Statutes, as amended, are reenacted, without change, as follows:

[Duty of collectors to report violations of law to district attorney.]

“ SEC. 3164. It shall be the duty of every collector of internal revenue having knowledge of any willful violation of any law of the United States relating to the revenue, within thirty days after coming into possession of such knowledge, to file with the district attorney of the district in which any fine, penalty, or forfeiture may be incurred, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, setting forth the provisions of law believed to be so violated on which reliance may be had for condemnation or conviction.

For R. S. sec. 3164 as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 989.

[Revenue officers who may administer oaths and take evidence.] “ SEC. 3165.

Every collector, deputy collector, internal-revenue agent, and internal-revenue officer assigned to duty under an internal-revenue agent, is authorized to administer oaths and to take evidence touching any part of the administration of the internal-revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken.

For R. S. sec. 3165, as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 989.

[Disclosure by revenue officers of operations, etc., prohibited — penalty.]

“ SEC. 3167. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding \$1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

For R. S. sec. 3167, as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 990.

[Canvass of districts for persons liable to, and objects subject to, taxation.]

“ SEC. 3172. Every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal-revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects.

For R. S. sec. 3172, as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 1002.

[Annual returns of persons liable to tax.] “ SEC. 3173. It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any

duty, special tax, or other tax imposed by law, when not otherwise provided for, (1) in case of a special tax, on or before the thirty-first day of July in each year, and (2) in other cases before the day on which the taxes accrue, to make a list or return, verified by oath, to the collector or a deputy collector of the district where located, of the articles or objects, including the quantity of goods, wares, and merchandise, made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, article [sic] or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose the particulars of any and all the property, goods, wares, and merchandise, articles, and objects liable to pay any duty or tax, or any business or occupation liable to pay any tax as aforesaid, then, and in that case, it shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further*, That in case no annual list or return has been rendered by such person to the collector or deputy collector as required by law, and the person shall be absent from his or her residence or place of business at the time the collector or a deputy collector shall call for the annual list or return, it shall be the duty of such collector or deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post office, a note or memorandum addressed to such person, requiring him or her to render to such collector or deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath. And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or refuses to allow any regularly authorized Government officer to examine the books of such person, firm, or corporation, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account containing entries relating to the business of such person or any other person he may deem proper, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned: *Provided*, That 'person,' as used in this section, shall be construed to include any corporation, joint-stock company

or association, or insurance company when such construction is necessary to carry out its provisions.

For R. S. sec. 3173, as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 1002.

[On failure, return to be made by officer — penalty for failure to make return.] “SEC. 3176. If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be *prima facie* good and sufficient for all legal purposes.

“ If the failure to file a return or list is due to sickness or absence, the collector may allow such further time, not exceeding thirty days, for making and filing the return or list as he deems proper.

“ The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner of Internal Revenue shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner of Internal Revenue shall add to the tax 50 per centum of its amount.

“ The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax.”

For R. S. sec. 3176, as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 1006.

SEC. 1312. Final determinations and assessments. That if after a determination and assessment in any case the taxpayer has without protest paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

SEC. 1313. Administrative review. That in the absence of fraud or mistake in mathematical calculation, the findings of facts in and the decision of the

Commissioner upon (or in case the Secretary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States.

SEC. 1314. Retroactive regulations. That in case a regulation or Treasury decision relating to the internal-revenue laws made by the Commissioner or the Secretary, or by the Commissioner with the approval of the Secretary, is reversed by a subsequent regulation or Treasury decision, and such reversal is not immediately occasioned or required by a decision of a court of competent jurisdiction, such subsequent regulation or Treasury decision may, in the discretion of the Commissioner, with the approval of the Secretary, be applied without retroactive effect.

REFUNDS.

SEC. 1315. [Refundment of taxes, penalties, etc.— R. S. sec. 3220 re-enacted.] That section 3220 of the Revised Statutes, as amended, is reenacted without change, as follows:

“ **SEC. 3220.** The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section.”

For R. S. sec. 3220, as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 1028.

SEC. 1316. [Claims for refundment — limitation — R. S. sec. 3228 amended.] That section 3228 of the Revised Statutes is amended to read as follows:

“ **SEC. 3228.** All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum.”

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

For R. S. sec. 3228, as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 1037.

SEC. 1317. [Permanent indefinite appropriations — refunding taxes illegally collected — R. S. sec. 3689 repealed in part.] That the paragraph of section 3689 of the Revised Statutes, as amended, reading as follows: “Refunding taxes illegally collected (internal revenue): To refund and pay back duties

erroneously or illegally assessed or collected under the internal revenue laws," is repealed from and after June 30, 1920; and the Secretary of the Treasury shall submit for the fiscal year 1921, and annually thereafter, an estimate of appropriations to refund and pay back duties or taxes erroneously or illegally assessed or collected under the internal-revenue laws, and to pay judgments, including interest and costs, rendered for taxes or penalties erroneously or illegally assessed or collected under the internal-revenue laws.

For R. S. sec. 3689, partly repealed by this paragraph, see 3 Fed. Stat. Ann. (2d ed.) 141.

LIMITATIONS UPON SUITS AND PROSECUTIONS.

SEC. 1318. [Suits for recovery of taxes wrongfully collected — R. S. sec. 3226 amended.] That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

This section shall not affect any suit or proceeding instituted prior to the passage of this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress.

For R. S. sec. 3226 as it formerly read, see 3 Fed. Stat. Ann. (2d ed.) 1034.

SEC. 1319. [R. S. sec. 3227 repealed.] That section 3227 of the Revised Statutes is hereby repealed but such repeal shall not affect any suit or proceeding instituted prior to the passage of this Act.

For R. S. sec. 3227, here repealed, see 3 Fed. Stat. Ann. (2d ed.) 1037.

SEC. 1320. [Suits for collection of any internal revenue tax.] That no suit or proceeding for the collection of any internal revenue tax shall be begun after the expiration of five years from the time such tax was due, except in the case of fraud with intent to evade tax, or willful attempt in any manner to defeat or evade tax. This section shall not apply to suits or proceedings for the collection of taxes under section 250 of this Act, nor to suits or proceedings begun at the time of the passage of this Act.

SEC. 1321. [Prosecution for offenses against internal revenue laws — Act of July 5, 1884, amended.] (a) That the Act entitled "An Act to limit the time within which prosecutions may be instituted against persons charged with violating internal-revenue laws," approved July 5, 1884, is amended to read as follows:

"That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal-revenue laws of the United States unless the indictment is found or the information instituted within three years next after

the commission of the offense: *Provided*, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further*, That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further*, That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further*, That this Act shall not apply to offenses committed by officers of the United States."

(b) Any prosecution or proceeding under an indictment found or information instituted prior to the passage of this Act shall not be affected in any manner by this amendment, but such prosecution or proceeding shall be subject to the limitations imposed by law prior to the passage of this Act.

For Act of July 5, 1884, as it formerly read, see 4 Fed. Stat. Ann. (2d ed.) 330.

ASSESSMENTS.

SEC. 1322. [Time of assessments — effect of fraud, etc.] That all internal revenue taxes, except as provided in section 250 of this Act, shall, notwithstanding the provisions of section 3182 of the Revised Statutes or any other provision of law, be assessed within four years after such taxes became due, but in the case of fraud with intent to evade tax or willful attempt in any manner to defeat or evade tax, such tax may be assessed at any time.

For R. S. sec. 3182, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 1010.

FRAUDULENT RETURNS.

SEC. 1323. [Recovery of taxes collected under second assessment based on fraudulent returns — R. S. sec. 3225 re-enacted.] That section 3225 of the Revised Statutes of the United States, as amended, is reenacted without change as follows:

"SEC. 3225. When a second assessment is made in case of any list, statement, or return, which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, or recovered by any suit, unless it is proved that such list, statement, or return was not willfully false or fraudulent and did not contain any willful understatement or undervaluation."

For R. S. sec. 3225, as it formerly read, see 1918 Supp. 279.

SEC. 1324. Interest on refunds and judgments. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund

or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

(b) Section 177 of the Judicial Code is amended to read as follows:

"SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws."

For Jud. Code, sec. 177, as it formerly read, see 5 Fed. Stat. Ann. (2d ed.) 680.

SEC. 1325. Payments of taxes by check or United States securities. That collectors may receive, at par with an adjustment for accrued interest, notes or certificates of indebtedness issued by the United States and uncertified checks in payment of income, war profits and excess-profits taxes and any other taxes payable other than by stamp, during such time and under such regulations as the Commissioner, with the approval of the Secretary, shall prescribe; but if a check so received is not paid by the bank on which it is drawn the person by whom such check has been tendered shall remain liable for the payment of the tax and for all legal penalties and additions the same as if such check had not been tendered.

SEC. 1326. Frauds on purchasers. That whoever in connection with the sale or lease, or offer for sale or lease, of any article, or for the purpose of making such sale or lease, makes any statement, written or oral, (1) intended or calculated to lead any person to believe that any part of the price at which such article is sold or leased, or offered for sale or lease, consists of a tax imposed under the authority of the United States, or (2) ascribing a particular part of such price to a tax imposed under the authority of the United States, knowing that such statement is false or that the tax is not so great as the portion of such price ascribed to such tax, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or by imprisonment not exceeding one year, or both.

SEC. 1327. Tax simplification board. (a) That there is hereby established in the Department of the Treasury a board to be known as the "Tax Simplification Board" (hereinafter in this section called the "Board"), to be composed as follows:

(1) Three members who shall represent the public, to be appointed by the President; and

(2) Three members who shall represent the Bureau of Internal Revenue and shall be officers or employees of the United States serving in such Bureau, to be appointed by the Secretary.

(b) Any vacancy in the Board shall be filled in the same manner as the original appointment. The members representing the public shall serve without compensation except reimbursement for traveling, subsistence, and other necessary expenses incurred in the performance of the duties vested in them by this

section. The members representing the Bureau of Internal Revenue shall serve without compensation in addition to that received for their service in such Bureau.

(c) The Secretary shall furnish the Board with such clerical assistance, quarters and stationery, furniture, office equipment, and other supplies as may be necessary for the performance of the duties vested in them by this section.

(d) It shall be the duty of the Board to investigate the procedure of and the forms used by the Bureau in the administration of the internal revenue laws, and to make recommendations in respect to the simplification thereof. The Board shall make a report to the Congress on or before the first Monday of December in each year.

(e) The expenditures of the Board shall be paid upon vouchers approved by the Board and signed by the chairman thereof. For the expenditures of the Board for the fiscal year ending June 30, 1922, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$10,000.

(f) The Board shall cease to exist on December 31, 1924.

SEC. 1328. Consolidation of Liberty bond tax exemptions. That the various Acts authorizing the issues of Liberty bonds are amended and supplemented as follows:

(a) On and after January 1, 1921, 4 per centum and $4\frac{1}{4}$ per centum Liberty bonds shall be exempt from graduated additional income taxes, commonly known as surtaxes, and excess-profits and war-profits taxes, now or hereafter imposed by the United States upon the income or profits of individuals, partnerships, corporations, or associations, in respect to the interest on aggregate principal amounts thereof as follows:

Until the expiration of two years after the date of the termination of the war between the United States and the German Government, as fixed by proclamation of the President, on \$125,000 aggregate principal amount; and for three years more on \$50,000 aggregate principal amount.

(b) The exemptions provided in subdivision (a) shall be in addition to the exemptions provided in section 7 of the Second Liberty Bond Act, and in addition to the exemption provided in subdivision (3) of section 1 of the Supplement to the Second Liberty Bond Act in respect to bonds issued upon conversion of $3\frac{1}{2}$ per centum bonds, but shall be in lieu of the exemptions provided and free from the conditions and limitations imposed in subdivisions (1) and (2) of section 1 of the Supplement to Second Liberty Bond Act and in section 2 of the Victory Liberty Loan Act.

For the various Liberty Bond Acts, see 1918 Supp. 672; 1919 Supp. 309.

SEC. 1329. Deposit of United States bonds or notes in lieu of surety. (See SURETY AND SURETYSHIP.)

SEC. 1330. Lost stamps for tobacco, cigars, and so forth — R. S. sec. 3315 re-enacted. That section 3315 of the Revised Statutes, as amended, is re-enacted without change, as follows:

“ SEC. 3315. The Commissioner of Internal Revenue may, under regulations prescribed by him with the approval of the Secretary of the Treasury, issue

stamps for restamping packages of distilled spirits, tobacco, cigars, snuff, cigarettes, fermented liquors, and wines which have been duly stamped but from which the stamps have been lost or destroyed by unavoidable accident."

For R. S. sec. 3315, as it formerly read, see 4 Fed. Stat. Ann. (2d ed.) 70.

SEC. 1331. Consolidated returns for year 1917. (a) That Title II of the Revenue Act of 1917 shall be construed to impose the taxes therein mentioned upon the basis of consolidated returns of net income and invested capital in the case of domestic corporations and domestic partnerships that were affiliated during the calendar year 1917.

(b) For the purpose of this section a corporation or partnership was affiliated with one or more corporations or partnerships (1) when such corporation or partnership owned directly or controlled through closely affiliated interests or by a nominee or nominees all or substantially all the stock of the other or others, or (2) when substantially all the stock of two or more corporations or the business of two or more partnerships was owned by the same interests: *Provided*, That such corporations or partnerships were engaged in the same or a closely related business, or one corporation or partnership bought from or sold to another corporation or partnership products or services at prices above or below the current market, thus effecting an artificial distribution of profits, or one corporation or partnership in any way so arranged its financial relationships with another corporation or partnership as to assign to it a disproportionate share of net income or invested capital. For the purposes of this section, public service corporations which (1) were operated independently, (2) were not physically connected or merged and (3) did not receive special permission to make a consolidated return, shall not be construed to have been affiliated; but a railroad or other public utility which was owned by an industrial corporation and was operated as a plant facility or as an integral part of a group organization of affiliated corporations which were required to file a consolidated return, shall be construed to have been affiliated.

(c) The provisions of this section are declaratory of the provisions of Title II of the Revenue Act of 1917.

For Revenue Act of 1917, see 1918 Supp. 270 et seq.

SEC. 1332. Alternative tax on personal service corporations. (a) That if either subdivision (e) of section 218 of the Revenue Act of 1918 or subdivision (d) of section 218 of this Act is by final adjudication declared invalid, there shall, in addition to all other taxes, be levied, collected, and paid on the net income (as defined in section 232) received during the calendar years 1918, 1919, 1920, and 1921, by every personal service corporation (as defined in section 200) included within the provisions of such subdivisions, a tax equal to the taxes imposed by Titles II and III of the Revenue Act of 1918 and, in the case of income received during the calendar year 1921, by Titles II and III of this Act.

(b) In such event every such personal service corporation shall, on or before the fifteenth day of the sixth month following the date of entry of decree upon such final adjudication, make a return of any income received during each of the calendar years 1918, 1919, 1920, and 1921 in the manner prescribed by the Revenue Act of 1918 (or in the manner prescribed by this Act, in the case of income received during the calendar year 1921). Such return shall be made

and the net income shall be computed on the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in the manner provided for other corporations under the Revenue Act of 1918 and this Act.

(c) If either subdivision (e) of section 218 of the Revenue Act of 1918, or subdivision (d) of section 218 of this Act is so declared invalid, claims for credit or refund of taxes paid under both such sections shall be allowed, if made within the time provided in subdivision (f) of this section.

(d) In case the claims for credit or refund, filed within six months from such date of entry of decree, represents less than 30 per centum of the outstanding stock or shares in the corporation, the amount of taxes imposed by this section upon such corporation shall be reduced to that proportion thereof which the number of stock or shares owned by the shareholders or members making such claims bears to the total number of stock or shares outstanding.

(e) The tax imposed by this section shall be assessed, collected, and paid upon the same basis, in the same manner, and subject to the same provisions of law, including penalties, as the taxes imposed by sections 230 and 301 of the Revenue Act of 1918 (or by sections 230 and 301 of this Act, in the case of income received during the calendar year 1921), but no interest or penalties shall be due or payable thereon for any period prior to the date upon which the return is by this section required to be made and the first installment paid. The amount of tax paid by any shareholder or member of a personal service corporation pursuant to the provisions of subdivision (e) of section 218 of the Revenue Act of 1918 or subdivision (d) of section 218 of this Act shall be credited against the tax due from such corporation under this section upon the joint written application of such corporation and such shareholder or member or his representatives, heirs, or assigns, if such application is filed with the Commissioner within six months from such date of entry of decree.

(f) Notwithstanding any other provision of law, no claim for a credit or refund of taxes paid under subdivision (e) of section 218 of the Revenue Act of 1918 or subdivision (d) of section 218 of this Act, may be filed after the expiration of six months from such date of entry of decree: *Provided, however,* That a personal service corporation of which no shareholder or member has filed such claim within such period of six months shall not be subject to the tax imposed by this section.

For Revenue Act of 1918, see 1919 Supp. 90 et seq.

TITLE XIV.—GENERAL PROVISIONS.

SEC. 1400. Repeals. (a) That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

Title II (called "Income Tax," as of January 1, 1921;

Title III (called "War-Profits and Excess-Profits Tax") as of January 1, 1921;

Title IV (called "Estate Tax") on the passage of this Act;

Title V (called "Tax on Transportation and Other Facilities, and on Insurance");

Sections 628, 629, and 630 of Title VI (being the taxes on soft drinks, ice cream, and similar articles);

Title VII (called "Tax on Cigars, Tobacco and Manufactures Thereof");
Title VIII (called "Tax on Admissions and Dues");
Title IX (called "Excise Taxes");
Title X (called "Special Taxes");
Title XI (called "Stamp Taxes");
Title XII (called "Tax on Employment of Child Labor") as of January 1, 1921; and

Sections 1314, 1315, 1316, 1317, 1319, and 1320 of Title XIII (being certain administrative provisions) on the passage of this Act.

For Revenue Act of 1918, see 1919 Supp. 90 et. seq.

(b) The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act. The unexpended balance of any appropriation heretofore made and now available for the administration of any such part of the Revenue Act of 1918 shall be available for the administration of this Act or the corresponding provision thereof.

SEC. 1401. Increase in note authorization. (See PUBLIC DEBT.)

SEC. 1402. Increase in Treasury savings certificate limit. (See PUBLIC DEBT.)

SEC. 1403. Saving clause in event of unconstitutionality. That if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SEC. 1404. Effective date of Act. That except as otherwise provided, this Act shall take effect upon its passage.

INTERNATIONAL LAW

See DIPLOMATIC AND CONSULAR OFFICERS; FOREIGN RELATIONS

INTERSTATE COMMERCE

Act of Feb. 26, 1921, 225.

"Transportation Act"—Certifications under Secs. 204 and 209—Ascertainment of Amounts Payable—New Section Added, 225.

Res. of Feb. 27, 1921, 226.

"Transportation Act"—Exemption of New York State Barge Canal from Provisions of Sec. 201, 226.

Act of March 4, 1921 (Sundry Civil Appropriation Act), 227.

Sec. 1. "Transportation Act"—Amendment of Sec. 201 (c)—Terminal Facilities—Construction by Secretary of War, 227.

Act of June 10, 1921, 227.

"Transportation Act"—Amendment of Sec. 407—Consolidation of Telephone Companies, 227.

CROSS-REFERENCES

See also *PENAL LAWS; STOCKYARDS*

An Act To amend the Transportation Act, 1920.

[Act of Feb. 26, 1921.]

[“Transportation Act”—certifications under secs. 204 and 209—ascertainment of amounts payable—new section added.] That the Transportation Act, 1920, is hereby amended by adding after section 211 a new section to read as follows:

“SEC. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g)

of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

“(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be *prima facie* but not conclusive evidence of their correctness in amount in final settlement.”

The “Transportation Act” here amended is set out in 1920 Supp. Fed. Stat. Ann. 72.

Mandamus to compel secretary of treasury to issue warrant.—In *U. S. v. Mellon*, (App. Cas. D. C. 1921) 273 Fed. 762, a judgment of dismissal of a petition for mandamus to compel the secretary of the treasury to issue

a warrant on the certificate of the Interstate Commerce Commission was affirmed on the ground that this section directed the secretary of the treasury to do in effect what the action was instituted to compel him to do.

Joint Resolution To exempt the New York State Barge Canal from the provisions of section 201 of the Transportation Act, 1920, and for other purposes.

[*Res. of Feb. 27, 1921, No. 62.*]

[“Transportation Act”—exemption of New York state barge canal from provisions of sec. 201.] That at the end of thirty days after the passage of this resolution the authority conferred upon the Secretary of War under section 201 of the Transportation Act, 1920, to operate for commercial purposes boats, barges, tugs, or other transportation facilities upon the New York State Barge Canal shall cease, and thereafter there shall be no such operation by the Secretary of War or any other agency of the United States. The Secretary of War shall as soon as is practicable, dispose of boats, barges, tugs, and other transportation facilities purchased or constructed for use upon the said canal, and, pending final disposition, the Secretary of War may lease the same: *Provided*; That all the money obtained from the sale or lease of these boats, barges, and tugs shall be available until expended by the inland and coastwise waterways service of the War Department in the inauguration and development of other inland, canal, and coastwise waterways in accordance with the expressed desire of Congress in section 500 of the Transportation Act, 1920: *Provided further*, That not to exceed 25 per centum of the boats, barges, and tugs built or purchased for the United States, herein authorized to be sold, may be retained by the United States for the operation of other inland, canal, or coastwise routes of the United States until such equipment can be replaced by other equipment to be purchased from funds received from the sale prescribed above.

For section 201 of “Transportation Act” affected by provisions of the text, see 1920 Supp. Fed. Stat. Ann. (2d ed.) 73.

[SEC. 1.] * * * [“Transportation Act” — amendment of sec. 201 (c) — terminal facilities — construction by Secretary of War.] That section 201 (c), Transportation Act, 1920, be amended by striking out the words “whose constitution prohibits the ownership of such terminal facilities by other than the State or a political subdivision thereof,” and insert in lieu thereof the following: “municipality or transportation company; or to expend such moneys for necessary terminal improvements and facilities upon property leased from States, cities, or transportation companies under terms approved by the Interstate Commerce Commission, or otherwise, in accordance with any order rendered by said commission under subheading (a), paragraph 13, section 6, Interstate Commerce Act.”

This is from the Sundry Civil Appropriation Act of March 4, 1921.

For section 201 (c) of “Transportation Act” here amended, see 1920 Supp. Fed. Stat. Ann. (2d ed.) 74.

An Act To amend section 407 of the Transportation Act of 1920.

[Act of June 10, 1921.]

[Transportation Act — amendment of sec. 407 — consolidation of telephone companies.] That section 407 of the Transportation Act of 1920 be, and it is hereby, amended by adding thereto a new paragraph designated as paragraph (9), as follows:

“(9) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the commission shall fix a time and place for a public hearing upon such application and shall thereupon give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State public service commission or other regulatory body, if any, having jurisdiction over telephone companies, and to such other persons as it may deem advisable. After such public hearing, if the commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this paragraph contained shall be construed as in any wise limiting or restricting the powers of the several States, as now existing to control and regulate telephone companies.”

For sec. 407 of the Transportation Act, here amended, see 1920 Supp. 102.

INTOXICATING LIQUORS

Act of Nov. 23, 1921 (Act Supplemental to National Prohibition Act), 228.

Sec. 1. Terms in Act Defined, 228.

2. Prescriptions for Medicinal Purposes of Spirituous and Vinous Liquors — Importation, Reimportation and Manufacture, 228.

Sec. 3. Territory Affected by National Prohibition Act — Hawaii — Virgin Islands — Courts, 229.

4. Regulations — Making by Commissioner — Penalty for Violations, 229.

5. National Prohibition Act as Affecting Laws in Existence at Time of Enactment — Loss of Distilled Spirits as Affecting Payment of Tax Thereon, 229.

6. Immunity of Private Dwelling from Search Without Warrant — Impersonating United States Officer or Employee, 230.

CROSS-REFERENCE

See also *INTERNAL REVENUE*

An Act Supplemental to the National Prohibition Act.*

[Act of Nov. 23, 1921.]

[SEC. 1.] [Terms in Act defined.] That the words "person," "commissioner," "application," "permit," "regulation," and "liquor," and the phrase "intoxicating liquor," when used in this Act, shall have the same meaning as they have in Title II of the National Prohibition Act.

SEC. 2. [Prescriptions for medicinal purposes of spirituous and vinous liquors — importations, reimportation and manufacture.] That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 4, Title II, of the National Prohibition Act.

If the commissioner shall find after hearing, upon notice as required in section 5 of Title II of the National Prohibition Act, that any article enumerated in subdivisions b, c, d, or e of section 4 of Title II of said National Prohibition Act is being used as a beverage, or for intoxicating beverage purposes, he may require a change of formula of such article and in the event that such change is not made within a time to be named by the commissioner he may cancel the permit for the manufacture of such article unless it is made clearly to appear to the commissioner that such use can only occur in rare or exceptional instances, but such action of the commissioner may by appropriate proceedings in a court of equity be reviewed, as provided for in section 5, Title II, of said National Prohibition Act: *Provided*, That no change of formula shall be required and

* For National Prohibition Act, see 1919 Supp. Fed. Stat. Ann. 197.

no permit to manufacture any article under subdivision (E), section 4, Title II of the National Prohibition Act shall be revoked unless the sale or use of such article is substantially increased in the community by reason of its use as a beverage or for intoxicating beverage purposes.

No spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor, save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses: *Provided*, That no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such nonbeverage use produced in the United States is not sufficient to meet such nonbeverage needs: *Provided further*, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act: *And provided further*, That the commissioner may authorize the return to the United States under such regulations and conditions as he may prescribe any distilled spirits of American production exported free of tax and reimported in original packages in which exported and consigned for redeposit in the distillery bonded warehouse from which originally removed.

SEC. 3. [Territory affected by National Prohibition Act — Hawaii — Virgin Islands — courts.] That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands.

SEC. 4. [Regulations — making by commissioner — penalty for violations.] That regulations may be made by the commissioner to carry into effect the provisions of this Act. Any person who violates any of the provisions of this Act shall be subject to the penalties provided for in the National Prohibition Act.

SEC. 5. [National Prohibition Act as affecting laws in existence at time of enactment — loss of distilled spirits as affecting payment of tax thereon.] That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal-revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act, 1920, or if lost by theft from a distillery or other bonded warehouse, and it

shall be made to appear to the commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act.

Sec. 6. [Immunity of private dwelling from search without warrant — impersonating United States officer or employee.] That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than \$1,000, and for a subsequent offense not more than \$1,000 or imprisoned not more than one year, or both such fine and imprisonment.

Whoever not being an officer, agent, or employee of the United States shall falsely represent himself to be such officer, agent, or employee and in such assumed character shall arrest or detain any person, or shall in any manner search the person, buildings, or other property of any person, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000, or imprisoned for not more than one year, or by both such fine and imprisonment.

INVENTIONS

See PATENTS

IRRIGATION

See PUBLIC LANDS; WATERS

JUDGES

See JUDICIAL OFFICERS; JUDICIARY

JUDICIAL OFFICERS

Act of Feb. 11, 1921, 231.

United States District Courts — Clerks — Appointments — Fees and Emoluments — Salaries, 231.

Act of March 2, 1921 (Diplomatic and Consular Appropriation Act), 231.

Sec. 1. United States Court for China — Expenses of Judge and District Attorney During Sessions Away from Shanghai, 231.

Act of March 4, 1921 (Sundry Civil Appropriation Act), 232.

Sec. 1. Marshals and Deputy Marshals — Per Diem in Lieu of Subsistence, 232.

District Attorneys and Assistants — Per Diem in Lieu of Subsistence, 232.

Assistant District Attorneys — Compensation, 232.

Clerks of Courts and Assistants — Salaries and Compensation — District of Columbia — Hawaii — Porto Rico, 232.

Criers and Bailiffs — Attendance — acation, 232.

Act of June 16, 1921 (Deficiency Appropriation Act) 233.

Sec. 1. Foreign Counsel Employed by Attorney-General — Oath of Office, 233.

United States District Courts — Clerks, Deputies and Assistants Serving as United States Commissioners — Compensation, 233.

Clerks, Deputies and Assistants — Gratuities, 233.

An Act To amend section 1 of an Act approved February 26, 1919, entitled "An Act to fix the salaries of the clerks of the United States district courts and to provide for their office expenses, and for other purposes."

[Act of Feb. 11, 1921.]

[United States district courts — clerks — appointments — fees and emoluments — salaries.] That section 1 of the Act approved February 26, 1919, entitled "An Act to fix the salaries of the Clerks of the United States district courts and to provide for their office expenses, and for other purposes," is hereby amended to read as follows:

"Section 1. That on and after the 1st day of July, 1918, all clerks of the United States district courts shall be appointed by the judge for the district, or the senior judge if there be more than one judge in the district, and all fees and emoluments authorized by law to be paid to the clerks of the United States district courts, except the clerks of the district courts of Alaska, shall be charged as heretofore and shall be collected, as far as possible, and paid into the Treasury of the United States in such manner and at such times as herein-after provided; and such clerks shall be paid, in lieu of the fees and emoluments now allowed by law, an annual salary as hereinafter provided: *Provided*, That this section shall not be construed to require or authorize fees to be charged or collected from the United States."

For this section as originally enacted, see 1919 Supp. Fed. Stat. Ann. 224.

[SEC. 1.] * * * [United States Court for China — expenses of judge and district attorney during sessions away from Shanghai.] The judge of the

said court and the district attorney shall, when the sessions of the court are held at other cities than Shanghai, receive in addition to their salaries their necessary actual expenses during such sessions, not to exceed \$8 per day each.

This is from the Diplomatic and Consular Appropriation Act of March 2, 1921.

[SEC. 1.] * * * [Marshals and deputy marshals — per diem in lieu of subsistence.] That marshals and office deputy marshals (except in the District of Alaska) may be granted a per diem of not to exceed \$4 in lieu of subsistence, instead of, but under the conditions prescribed for, the present allowance for actual expenses of subsistence.

This and the four paragraphs which follow are from the Sundry Civil Appropriation Act of March 4, 1921.

* * * [District attorneys and assistants — per diem in lieu of subsistence.] That United States district attorneys and their regular assistants may be granted a per diem of not to exceed \$4 in lieu of subsistence, instead of, but under the conditions prescribed for, the present allowance for actual expenses of subsistence.

See note to preceding paragraph.

* * * [Assistant district attorneys — compensation.] That except as otherwise prescribed by law the compensation of such of the assistant district attorneys authorized by section 8 of the Act approved May 28, 1896, as the Attorney General may deem necessary, may be fixed at not exceeding \$3,000 per annum.

See note to the first paragraph of this section.

For Act of May 28, 1896, section 8, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 622.

* * * [Clerks of courts and assistants — salaries and compensation — District of Columbia — Hawaii — Porto Rico.] That provisions of the Act entitled "An Act to fix the salaries of the clerks of the United States district courts and to provide for their office expenses, and for other purposes," approved February 26, 1919, shall be applicable on and after July 1, 1921, to the clerk of the Supreme Court of the District of Columbia, excepting that said clerk shall be appointed as heretofore by said Court in General Term, and to the clerks of the district courts of the United States for Hawaii and Porto Rico: *Provided further*, That no clerk or deputy clerk or assistant in the office of the clerk of a United States district court shall receive any compensation or emoluments through any office or position to which he may be appointed by the court, other than that received as such clerk, deputy clerk, or assistant, whether from the United States or from private litigants.

See note to the first paragraph of this section.

For Act of Feb. 26, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 224.

* * * [Criers and bailiffs — attendance — vacation.] That all persons employed under section 715 of the Revised Statutes shall be deemed to be in actual attendance when they attend upon the order of the courts: *Provided further*, That no such person shall be employed during vacation.

See note to first paragraph of this section.

For R. S. sec. 715 (Jud. Code, sec. 5), mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 819 note.

[SEC. 1.] * * * **[Foreign counsel employed by Attorney-General — oath of office.]** For payment of foreign counsel employed by the Attorney General in special cases (such counsel shall not be required to take oath of office in accordance with section 366, Revised Statutes of the United States), to be available * * *

This and the two following paragraphs are from the Deficiency Appropriation Act of June 16, 1921.

For R. S. sec. 366, mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 622.

* * * **[United States District Courts — Clerks, deputies and assistants serving as United States Commissioners — compensation.]** That clerks of United States district courts, their deputies and assistants, who are or may be appointed United States commissioners, may receive compensation for both offices in an aggregate amount not exceeding the rate of \$2,000 per annum:

See note to preceding paragraph.

[Clerks, deputies and assistants — gratuities.] That the acceptance of payment for personal services from private litigants shall be deemed a vacation of their appointments as clerks, deputy clerks, or clerical assistants.

See note to first paragraph of the section.

JUDICIARY

Act of Feb. 27, 1921, 234.

District Courts — Connecticut — Terms — Sec. 74 of Jud. Code Amended, 234.

Act of March 4, 1921, 234.

District Courts — New Mexico — Circuit — Officers — Terms — Sec. 13 of Act of June 20, 1910, Amended, 234.

Act of June 25, 1921, 235.

Sec. 1. North Dakota Judicial District — Additional Judge, 235.

2. Retirement, etc., of Senior Judge — Filling Vacancy, 235.

Act of June 25, 1921, 235.

Sec. 1. West Virginia Southern Judicial District — Additional Judge, 235.

2. Retirement, etc., of Senior Judge — Filling Vacancy, 235.

Act of Nov. 23, 1921 ("Revenue Act of 1921"), 236.

Sec. 1310 (c). Jurisdiction of District Courts — Of Suits Against the United States — Sec. 24 of Jud. Code Amended, 236.

1324 (b). Court of Claims — No Interest on Claim — Sec. 177 of Jud. Code Amended, 236.

Res. of Dec. 22 1921 (Act Amending R. S. Sec. 955), 236.

Procedure in General — Death of Parties — Revivor — R. S. Sec. 955 Amended, 236.

CROSS-REFERENCE

See also *AGRICULTURE; JUDICIAL OFFICERS*

An Act To amend section 74 of the Judicial Code, as amended.

[*Act of Feb. 27, 1921.*]

[**District courts — Connecticut — terms — sec. 74 of Jud. Code amended.**] That section 74 of the Judicial Code, as amended, be amended to read as follows:

“**SEC. 74.** The State of Connecticut shall constitute one judicial district, to be known as the District of Connecticut. Terms of the district court shall be held at New Haven on the fourth Tuesdays in February and September, at Hartford on the fourth Tuesday in May and the first Tuesday in December, and at Norwalk on the fourth Tuesday in April: *Provided, however,* That suitable rooms and accommodations shall be furnished for the holdings of said court and for the use of the officers of said court at Norwalk free of expense to the Government of the United States.”

For section 74 of Jud. Code here amended, see 5 Fed. Stat. Ann. (2d ed.) 557.

An Act To amend an Act entitled “ The New Mexico Enabling Act.”

[*Act of March 4, 1921.*]

[**District courts — New Mexico — circuit — officers — terms — sec. 13 of Act of June 20, 1910, amended.**] That section 13 of the Act entitled “An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States,” approved June 20, 1910, is hereby amended to read as follows:

“**SEC. 13.** That the State, when admitted as aforesaid, shall constitute one judicial district, and the district court of said district shall be held at the capital of said State, and the said district shall, for judicial purposes, be attached to the eighth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of said district shall receive a yearly salary the same as other similar judges of the United States, payable as provided for by law, and shall reside in the district to which he is appointed. There shall be appointed a clerk of said court, who shall keep his office at the capital of said State. The regular terms of said court shall be held on the first Monday in March and the first Monday in September of each year. The district court for said district and the judges thereof shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other district court and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the district court of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the Territory of New Mexico.”

An Act Authorizing the appointment of an additional judge for the district of North Dakota.

[Act of June 25, 1921.]

[SEC. 1.] **[North Dakota judicial district — additional judge.]** That the President of the United States, by and with the advice and consent of the Senate, shall appoint an additional judge of the District Court of the United States for the judicial district of the State of North Dakota, who shall possess the same powers, perform the same duties, and receive the same compensation and allowance as the present judge of said district, and the judge so appointed shall be held and treated as the senior judge and shall exercise such powers and perform such duties in that judicial district as may be incident to seniority.

SEC. 2. **[Retirement, etc., of senior judge — filling vacancy.]** That whenever a vacancy shall occur in the office of the district judge for the district of North Dakota, by the retirement, disqualification, or death of the judge senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district.

An Act Providing for the appointment of an additional district judge for the southern judicial district of the State of West Virginia.

[Act of June 25, 1921.]

[SEC. 1.] **[West Virginia southern judicial district — additional judge.]** That the President of the United States, by and with the advice and consent of the Senate, shall appoint an additional judge of the district court of the United States for the southern judicial district of the State of West Virginia, who shall possess the same powers, perform the same duties, and receive the same compensation and allowance as the present judge of said district, and the judge so appointed shall be held and treated as the senior judge and shall exercise such powers and perform such duties in that judicial district as may be incident to seniority.

SEC. 2. **[Retirement, etc., of senior judge — filling vacancy.]** That whenever a vacancy shall occur in the office of the district judge for the southern district of West Virginia senior in commission such vacancy shall not be filled, and thereafter there shall be but one district judge in said district.

SEC. 1310 (c). **[Jurisdiction of district courts — of suits against the United States — sec. 24 of Jud. Code amended.]** Paragraph Twentieth of section 24 of the Judicial Code is amended by adding at the end thereof the following new paragraph:

“ Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the

internal-revenue laws, even if the claim exceeds \$10,000, if the collector of internal-revenue by whom such tax, penalty, or sum was collected is dead at the time such suit or proceeding is commenced."

This and the section which follows are from the "Revenue Act of 1921" enacted Nov. 23, 1921.

For the paragraph here amended, as it formerly read, see 4 Fed. Stat. Ann. (2d ed.) 1059.

SEC. 1324 (b). [Court of Claims — no interest on claim — sec. 177 of Jud. Code amended.] Section 177 of the Judicial Code is amended to read as follows:

"SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws."

See note to preceding paragraph.

For sec. 177 as it formerly read, see 5 Fed. Stat. Ann. (2d ed.) 680.

Joint Resolution To amend an Act entitled "An Act to amend section 955 of the Revised Statutes by extending the jurisdiction of courts in cases of revivor."

[*Res. of Dec. 22, 1921, No. 35.*]

[Procedure in general — death of parties — revivor — R. S. sec. 955 amended.] That an Act entitled "An Act to amend section 955 of the Revised Statutes by extending the jurisdiction of courts in cases of revivor," approved November 23, 1921 (Public Numbered 104), be amended so as to read as follows:

"SEC. 955. When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly, and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

"The provisions of this section shall apply to suits in equity and in admiralty as well as to suits at law, and the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Terri-

tory of the United States, and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its scire facias to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof: *Provided, however,* That no executor or administrator shall be made a party unless such service is made before final settlement and distribution of the estate of said deceased party to the suit."

SEC. 2. That the provisions of section 955 of the Revised Statutes of the United States as amended by this Act shall apply to suits in which any party has deceased prior to the passage of this amendatory Act as well as to suits in which any party may die hereafter.

The Act of Nov. 23, 1921, amended by this resolution, differed from it in containing in the second paragraph of the first section after the words "or Territory of the United States," where they first occur, the words "in which the action is pending." These latter words were stricken out by the amending resolution.

For R. S. sec. 955, here amended, see 4 Fed. Stat. Ann. (2d ed.) 111.

LABOR

Act of Dec. 15, 1921 (Deficiency Appropriation Act), 237.

[Sec. 1.] *Offices of Commissioner of Mediation and Conciliation — Abolishment, 237.*

CROSS-REFERENCE

Tax on Employment of Child Labor, see INTERNAL REVENUE

[SEC. 1.] * * * [Offices of Commissioner of Mediation and Conciliation — abolishment.] The offices of Commissioner of Mediation and Conciliation and Assistant Commissioner of Mediation and Conciliation are abolished after December 31, 1921.

This is from the "First Deficiency Appropriation Act, fiscal year 1922," approved Dec. 15, 1921.

The offices here abolished were created by Act of July 15, 1913, sec. 11, and will be found in 6 Fed. Stat. Ann. (2d ed.) 267.

LABOR DEPARTMENT

Children's Bureau of Labor Department, see HEALTH AND QUARANTINE

LAND BANKS

See AGRICULTURE

LANDLORD AND TENANT

See DISTRICT OF COLUMBIA

LEAVENWORTH PENITENTIARY

See PRISONS AND PRISONERS

LEVER ACT

See FOOD AND FUEL

LIBERTY BOND ACTS

See PUBLIC DEBT; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

LIGHTS AND BUOYS

Act of March 4, 1921 (Sundry Civil Appropriation Act), 238.

Sec. 1. Lighthouse Service—Officers and Employees—Retirement—Pay, 238.

[**SEC. 1.**] * * * [**Lighthouse service—officers and employees—retirement—pay.**] The provision of section 6 of the Act entitled “An Act to authorize aids to navigation and for other works in the Lighthouse Service, and for other purposes,” approved June 20, 1918, relative to compulsory retirement shall not apply to an employee of the Lighthouse Service if within sixty days after the passage of this Act or not less than thirty days before the arrival of such employee at the age of seventy, the Secretary of Commerce shall certify as a matter of public record that by reason of his efficiency and willingness to remain in the Lighthouse Service of the United States the continuance of such employee therein would be advantageous to the public service. In that event such employee may be retained for a term not exceeding two years, and at the end of two years such employee may, by similar certification, be continued for an additional term not exceeding two years: *Provided, however,* That at the end of ten years after this Act becomes effective no employee shall be continued in the Lighthouse Service beyond the age of compulsory retirement defined in the Act of June 20, 1918, referred to in this paragraph: *Provided further,* That nothing herein shall exclude or prevent any employee of the Lighthouse Service who shall have reached the age of compulsory retirement within thirty days before or after the date of the passage of this Act from enjoying the privileges thereof.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

For section 6 of Act of June 20, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. (2d ed.) 459.

LIMITATION OF ACTIONS

See CRIMINAL LAW

LIMITATION OF ARMAMENT

See NAVY

LIVESTOCK

See STOCKYARDS

MAILS

See POSTAL SERVICE

MARSHALS

See JUDICIAL OFFICERS

MATERNITY

See HEALTH AND QUARANTINE

MEAT FOOD PRODUCTS

See STOCKYARDS

MEDALS

See SHIPPING AND NAVIGATION; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

MEDICAL RESERVE CORPS

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

MEMORIALS

See CEMETERIES

MERCHANT MARINE

See SHIPPING AND NAVIGATION

MIDSHIPMEN

See NAVAL ACADEMY

MILITARY ACADEMY

Act of June 30, 1921 (Army Appropriation Act), 240.

Sec. 1. Cadets — Pay and Allowances, 240.

Surplus Material Belonging to War Department — Use by Academy, 240.

Constructing Quartermaster — Leaves of Absence, 240.

[SEC. 1.] * * * [Cadets — pay and allowances.] The pay of cadets for the fiscal year ending June 30, 1922, shall be fixed at \$780 per annum and one ration per day or commutation thereof at the rate of \$1.08 per ration, to be paid from the appropriation for the subsistence of the Army: *Provided*, That the sum of \$250 shall be credited to each cadet who entered the academy since June 15, 1920, and to each such cadet discharged since that date, to the extent of paying any balance due by any such cadet to the academy on account of initial clothing and equipment issued to him: *Provided further*, That hereafter each new cadet shall, upon admission to the United States Military Academy, be credited with the sum of \$250 to cover the cost of his initial clothing and equipment issue, to be deducted subsequently from his pay.

* This and the two paragraphs which follow are from the Army Appropriation Act of June 30, 1921.

* * * [Surplus material belonging to War Department — use by academy.] The Secretary of War is hereby directed to turn over to the United States Military Academy without expense all such surplus material as may be available and necessary for the construction of temporary buildings; also surplus tools and matériel for use in the instruction of cadets at the academy.

See note to preceding paragraph.

* * * [Constructing quartermaster — leaves of absence.] That the constructing quartermaster, United States Military Academy, is hereby exempted from all laws and regulations relative to granting leaves of absence to employees with pay while employed on construction work at the Military Academy.

See note to first paragraph of section.

MILITARY ESTABLISHMENT

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

MINERAL LANDS, MINES AND MINING

Act of March 4, 1921 (Sundry Civil Appropriation Act), 241.

Sec. 1. Bureau of Mines — Officers of Public Health Service — Detail — Compensation, 241.

Employees — Detail — Expenses per Diem, 241.

Cooperative Work for Other Departments — Expenses — Transfer of Funds, 241.

Act of Aug. 24, 1921, 242.

Unpatented Mineral Claims — Annual Assessment Work — R. S. Sec. 2324 Amended, 242.

[SEC. 1.] * * * [Bureau of Mines — officers of Public Health Service — detail — compensation.] The Secretary of the Treasury may detail medical officers of the Public Health Service for cooperative health, safety, or sanitation work with the Bureau of Mines, and the compensation and expenses of the officers so detailed may be paid from the applicable appropriations made herein for the Bureau of Mines;

This and the paragraphs which follow are from the Sundry Civil Appropriation Act of March 4, 1921.

* * * [Employees — detail — expenses per diem.] Persons employed during the fiscal year 1922 in field work outside of the District of Columbia under the Bureau of Mines may be detailed temporarily for service in the District of Columbia, for purposes of preparing results of their field work; all persons so detailed shall be paid in addition to their regular compensation only their actual traveling expenses or per diem in lieu of subsistence in going to and returning therefrom: *Provided*, That nothing herein shall prevent the payment to employees of the Bureau of Mines of their necessary expenses, or per diem in lieu of subsistence while on temporary detail in the District of Columbia, for purposes only of consultation or investigations on behalf of the United States. All details made hereunder, and the purposes of each, during the preceding fiscal year shall be reported in the annual estimates of appropriations to Congress at the beginning of each regular session thereof;

See note to preceding paragraph.

* * * [Cooperative work for other departments — expenses — transfer of funds.] During the fiscal year 1922, the head of any department or independent establishment of the Government having funds available for scientific investigations and requiring cooperative work by the Bureau of Mines on scientific investigations within the scope of the functions of that Bureau and which it is unable to perform within the limits of its appropriations, may, with the approval of the Secretary of the Interior, transfer to the Bureau of Mines such sums as may be necessary to carry on such investigations. The

Secretary of the Treasury shall transfer on the books of the Treasury Department any sums which may be authorized hereunder and such amounts shall be placed to the credit of the Bureau of Mines for the performance of work for the department or establishment from which the transfer is made;

See note to first paragraph of this section.

An Act Changing the period for doing annual assessment work on unpatented mineral claims from the calendar year to the fiscal year beginning July 1 each year.

[Act of Aug. 24, 1921.]

[Unpatented mineral claims — annual assessment work — R. S. Sec. 2324 amended.] That section 2 of “An Act to amend sections 2324 and 2325 of the Revised Statutes of the United States concerning mineral lands,” approved January 22, 1880, be, and the same is hereby, amended to read as follows:

“SEC. 2. That section 2324 of the Revised Statutes of the United States be amended by adding the following words ‘*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim: *Provided further*, That on all such valid existing claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.’ ”

For R. S. sec. 2324, here amended, see 6 Fed. Stat. Ann. (2d ed.) 533.

NATIONAL BANKS

Act of Feb. 27, 1921, 243.

Powers of Federal Reserve Board — Permitting Federal Reserve Banks to Discount Notes, etc., for Member Banks — Sec. 11 (m) of Federal Reserve Act Amended, 243.

Act of Feb. 27, 1921, 243

Creation of Corporations to Do Foreign Banking — Depositaries in Insular Possession — Sec. 25 (a) of Federal Reserve Act Amended, 243.

Act of March 1, 1921, 244.

Requisite Qualifications of Directors — R. S. Sec. 5146 Amended, 244.

Act of June 14, 1921, 244.

Creation of Corporations to Do Foreign Business — Capital Stock — Sec. 25(a) of Federal Reserve Act Amended, 244.

CROSS-REFERENCES

Federal Land Banks, see AGRICULTURE
War Finance Corporation Act, see CORPORATIONS

An Act To amend section 11 (m) of the Act approved December 23, 1913, known as the Federal Reserve Act, as amended by the Acts approved September 7, 1916, and March 3, 1919.

[Act of Feb. 27, 1921.]

[Powers of Federal Reserve Board — permitting Federal Reserve Banks to discount notes, etc., for member banks — sec. 11 (m) of Federal Reserve Act amended.] That section 11 of the Act approved December 23, 1913, known as the Federal Reserve Act, as amended, be further amended by striking out the whole of subsection (m), and by substituting therefor a subsection to read as follows:

“(m) Upon the affirmative vote of not less than five of its members, the Federal Reserve Board shall have power to permit Federal reserve banks to discount for any member bank notes, drafts, or bills of exchange bearing the signature or endorsement of any one borrower in excess of the amount permitted by section 9 and section 13 of this Act, but in no case to exceed 20 per centum of the member bank’s capital and surplus: *Provided, however,* That all such notes, drafts, or bills of exchange discounted for any member bank in excess of the amount permitted under such sections shall be secured by not less than a like face amount of bonds or notes of the United States issued since April 24, 1917, for which the borrower shall in good faith prior to January 1, 1921, have paid or agreed to pay not less than the full face amount thereof, or certificates of indebtedness of the United States: *Provided further,* That the provisions of this subsection (m) shall not be operative after October 31, 1921.”

Sec. 11(m) here amended was added to sec. 11 by Act of Sept. 16, 1916, set out in 1918 Supp. Fed. Stat. Ann. 470. Sec. 11 as originally enacted is set out in 6 Fed. Stat. Ann. (2d ed.) 828.

For secs. 9 and 13 of Federal Reserve Act mentioned in text, see 6 Fed. Stat. Ann. (2d ed.) 825, 831.

An Act To amend the Act approved December 23, 1913, known as the Federal Reserve Act.

[Act of Feb. 27, 1921.]

[Creation of corporations to do foreign banking — depositaries in insular possession — sec. 25 (a) of Federal Reserve Act amended.] That the first paragraph of the Act approved December 24, 1919, known as the Edge Act, amending the Federal Reserve Act, be amended by adding at the end a proviso, so that the paragraph as amended will read as follows:

“SEC. 25. (a) Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this section, and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five: *Provided,* That nothing in this section shall be construed to deny the right of the Secretary of the Treasury to use any corporation organized under

this section as depositaries in Panama and the Panama Canal Zone, or in the Philippine Islands and other insular possessions and dependencies of the United States.”

For sec. 25 (a) as originally enacted see 1919 Supp. Fed. Stat. Ann. 268.

See Act of June 14, 1921, on this page, which amends another paragraph of sec. 25(a) here amended.

An Act To amend section 5146 of the Revised Statutes of the United States, in relation to the qualifications of directors of the National Banking Association.

[*Act of March 1, 1921.*]

[**Requisite qualifications of directors — R. S. sec. 5146 amended.**] That Section 5146 of the Revised Statutes of the United States be so amended as to read as follows:

“SEC. 5146. Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located, or within fifty miles of the location of the office of the association, for at least one year immediately preceding their election, and must be residents of such State or within a fifty-mile territory of the location of the association during their continuance in office. Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director, unless the capital of the bank shall not exceed \$25,000, in which case he must own in his own right at least five shares of such capital stock. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.”

For R. S. sec. 5146 here amended, see 6 Fed. Stat. Ann. (2d ed.) 704.

An Act To amend the Act approved December 23, 1913, known as the Federal Reserve Act.

[*Act of June 14, 1921.*]

[**Creation of corporations to do foreign business — capital stock — sec. 25 (a) of Federal Reserve Act amended.**] That section 25 (a) of the Federal Reserve Act, being the section added to said Act by the Act approved December 24, 1919, be amended so that the first sentence of the paragraph prescribing the amount of capital stock a corporation organized under that section is required to have and prescribing also the manner in which such capital stock must be paid in, said paragraph being the fourth paragraph following subparagraph (c) of said section shall read as follows:

“No corporation shall be organized under the provisions of this section with a capital stock of less than \$2,000,000, one-quarter of which must be paid in before the corporation may be authorized to begin business, and the remainder of the capital stock of such corporation shall be paid in installments of at least 10 per centum on the whole amount to which the corporation shall be limited as frequently as one installment at the end of each succeeding two months from the time of the commencement of its business operations until the whole of the capital stock shall be paid in: *Provided, however.* That whenever

\$2,000,000 of the capital stock of any corporation is paid in the remainder of the corporation's capital stock or any unpaid part of such remainder may, with the consent of the Federal Reserve Board and subject to such regulations and conditions as it may prescribe, be paid in upon call from the board of directors; such unpaid subscriptions, however, to be included in the maximum of 10 per centum of the national bank's capital and surplus which a national bank is permitted under the provisions of this Act to hold in stock of corporations engaged in business of the kind described in this section and in section 25 of the Federal Reserve Act as amended: *Provided further*, That no such corporation shall have liabilities outstanding at any one time upon its debentures, bonds, and promissory notes in excess of ten times its paid-in capital and surplus.

For sec. 25(a) of the Federal Reserve Act, here amended, see 1919 Supp. Fed. Stat. Ann. 268.

See Act of Feb. 27, 1921, on p. 243, which amends the first paragraph of sec. 25(a) here amended.

NATIONAL CEMETERIES

See CEMETERIES

NATIONAL GUARD

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

NATIONAL MUSEUMS

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

NATIONAL PARKS

See PUBLIC PARKS

NATIONAL PROHIBITION ACT

See INTOXICATING LIQUORS

NAVAL ACADEMY

Act of July 12, 1921, 246.

Sec. 1. Midshipmen — Clothing and Equipment — Allowance, 246.

Act of Oct. 22, 1921, 246.

Sec. 1. Deficient Midshipmen — Reinstatement, 246.

2. Repeal of Clause in Act of June 5, 1920, Respecting Deficient Midshipmen — Restoration of R. S. Sec. 1519, 246.

[SEC. 1.] * * * [Midshipmen — clothing and equipment — allowance.] That hereafter each new midshipman shall, upon admission to the Naval Academy, be credited with the sum of \$250 to cover the cost of his initial clothing and equipment issue, to be deducted subsequently from his pay: *Provided further*, That the foregoing proviso shall apply to midshipmen who enter the Naval Academy during the period between June 20, 1921, and the date of the approval of this Act.

This is from the Naval Appropriation Act of July 12, 1921.

An Act Providing for the readmission of certain deficient midshipmen to the United States Naval Academy.

[Act of Oct. 22, 1921.]

[SEC. 1.] [Deficient midshipmen — reinstatement.] That the Secretary of the Navy is authorized, upon application, to admit to and reinstate in the United States Naval Academy, subject to examination as to physical qualifications, as provided by law, but waiving the provisions of law as to age requirements, all former midshipmen at the United States Naval Academy found deficient at the end of the first term of the academic year 1920-21 whose resignations were asked for and received by the Superintendent of the Naval Academy: *Provided*, That they shall upon admission be placed in the class one year behind their former class in each case: *Provided further*, That said midshipmen affected by this Act must signify their acceptance of the benefits thereof by presenting themselves for physical examination within one month of the date of its approval, and if found qualified will enter the Naval Academy immediately.

SEC. 2. [Repeal of clause in Act of June 5, 1920, respecting deficient midshipmen — restoration of R. S. sec. 1519.] That the clause in the Act approved June 5, 1920 (Forty-first Statutes, page 1028), entitled "An Act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1920, and for other purposes," which reads as follows: "That until otherwise provided by law no midshipmen found deficient at the close of the last and succeeding academic terms shall be involuntarily discontinued at the Naval Academy or in the service unless he shall fail upon reexamination in the subjects in which found deficient at an examination to be held at the beginning of the next and succeeding academic terms, and the Secretary of the Navy shall provide for the special instruction of such midshipmen in the subjects in which found deficient during the period between academic terms," be, and the same

hereby is, repealed, and section 1519 of the Revised Statutes restored to its full force and effect.

For clause in Act of June 5, 1920, here repealed, see 1920 Fed. Stat. Ann. (2d ed.) 141.

For R. S. sec. 1519 restored to its full force and effect by this section, see 6 Fed. Stat. Ann. (2d ed.) 1009.

NAVY*

Act of July 12, 1921 (Navy Appropriation Act), 247.

Sec. 1. Land Not Needed for Naval Purposes — Disposition, 247.

Bureau of Ordnance — Appropriations — Application, 248.

Naval Reserve Force — Retainer Pay, 248.

Courts-Martial Prisoners — Rations — Commutation, 248.

2. Enlisted Men — Reenlistment — Honorable Discharge Gratuity, 248.

3. Bureau of Yards and Docks — Appropriations, 248.

4. Officers, Enlisted Men and Midshipmen — Rations — Commutation, 249.

5. Radio Station in Porto Rico — Exchange of Land under Naval Control for Site, etc., 249.

6. Retirement of Officers of Naval Reserve Force and Temporary Officers — Physical Disability, 249.

7. Office of Solicitor for Navy Department — Compensation of Employees, 249.

8. Bureau of Aeronautics — Creation — Officers and Employees, 249.

9. Conference with Great Britain and Japan for Limitation of Armaments, 250.

CROSS-REFERENCES

See also **NAVAL ACADEMY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT**

An Act Making appropriations for the naval service for the fiscal year ending June 30, 1922, and for other purposes.

[Act of July 12, 1921.]

[SEC. 1.] * * * [Land not needed for naval purposes — disposition.] That the Secretary of the Navy is authorized, in his discretion, to dispose of, at public or private sale, at a price to be approved by him, any land in the vicinity of the Navy Mine Depot, Yorktown, Virginia, and the naval training station, Great Lakes, Illinois, and East Camp, Hampton Roads, Virginia, or interest therein, title to, or interest in which has been acquired by the United States subsequent to April 6, 1917, also any improvements that have been placed thereon by the United States that are deemed by him to be no longer needed for naval purposes: *Provided further*, That in cases where compensation has not as yet been made by the United States in accordance with the provisions of law, then, and in that event, the Secretary of the Navy is hereby authorized to restore such lands to former owners, and is further authorized to ascertain, determine, adjust, and pay the just compensation that such former owners are entitled to receive

* See Resolution of March 3, 1921, set out in the title **WAR DEPARTMENT AND MILITARY ESTABLISHMENT**, *infra*, this volume. This resolution repealed much war time legislation but provided: "That nothing herein contained shall be construed as effective to terminate the military status of any person now in desertion from the military or naval service of the United States."

for the use and occupancy of such lands by the United States, such compensation to be paid from appropriations made for payments for such lands: *Provided further*, That the Secretary of the Navy, in determining the compensation for the use and occupancy of such lands, is authorized, in his discretion, to sell and convey, under such terms and conditions as he may deem appropriate, to the parties entitled to receive the land such improvements or any part thereof as may have been placed in or on said lands by the United States: *Provided further*, That the Secretary of the Navy be, and he is hereby, authorized to execute all necessary instruments to accomplish the purposes of aforesaid, and all moneys received from the disposition of such lands shall be covered into the Treasury as "miscellaneous receipts." Report shall be made to the Congress of the final disposition of the lands aforesaid.

* * * **[Bureau of Ordnance — appropriations — application.]** That no part of the appropriations heretofore, herein, or hereafter made for "Increase of the Navy" under the Bureau of Ordnance and no part of allotments of appropriations heretofore or hereafter made to said bureau shall be available for the payment for services or materials used in the construction of any shop, building, living quarters, or other structures, except such temporary structures costing not in excess of \$5,000 each as may be incident to current work of said bureau, or for additions and betterments to any existing shore station facilities unless the appropriation shall in terms specifically authorize such construction or additions and betterments: *Provided*, That nothing herein shall be construed as interfering in any way with any existing contract or any work in progress on the date of the approval of this Act: *Provided further*, That hereafter no money appropriated for ordnance or ordnance material or material purchased therewith shall be used for any other purpose than that for which the appropriation was made: *Provided further*, That nothing herein shall be construed as preventing the allocation of armor, armament, ammunition, ordnance material, equipment, and accessories to ships according to the requirements of the naval service.

* * * **[Naval Reserve Force — retainer pay.]** That retainer pay provided by existing law shall not be paid to any member of the Naval Reserve Force who fails to train as provided by law during the year for which he fails to train.

* * * **[Courts-martial prisoners — rations — commutation.]** That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed 30 cents per diem for each ration so commuted;

SEC. 2. [Enlisted men — reenlistment — honorable discharge gratuity.] That hereafter no enlisted man in the Navy shall be paid on reenlistment an honorable discharge gratuity, or any proportionate part thereof, in excess of any amount equal to one month's pay for each year of service in the last expiring enlistment of such enlisted man.

SEC. 3. [Bureau of Yards and Docks — appropriations.] That appropriations herein and hereafter made under the Bureau of Yards and Docks for

public works, exclusive of repairs and preservation, shall remain available until expended.

SEC. 4. [Officers, enlisted men and midshipmen — rations — commutation.] That during the fiscal year 1922 the ration for officers and enlisted men of the Navy entitled thereto shall be commuted at the rate of 50 cents per diem; and the commuted value of the ration for midshipmen shall be \$1.08 per diem; and commuted rations stopped on account of sick in hospital shall be credited at the rate of 75 cents per ration to the naval hospital fund.

SEC. 5. [Radio station in Porto Rico — exchange of land under naval control for site, etc.] That as consideration for a suitable site and requisite rights, privileges, and easements for a receiving and distant-control radio station in Porto Rico the Secretary of the Navy be, and he hereby is, authorized to exchange or lease for such period as he may deem proper any land under naval control in Porto Rico not otherwise required for naval purposes: *Provided*, That in time of war or national emergency, if necessary, the Navy Department shall have without cost free and unlimited use of any land so exchanged or leased.

SEC. 6. [Retirement of officers of Naval Reserve Force and temporary officers — physical disability.] That the last paragraph of section 2 of the Act entitled "An Act making appropriations for the naval service for the fiscal year ending June 30, 1921, and for other purposes," approved June 4, 1920, is hereby amended to read as follows:

"That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty in time of war shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty: *Provided, however*, That application for such retirement shall be filed with the Secretary of the Navy not later than October 1, 1921."

For sec. 2 of Act of June 4, 1920, as it read prior to this amendment, see 1920 Supp. Fed. Stat. Ann. 146.

SEC. 7. [Office of solicitor for Navy Department — compensation of employees.] That the paragraph in the Act approved March 3, 1921, making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1922, and for other purposes, providing for temporary employees in the office of the Solicitor for the Navy Department, is hereby amended to read as follows:

"For temporary employees in the office of the Solicitor for the Navy Department, \$20,000: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding \$1,800 per annum except the following: One at \$3,000, one at \$2,400, one at \$2,250."

SEC. 8. [Bureau of aeronautics — creation — officers and employees.] That there is hereby created and established in the Department of the Navy a Bureau of Aeronautics, which shall be charged with matters pertaining to naval

aeronautics as may be prescribed by the Secretary of the Navy, and all of the duties of said bureau shall be performed under the authority of the Secretary of the Navy, and its orders shall be considered as emanating from him, and shall have full force and effect as such.

There shall be a Chief of the Bureau of Aeronautics, appointed by the President, by and with the advice and consent of the Senate, from among the officers of the active list of the Navy or Marine Corps who shall within one year after his appointment qualify as an aircraft pilot or observer, for a period of four years, and who shall, while holding such position, have the corresponding rank and receive the same pay and allowances as are now or may hereafter be prescribed by or in pursuance of law for chiefs of bureaus of the Department of the Navy.

An officer of the active list of the Navy, or Marine Corps, may be detailed as Assistant Chief of the Bureau of Aeronautics, and such officer shall receive the highest pay of his grade, and, in case of the death, resignation, absence, or sickness of the chief of the bureau shall, until otherwise directed by the President, as provided by section 179 of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease.

There shall be a chief clerk at a salary of \$2,250 per annum.

The Secretary of the Navy is authorized to transfer to the Bureau of Aeronautics such number of the civilian, technical, clerical, and messenger personnel, together with such records, equipment, and facilities now assigned for aeronautic work under the various bureaus of the Department of the Navy or Marine Corps as in his judgment may be necessary. The unexpended and unobligated portion of all moneys heretofore appropriated for any bureau of the Department of the Navy or Marine Corps used in connection with aeronautics, including the appropriation "Aviation, Navy," is hereby made available for the use of the Bureau of Aeronautics.

The number of officers and enlisted men of the Navy and Marine Corps detailed to duty in aircraft and involving actual flying and to duties in connection with aircraft shall hereafter be in accordance with the requirements of Naval Aviation as determined by the Secretary of the Navy: *Provided*, That not to exceed 30 per centum of the officers in each grade below that of rear admiral who fail to qualify as aircraft pilots or as aircraft observers within one year after the date of their detail into the Bureau of Aeronautics shall be permitted to remain detailed in this bureau: *Provided, further*, That flying units or detachments, with the exception of aircraft carriers or other vessels, shall in all cases be commanded by flying officers.

For R. S. sec. 179, mentioned in the text, see 3 Fed. Stat. Ann. (2d. ed.) 256.

SEC. 9. [Conference with Great Britain and Japan for limitation of armaments.] That the President is authorized and requested to invite the Governments of Great Britain and Japan to send representatives to a conference, which shall be charged with the duty of promptly entering into an understanding or agreement by which the naval expenditures and building programs of each of said Governments, to wit, the United States, Great Britain, and Japan, shall be substantially reduced annually during the next five years to such an extent and upon such terms as may be agreed upon, which understanding or agreement is to be reported to the respective Governments for approval.

NURSES

See CLAIMS

OCCUPATIONAL TAXES

See INTERNAL REVENUE

OFFICERS

See JUDICIAL OFFICERS; PUBLIC OFFICERS AND EMPLOYEES

"PACKERS AND STOCKYARDS ACT, 1921"

See STOCKYARDS

PAN-AMERICAN UNION

See STATE DEPARTMENT

PARKS

See PUBLIC PARKS

PARTNERSHIP

See INTERNAL REVENUE

PASSPORTS

Act of March 2, 1921 (Diplomatic and Consular Appropriation Act), 251.

Sec. 1. Necessity in Time of War—Aliens—Act of May 22, 1918—Continuance of Provision, 251.

[SEC. 1.] * * * [Necessity in time of war—aliens—Act of May 22, 1918—continuance of provisions.] That the provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and visés

from aliens seeking to come to the United States, continue in force and effect until otherwise provided by law.

This is from the Diplomatic and Consular Appropriation Act of March 2, 1921. For Act of May 22, 1918, certain provisions of which were affected by the text, see 1918 Supp. Fed. Stat. Ann. 136.

PATENTS

Act of March 3, 1921, 252.

- Sec. 1. Applications for Patents—Rights of Priority Provided by R. S. Sec. 4887 Extended—Previous Applications in Foreign Countries, 252.*
- 2. Payment of Fees—Taking any Action with Respect to Application for Patent—Extension of Time—Reopening Interference Proceedings, 253.*
- 3. Patents Granted or Validated by Reason of Extensions as Affecting Vested Rights, 253.*
- 4. Applications by Agents between Aug. 1, 1914 and June 15, 1920—Supplementary Petition by Principal, 253.*
- 5. Applications Filed Since Aug. 1, 1914—Authentication by Consular Officers—Validity, 254.*
- 6. Inventions by Persons Serving in World War—Interference and Other Proceedings—Priority Rights—Abandoned or Forfeited Applications—Revival, 254.*
- 7. Patent Rights of Alien Enemy—Use by United States Government Since Aug. 1, 1914—Claims, 254.*
- 8. Acts Done under Trading with the Enemy Act as Affected by This Act, 254.*

CROSS-REFERENCE

See also *PUBLIC LANDS*

An Act To extend temporarily the time for filing applications for letters patent, for taking actions in the United States Patent Office with respect thereto, for the reviving and reinstatement of applications for letters patent, and for other purposes.

[*Act of March 3, 1921.*]

[SEC. 1.] [Applications for patents—rights of priority provided by R. S. sec. 4887 extended—previous applications in foreign countries.] That the rights of priority provided by section 4887 of the Revised Statutes, for the filing of applications for patent for inventions and designs, which rights had not expired on the 1st day of August, 1914, or which rights have arisen since the 1st day of August, 1914, shall be, and the same are hereby, extended until the expiration of a period of six months from the passage of this Act in favor of the citizens of the United States or citizens or subjects of all countries which have extended, or which now extend, or which within said period of six months shall extend substantially reciprocal privileges to citizens of the United States, and such extension shall apply to applications upon which patents have been granted, as well as to applications now pending or filed within

the period herein: *Provided*, That such extension shall in no way furnish a basis of claim against the Government of the United States: *Provided further*, That such extension shall in no way affect the right of any citizen of the United States, who, before the passage of this Act, was bona fide in possession of any rights in patents or applications for patent conflicting with rights in patents granted or validated by reason of such extension, to exercise such rights by itself or himself personally, or by such agents, or licensees, as derived their rights from it, or him, before the passage of this Act, and such persons shall not be amenable to any action for infringement of any patent granted or validated by reason of such extension.

A patent shall not be refused on an application coming within the provisions of this Act, nor shall a patent granted on such application be held invalid by reason of the invention having been patented or described in any printed publication or in public use or on sale in the United States prior to the filing of the application, unless such patent or publication or such public use or sale was prior to the filing of the foreign application upon which the right of priority is based.

SEC. 2. [Payment of fees — taking any action with respect to application for patent — extension of time — reopening interference proceedings.] That the time now fixed by law for the payment of any fee or for the taking of any action with respect to an application for patent, which time had not expired on August 1, 1914, or which commenced after August 1, 1914, is hereby extended until the expiration of one year from the passage of this Act, without the payment of extension fees or other penalty in favor of the citizens or subjects of countries which have extended, now extend, or shall extend during a period of one year from the passage of this Act substantially reciprocal privileges to citizens of the United States, provided that no extension herein shall confer such privileges on the citizens or subjects of a foreign country for a longer term than the term during which such privileges are conferred by such foreign country on the citizens of the United States, but nothing in this Act shall give any right to reopen interference proceedings where final hearing before the examiner of interferences has taken place.

SEC. 3. [Patents granted or validated by reason of extensions as affecting vested rights.] That no patent granted or validated by reason of the extensions provided for in sections 1 and 2 of this Act shall abridge or otherwise affect the right of any citizen of the United States, or his agent or agents, or his successor in business, to continue any manufacture, use, or sale commenced before the passage of this Act by such citizen, nor shall the continued manufacture, use, or sale by such citizen, or the use or sale of the devices resulting from such manufacture or use constitute an infringement.

SEC. 4. [Applications by agents between Aug. 1, 1914 and June 15, 1920 — supplementary petition by principal.] That all applications for patent filed since August 1, 1914, and prior to June 15, 1920, which were executed by an agent of the applicant, and in which a petition, specification, and oath, signed by the inventor, or his executor or administrator, had been filed or shall have been filed within a period of one year from the passage of this Act, and the

patents granted on such applications, shall have the same force and effect as if the papers signed by the inventor, or his executor or administrator, had been filed on the date on which the papers signed by the agent were filed.

SEC. 5. [Applications filed since Aug. 1, 1914 — authentication by consular officers — validity.] That all applications for patent filed since August 1, 1914, in which the oath was executed before or authenticated by a consular officer, or other representative qualified to administer oaths, of a Government acting in the interest of the Government of the United States, shall have the same force and effect as if said oath had been executed by the applicant before a consular officer of the United States.

SEC. 6. [Inventions by persons serving in World War — interference and other proceedings — priority rights — abandoned or forfeited applications — revival.] That where an invention was made by a person while serving abroad, during the war, with the forces of the United States, civil or military, the inventor thereof shall be entitled, in interference and other proceedings arising in connection with such invention, to the same rights of priority with respect of such invention as if the same had been made in the United States, and where an application became abandoned or forfeited, during the time the applicant was serving with the forces of the United States, by reason of his failure to take action or pay a fee within the time now required by law, such action may be taken, or the fee paid, within six months from the passage of this Act.

SEC. 7. [Patent rights of alien enemy — use by United States government since Aug. 1, 1914 — claims.] That no claim shall be made or action brought in respect of the use since August 1, 1914, up to the passage of this Act, by the Government of the United States, or by any persons acting on behalf of, or under contract with, or with the assent of the Government of the United States or of Governments or their representatives associated with the United States, under any patent rights owned in whole or in part since August 1, 1914, by an alien enemy, nor in respect of the use of any process during such period, or the sale, offering for sale, or use, at any time, of any products, articles, or apparatus whatsoever manufactured during such period to which such patent rights applied.

SEC. 8. [Acts done under Trading With the Enemy Act as affected by this Act.] That nothing in this Act shall affect any Act done by virtue of the special measures taken during the war under legislative, executive, or administrative authority of the United States in regard to the rights of an enemy, or ally of an enemy, as defined by the Trading with the Enemy Act of October 6, 1917, in patents for inventions and designs.

The Trading with the Enemy Act is set out in 1918 Supp. Fed. Stat. Ann. 846.

PENAL LAWS

Act of March 4, 1921, 255.

Transportation of Explosives — Secs. 232 to 236 of Penal Laws Amended, 255.

CROSS-REFERENCE

See also *CRIMINAL LAW*.

An Act To amend an Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909 (Thirty-fifth Statutes at Large, page 1134).

[Act of March 4, 1921.]

[Transportation of explosives — secs. 232 to 236 of Penal Laws amended.]

That sections 232, 233, 234, 235, and 236 of the Act to codify, revise, and amend the penal laws of the United States, approved March 4, 1909, be amended to read, respectively, as follows:

"SEC. 232. It shall be unlawful to transport, carry, or convey, within the limits of the jurisdiction of the United States, any high explosive, such as, and including, dynamite, blasting caps, detonating fuzes, black powder, gunpowder, or other like explosive, on any vessel, car, or vehicle of any description operated in the transportation of passengers by a common carrier engaged in interstate or foreign commerce, which vessel, car, or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel, car, or vehicle smokeless powder, primers, fuses, not including detonating fuzes, fireworks, or other similar explosives, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel, car, or vehicle; but such explosives shall not be carried in that part of a vessel, car, or vehicle which is being used for the transportation of passengers for hire: *Provided further*, That it shall be lawful to transport on any such vessel, car, or vehicle small-arms ammunition in any quantity, and such fusees, torpedoes, rockets, or other signal devices as may be essential to promote safety in operation: *And provided further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger-equipment vessels, cars, or vehicles.

"The words 'detonating fuzes,' as used in this section shall be interpreted to mean fuzes used in naval or military service to detonate the high explosive bursting charges of projectiles, mines, bombs, or torpedoes. The word 'fuses' as used herein shall be interpreted to mean devices used in igniting the bursting charges of projectiles. The word 'primers' as used herein shall be interpreted to mean devices used in igniting the propelling powder charges of ammunition. The word 'fusees' as used herein shall be interpreted to mean the slow-burning fuses used commercially and intended to convey fire to an explosive or combustible mass slowly or without danger to the person lighting. The word 'fuses' as used herein shall be interpreted to mean the fusees ordinarily used on steamboats and railroads as night signals.

" SEC. 233. The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including inflammable liquids, inflammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land or water, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water. Said commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best-known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall, unless a shorter time is authorized by the commission, take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified. In the execution of the provisions of this Act the Interstate Commerce Commission may utilize the services of the bureau for the safe transportation of explosives and other dangerous articles, and may avail itself of the advice and assistance of any department, commission, or board of the Government, but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law.

" SEC. 234. It shall be unlawful to transport, carry, or convey within the limits of the jurisdiction of the United States, liquid nitroglycerin, fulminate in bulk in dry condition, or other like explosive, on any vessel, car, or vehicle of any description operated in the transportation of passengers or property by land or water by a common carrier engaged in interstate or foreign commerce.

" SEC. 235. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, or to carry upon any vessel, car, or vehicle operated by any common carrier engaged in interstate or foreign commerce by land or water any explosive, or other dangerous article, as specified in section 233 of this Act, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier in writing of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than \$2,000 or imprisoned not more than eighteen months, or both.

["] SEC. 236. When the death or bodily injury of any person results from the violation of any of the four sections last preceding, or any regulation made by

the Interstate Commerce Commission in pursuance thereof, the person or persons who shall have so knowingly violated, or caused to be violated, such provision or regulation, shall be fined not more than \$10,000, or imprisoned not more than ten years, or both. [']

For secs. 232 to 236 of Penal Laws amended by the text, see 7 Fed. Stat. Ann. (2d ed.) 857 *et seq.*

PENSIONS

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

PHILIPPINE ISLANDS

Act of July 21, 1921, 257.

Limitation on Indebtedness — Temporary Certificates of Indebtedness, 257.

An Act To amend an Act entitled "An Act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for these islands," approved August 29, 1916; and to amend an Act entitled "An Act to establish a standard of value and to provide for a coinage system in the Philippine Islands," approved March 2, 1903.

[Act of July 21, 1921.]

[Limitation on indebtedness — temporary certificates of indebtedness.]

That the Act entitled "An Act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for these islands," approved August 29, 1916, be amended, as follows:

That the proviso of section 11 of said Act be, and the same is hereby, amended to read as follows: "*Provided, however,* That the entire indebtedness of the Philippine government created by the authority conferred herein shall not exceed at any one time the sum of \$30,000,000, exclusive of those obligations known as friar land bonds, nor that of any Province or municipality, a sum in excess of 7 per centum of the aggregate tax valuation of its property at any one time. In computing the indebtedness of the Philippine government, bonds not to exceed \$10,000,000 in amount, issued by that government, secured by an equivalent amount of bonds issued by the Provinces or municipalities thereof, shall not be counted."

That for the purpose set forth in section 6 of the Act approved March 2, 1903, entitled "An Act to establish a standard of value and to provide for a coinage system in the Philippine Islands," the government of the Philippine Islands may issue temporary certificates of indebtedness under the conditions therein provided, in addition to the amount therein fixed, to a further amount not exceeding \$10,000,000.

The act of the Philippine Legislature providing for the issue of temporary certificates of indebtedness within the conditions of section 6 of the Act of

March 2, 1903, entitled "An Act to establish a standard of value and to provide for a coinage system in the Philippine Islands," shall apply to the issue of additional certificates authorized by this Act.

For Act of March 2, 1903, here amended, see 7 Fed. Stat. Ann. (2d ed.) 1182.

PORTO RICO

Act of Feb. 3, 1921, 258.

Sec. 1. Bill of Rights — Appropriation of Public Moneys for Sectarian Purposes — Polygamous Marriages — Sec. 2 of Porto Rican Act Amended, 258.

2. Export Duties — Taxes and Assessments — Internal Revenue — Public Indebtedness — Bonds — Exemption from Taxation — Sec. 3 of Porto Rican Act Amended, 258.

CROSS-REFERENCES

See also *AGRICULTURE; JUDICIAL OFFICERS; NAVY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

An Act To amend an Act entitled "An Act to provide a civil government for Porto Rico, and for other purposes," approved March 2, 1917.

[Act of Feb. 3, 1921.]

[SEC. 1.] **[Bill of Rights — appropriation of public moneys for sectarian purposes — polygamous marriages — sec. 2 of Porto Rican Act amended.]** That paragraph 19 of section 2 of the Act entitled "An Act to provide a civil government for Porto Rico, and for other purposes," approved March 2, 1917, is hereby amended to read as follows:

"That no public money or property shall ever be appropriated, applied, donated, used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such. Contracting of polygamous or plural marriages hereafter is prohibited."

SEC. 2. [Export duties — taxes and assessments — internal revenue — public indebtedness — bonds — exemption from taxation — Sec. 3 Porto Rican Act amended.] That section 3 of said Act to provide a civil government for Porto Rico is hereby amended to read as follows:

"SEC. 3. That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; and, when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: *Provided, however,* That no public indebtedness of Porto Rico or of any subdivision or municipality thereof

shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of its property, and all bonds issued by the government of Porto Rico, or by its authority, shall be exempt from taxation by the Government of the United States or by the government of Porto Rico or of any political or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia. In computing the indebtedness of the people of Porto Rico, bonds issued by the people of Porto Rico secured by an equivalent amount of bonds of municipal corporations or school boards of Porto Rico shall not be counted."

POST ROADS

See HIGHWAYS; POSTAL SERVICE

POSTAL SERVICE

Act of March 1, 1921 (Postal Service Appropriation Act), 260.

- Sec. 1. Vacancy in Office of Postmaster—Temporary Designation by Postmaster General—Appointment of Regular Postmaster, 260. Substitute Clerks in First and Second Class Postoffices and Substitute Letter Carriers in City Delivery Service—Appointment to Regular Service—Credits for Time Served—Promotions—Service in World War, 260. Special Delivery Matter—Receipt, 260. Aeroplane Mail Service—Contracts by Postmaster General, 261. Post Route Maps and Rural Delivery Maps or Blue Prints—Sale Proceeds, 261.*
- 3. Congressional Commission Created to Investigate Mail Transportation, etc.—Extension of Time, 261.*

Act of June 16, 1921 ("Second Deficiency Act, Fiscal Year, 1921"), 261.

Claims against Department for Damage to Person and Property—Adjustment by Postmaster General, 261.

Act. of July 21, 1921, 261.

- Sec. 1. Postmasters of Fourth Class—Compensation—Per Centum of Cancellation, 261.*
- 2. Special Clerks in First-class Offices, 262.*
- 3. Clerks and Carriers in Intermediate or Automatic Grades—Credit for Time Served as Substitute—Promotion, 262.*
- 4. Foreman in First-class Offices—Compensation, 262.*
- 5. Assistant Superintendent of Mails—Compensation, 262.*
- 6. Assistant Postmasters of Second-class Offices, 262.*
- 7. Clerks and Laborers in First and Second-class Offices—Carriers in City Delivery Service—Overtime Compensation, 262.*
- 8. Retired Employees again Employed—Compensation, 262.*

Sec. 9. Supervisory Officials, etc.—Limitation on Promotion — Repeal of Provision in Act of June 5, 1920, 263.

10. Pan-American Postal Congress—Appointment of Delegates, 263.

CROSS-REFERENCES

See also *HIGHWAYS; WAR DEPARTMENT AND MILITARY ESTABLISHMENT*

An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1922, and for other purposes.

[Act of March 1, 1921.]

[SEC. 1.] * * * [Vacancy in office of postmaster — temporary designation by Postmaster General — appointment of regular postmaster.] That hereafter, whenever the office of a postmaster becomes vacant through death, resignation, or removal, the Postmaster General shall designate some person to act as postmaster until a regular appointment can be made by the President in case the office is in the first, second, or third class, and by the Postmaster General when the office is in the fourth class; and the Postmaster General shall notify the Auditor for the Post Office Department of the change. The postmaster so appointed shall be responsible under his bond for the safekeeping of the public property pertaining to the post office and the performance of the duties of his office until a regular postmaster has been duly appointed and qualified and has taken possession of the office. Whenever a vacancy occurs from any cause the appointment of the regular postmaster shall be made without unnecessary delay.

* * * [Substitute clerks in first and second class postoffices and substitute letter carriers in City Delivery Service — appointment to regular service — credits for time served — promotions — service in World War.] That that portion of the Act reclassifying salaries of postmasters and postal employees, approved June 5, 1920, which provides " that hereafter substitute clerks in first and second class post offices and substitute letter carriers in the City Delivery Service when appointed regular clerks or carriers shall have credit for actual time served on a basis of one year for each three hundred and six days of eight hours served as substitute, and appointed to the grade to which such clerk or carrier would have progressed had his original appointment as substitute been to grade one " shall be amended by adding the following: *Provided, That* Postal employees and substitute Postal employees who served in the military, marine or naval service of the United States during the World War and have not reached the maximum grade of salary shall receive credit for all time served in the military, marine or naval service on the basis of one day's credit of eight hours in the Postal Service for each day served in the military, marine or naval service and be promoted to the grade to which such postal employee or substitute postal employee would have progressed had his original appointment as substitute been to grade one. The provisions herein shall be effective as of date of passage of the original Act of June 5, 1920.

For Act of June 5, 1920, affected by the text, see 1920 Supp. Fed. Stat. Ann. 168.

* * * [Special delivery matter — receipt.] That the Postmaster General may, under such rules and regulations as he shall prescribe, authorize the

delivery of special delivery matter without obtaining a receipt therefor: *Provided further*, That nothing herein contained shall be construed as excusing the delivery of special delivery matter by messenger in the first instance.

* * * [**Aeroplane mail service — contracts by Postmaster General.**] That the Postmaster General may contract with any individual, firm, or corporation for the transportation of mail by aeroplane between such points as he may deem advisable and designate, in case such transportation service is furnished at a cost not greater than the actual cost of the same service by rail, and shall pay therefor out of the appropriation for inland transportation by railroad routes.

* * * [**Post route maps and rural delivery maps or blue prints — sale proceeds.**] The Postmaster General may authorize the sale to the public of post-route maps and rural delivery maps or blue prints at the cost of printing and 10 per centum thereof added, the proceeds of such sale to be used as a further appropriation for the preparation and publication of post-route maps and rural delivery maps or blue prints;

SEC. 3. [**Congressional Commission created to investigate mail transportation, etc.— extension of time.**] That the joint commission authorized under section 6 of the Act approved April 24, 1920, entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1921, and for other purposes," is hereby continued until June 30, 1922, to complete the investigation and to prepare a detailed report containing a summary of its findings thereof, and such recommendations as to legislation as it may deem proper: *Provided*, That the said commission shall not expend a greater sum than \$150,000 during the fiscal year 1922.

For Act of April 24, 1920, sec. 6 affected by the text, see 1920 Supp. Fed. Stat. Ann. 167.

* * * [**Claims against Department for damage to person and property — adjustment by Postmaster General.**] When any damage is done to person or property by or through the operation of the Post Office Department in any branch of its service and such damage is found by the Postmaster General upon investigation to be a proper charge against the United States, the Postmaster General is hereby invested with power to adjust and settle any claim for such damage when his award for such damage in any case does not exceed \$500; and the sum of \$35,000 is hereby appropriated for the fiscal year 1922 to carry out the provisions of this paragraph.

This is from the "Second Deficiency Act, fiscal year 1921," enacted June 16, 1921.

An Act To further reclassify postmasters and employees of the Postal Service and readjust their salaries and compensation on an equitable basis, and for other purposes.

[Act of July 21, 1921.]

[SEC. 1.] [**Postmasters of fourth class — compensation — per centum of cancellations.**] That from and after July 1, 1921, postmasters of the fourth class shall be paid the same compensation as now provided by law, except that

they shall receive 145 per centum of the cancellations of the first \$75 or less per quarter, 70 per centum of the next \$100 or less per quarter, and on the balance 60 per centum.

SEC. 2. [Special clerks in first-class offices.] That as a reward for faithful and meritorious service special clerks may be appointed in the executive, finance, money order, postal savings, registry, mailing, and other divisions of first-class post offices. Clerks in the executive, finance, money order, postal savings, registry, and other divisions of first-class post offices who were designated as special clerks, finance clerks, cashiers, foremen, bookkeepers, chief stamp clerks, chief mailing clerks, and stenographers on June 30, 1920, and who were, on and after July 1, 1920, assigned as clerks of grade five shall, from and after the passage of this Act, unless they were demoted for cause, be given the designation and status of special clerks, and assigned to the first or second grade: *Provided*, That clerks who have been designated as special clerks shall not be demoted except for cause.

SEC. 3. [Clerks and carriers in intermediate or automatic grades — credit for time served as substitute — promotion.] That clerks and carriers in the intermediate or automatic grades who were appointed to regular positions before June 5, 1920, and are receiving less than the maximum grade of salary, shall receive credit for all time served as substitute on a basis of one year for each three hundred and six days of eight hours served as substitute, and be promoted to the grade to which such clerk or carrier would have progressed had his original appointment as substitute been to grade one.

SEC. 4. [Foreman in first-class offices — compensation.] That, effective July 1, 1921, the minimum salary of foreman in first-class offices shall be \$2,100 per annum.

SEC. 5. [Assistant superintendents of mails — compensation.] That, effective July 1, 1921, the minimum salary of assistant superintendents of mails in post offices with receipts of \$1,000,000, but less than \$2,000,000, shall be \$2,300 per annum.

SEC. 6. [Assistant postmasters of second-class offices.] That, effective July 1, 1921, the salary of assistant postmasters at offices of the second class, where the gross postal receipts are \$8,000, but less than \$12,000, shall be \$1,850 per annum.

SEC. 7. [Clerks and laborers in first and second class offices — carriers in City Delivery Service — overtime compensation.] That the Postmaster General is hereby authorized to pay to the clerks and laborers in first and second class post offices and letter carriers in the City Delivery Service the amount due them as overtime in lieu of compensatory time for work performed by them on Sundays intervening between June 5 and July 1, 1920.

SEC. 8. [Retired employees re-employed — compensation.] That the Postmaster General be, and he is hereby, authorized to pay to persons who have been retired under the Act of Congress entitled "An Act for the retirement of

employees in the classified civil service, and for other purposes," approved May 22, 1920, and who have since their retirement been employed in the Postal Service, the sums to which they are entitled for services heretofore rendered.

For Act of May 22, 1920, mentioned in the text, see 1920 Supp. Fed. Stat. Ann. 16.

SEC. 9. [Supervisory officials, etc.—limitation on promotion—repeal of provision in Act of June 5, 1920.] That the paragraph in the Act of Congress entitled "An Act to reclassify postmasters and employees of the Postal Service and readjust their salaries and compensation on an equitable basis," approved June 5, 1920 (page 1053, Statutes at Large, second session, Sixty-sixth Congress), which reads as follows: "On and after July 1, 1921, no supervisory official or employee in the Postal Service shall be promoted more than \$300 during any one year, except when appointed postmaster, inspector in charge, or superintendent of the Railway Mail Service," be, and the same is hereby, repealed.

For provision in Act of June 5, 1920, here repealed, see 1920 Supp. Fed. Stat. Ann. 178.

SEC. 10. [Pan-American Postal Congress—appointment of delegates.] That the Postmaster General be, and he hereby is, authorized to appoint two delegates to the Pan-American Postal Congress, Buenos Aires, Argentina, beginning August 10, 1921, and for the purpose of paying the expenses of such delegates the sum of \$5,000 is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be expended in the discretion of the Postmaster General and to be accounted for on his certificate, which certificate shall be conclusive on the accounting officers of the United States.

POSTMASTERS

See POSTAL SERVICE

PRINTING

See PUBLIC PRINTING

PRISONS AND PRISONERS

Act. of March 4, 1921 (Sundry Civil Appropriation Act), 263.

Sec. 1. Leavenworth Penitentiary—Live Stock—Sale or Exchange, 263.

CROSS-REFERENCE

See also *DIPLOMATIC AND CONSULAR OFFICERS*

[SEC. 1.] * * * [Leavenworth Penitentiary—live stock—sale or exchange.] That live stock may be exchanged or traded when authorized by the Attorney General.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

PROCEDURE

See JUDICIARY

PROHIBITION ACT

See INTOXICATING LIQUORS

PUBLIC CONTRACTS

Act of Nov. 23, 1921, 264.

War Contracts — Adjustment — Minerals — Losses Occurring in Production, 264.

An Act To amend section 5 of the Act approved March 2, 1919, entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes."

[*Act of Nov. 23, 1921.*]

[**War contracts — adjustment — minerals — losses occurring in production.**] That section 5 of the Act approved March 2, 1919, entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," be, and the same is hereby, amended as follows:

Add to the first paragraph of section 5 the following proviso: "*Provided*, That all claimants who, in response to any personal, written, or published request, demand, solicitation, or appeal from any of the Government agencies mentioned in said Act, in good faith expended money in producing or preparing to produce any of the ores or minerals named therein and have heretofore mailed or filed their claims or notice in writing thereof within the time and in the manner prescribed by said Act, if the proof in support of said claims clearly shows them to be based upon action taken in response to such request, demand, solicitation or appeal, shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said Act.

"If in claims passed upon under said Act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculation, the Secretary of the Interior may award proper amounts or additional amounts."

For this section before amendment, see 1919 Supp. p. 306.

PUBLIC DEBT *

Act of June 16, 1921 ("Special Deficiency Act, Fiscal Year, 1921"), 265.

Appropriation for "Expenses of Loans" Contained in Liberty Bond Acts—Applicability to any Public Debt Issues, 265.

Act of Nov. 23, 1921 ("Revenue Act of 1921"), 265.

Sec. 1401. Second Liberty Bond Act—Increase in Note Authorization—Sec. 18 Amended, 265.

1402. Second Liberty Bond Act—Increase in Treasury Savings Certificate Limit—Sec. 6 Amended, 265.

CROSS-REFERENCE

Consolidation of Liberty Bond Tax Exemptions, See INTERNAL REVENUE, supra, this volume, p. 221.

* * * [Appropriation for "Expenses of loans" contained in Liberty Bond Acts—applicability to any public debt issues.] The appropriation for "Expenses of loans" contained in section 8 of the First Liberty Bond Act and in section 10 of the Second Liberty Bond Act, as amended, is hereby made applicable to any operations arising in connection with any public debt issues made subsequently to June 30, 1921, pursuant to the authority contained in the First Liberty Bond Act or the Second Liberty Bond Act, as amended and supplemented, the provisions of the Legislative, Executive, and Judicial Appropriation Act, approved May 29, 1920, to the contrary notwithstanding: *Provided*, That with respect to operations on account of any such issue hereafter made such appropriations shall be available only until the close of the fiscal year next following the fiscal year in which such issue was made.

This is from the "Second Deficiency Act, Fiscal Year, 1921," approved June 16, 1921. For Liberty Bond Acts mentioned in the text see 1918 Supp. Fed. Stat. Ann. 672.

SEC. 1401. [Second Liberty Bond Act—increase in note authorization—sec. 18 amended.] That subdivision (a) of section 18 of the Second Liberty Bond Act, as amended, is amended by striking out the words and figures "for the purposes of this Act, and to meet public expenditures authorized by law, not exceeding in the aggregate \$7,000,000,000," and inserting in lieu thereof the words and figures "for the purposes of this Act, to provide for the purchase or redemption of any notes issued hereunder, and to meet public expenditures authorized by law, not exceeding in the aggregate \$7,500,000,000 at any one time outstanding."

This and the section which follows are from the "Revenue Act of 1921," enacted Nov. 23, 1921.

For this section as it read before this amendment, see 1919 Supp. Fed. Stat. Ann. 311.

SEC. 1402. [Second Liberty Bond Act—increase in treasury savings certificate limit—sec. 6 amended.] That section 6 of the Second Liberty Bond Act,

* See the Resolution of March 3, 1921, set out in the title WAR DEPARTMENT AND MILITARY ESTABLISHMENT, *infra*, this volume. This Resolution repealed much war time legislation, but excepted the First, Second, Third and Fourth Bond Act, and the Victory Liberty Loan Act. The different Loan Acts, excepting the last and amendments to the second, are set out in 1918 Supp. Fed. Stat. Ann. 672. The last, known as the Victory Liberty Loan Act, together with amendments to the second, is set out in 1919 Supp. Fed. Stat. Ann. 309.

as amended, is amended by striking out in the next to the last sentence thereof the figures “ \$1,000 ” and inserting in lieu thereof the figures “ \$5,000.”

See note to preceding section.

For this section as it read before amendment, see 1918 Supp. Fed. Stat. Ann. 683.

PUBLIC HEALTH SERVICE

See HEALTH AND QUARANTINE; HOSPITALS AND ASYLUMS; MINERAL LANDS, MINES
AND MINING.

PUBLIC LANDS

Act of Jan. 6, 1921, 267.

Desert Lands — Time Limit for Reclamation by States — Extension — Restoration to Public Domain, 267.

Act of Jan. 6, 1921, 268.

Desert Lands — Entry — Resident Citizens — Colorado as Included in “ Desert Land Act,” 268.

Act of Jan. 26, 1921, 268.

Sec. 1. Lands Withdrawn from Settlement for Certain Purposes and No Longer Needed — Sale at Public Auction, 268.

2. Conveyance by Appropriate Patent of Lands Purchased — Reservations and Conditions, 268.

3. Receipts from Sale — Disposition, 269.

Act of Feb. 16, 1921, 269.

Survey of Public Lands — Florida, 269.

Act. of March 1, 1921, 270.

Rights of Way for Irrigation and Drainage — Permits for Adjoining Land for Dwellings, etc. — Lands in National Forests, 270.

Act. of March 1, 1921, 270.

Homesteads — Marriage of Entryman and Entrywoman — Impairment of Right to Patent — Act of April 6, 1914, Ameded, 270.

Act of March 1, 1921, 271.

Homestead Settlers or Entrymen in World War — Final Proof of Entries, 271.

Act of March 4, 1921, 271.

Sec. 1. Homestead Entries — Validation, 271.

2. Additional Entry by Homesteaders Commuting First Entry — Cancellation, 271.

Act of March 4, 1921 (Sundry Civil Appropriation Act), 272.

Sec. 1. Registers and Receivers — Consolidation of Offices at Certain Places, 272.

Expenses Incurred by Registers and Receivers — Liability of Government, 272.

Hearings in Land Entries — Depositions — Fees of Officers Taking, 272.

Act of Oct. 28, 1921, 272.

Sec. 1. District Land Offices — Consolidation of Offices of Register and Receiver, 272.

2. Vacancy in Office of Register — Designation, 273.

Act. of Dec. 15, 1921, 273.

Desert-land Claimants in World War — Final Proof of Entries, 273.

CROSS-REFERENCES

See also *HAWAIIAN ISLANDS; HIGHWAYS; INDIANS; INTERIOR DEPARTMENT; MINERAL LANDS, MINES AND MINING; WATERS*

An Act To amend section 3 of an Act entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1902, and for other purposes," approved March 3, 1901 (Thirty-first Statutes at Large, page 1133).

[Act of Jan. 6, 1921.]

[Desert lands — time limit for reclamation by states — extension — restoration to public domain.] That section 3 of the Act of Congress approved March 3, 1901 (Thirty-first Statutes at Large, page 1133), be, and the same is hereby, amended to read as follows:

"SEC. 3. That section 4 of the Act of August 18, 1894, entitled 'An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes,' be, and the same is hereby, amended so that the ten-year period within which any State shall cause the lands applied for under said Act to be irrigated and reclaimed, as provided in said section, as amended by the Act of June 11, 1896, shall begin to run from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period, not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; and if the State fails, within ten years from the date of such segregation, to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period not exceeding five years, or may, in his discretion, restore such lands not irrigated and reclaimed to the public domain upon the expiration of the ten-year period or of any extension thereof."

For section 3 of Act of March 3, 1901, here amended, see 8 Fed. Stat. Ann. (2d ed.) 701.

An Act To amend section 8 of an Act to provide for the sale of desert lands in certain States and Territories [sic] approved March 3, 1877, as amended by an Act to repeal timber culture laws, and for other purposes, approved March 3, 1891.

[Act of Jan. 6, 1921.]

[Desert lands — entry — resident citizens — Colorado as included in "Desert Land Act."] That section 8 of an Act to provide for the sale of desert lands in certain States and Territories, approved March 3, 1877, as amended by an Act to repeal timber culture laws, and for other purposes, approved March 3, 1891, be, and the same is hereby, amended so as to read as follows:

"SEC. 8. That the provisions of the Act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the State named in the original Act; and, excepting in the State of Nevada, no person shall be entitled to make entry of desert lands unless he be a resident citizen of the State or Territory in which the land sought to be entered is located."

For section 8 as it read before this amendment, see 8 Fed. Stat. Ann. (2d ed.) 698.

An Act To provide for the disposition of certain public lands withdrawn and improved under the provisions of the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 847), as amended by the Act of August 24, 1912 (Thirty-seventh Statutes at Large, page 497), and which are no longer needed.

[Act of Jan. 26, 1921.]

[SEC. 1.] [Lands withdrawn from settlement for certain purposes and no longer needed — sale at public auction.] That whenever in the opinion of the Secretary of the Interior any lands which have been withdrawn under the provisions of the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 847), as amended by the Act of Congress approved August 24, 1912 (Thirty-seventh Statutes at Large, page 497), for the purpose of exploratory drilling to discover water supplies for irrigation or other purposes, and which have had wells or other permanent improvements placed thereon by and at the expense of the United States, are no longer needed for the purpose for which they were withdrawn and improved, the Secretary of the Interior may appraise the lands, together with the improvements thereon, and thereafter sell the same to a citizen of the United States for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land.

For Act of June 25, 1910, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 657.

SEC. 2. [Conveyance by appropriate patent of lands purchased — reservations and conditions.] That upon payment of the purchase price the Secretary of the Interior is authorized by appropriate patent to convey all the right, title, and interest in and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secre-

tary may deem proper: *Provided*, That not over one hundred and sixty acres shall be sold to any one person: *Provided further*, That any patent issued hereunder shall contain a reservation to the United States of all oil, gas, coal, and other mineral.

SEC. 3. [Receipts from sale — disposition.] That the moneys derived from the sale of such lands and improvements be disposed of as are other receipts from the sale and disposal of public lands.

An Act Providing for the survey of public lands remaining unsurveyed in the State of Florida, with a view of satisfying the grant in aid of schools made to said State under the Act of March 3, 1845, and other Acts amendatory thereof.

[Act of Feb. 16, 1921.]

[Survey of public lands — Florida.] That it shall be lawful for the properly credited agent or official of the State of Florida having in charge the adjustment of its school grant to apply to the Commissioner of the General Land Office for the survey of any townships or parts of townships of public land unsurveyed in any of the surveying districts of said State, with a view to satisfy the grant in aid of schools made to said State of Florida by the Act of March 3, 1845, and other Acts amendatory thereto to the extent of the full quantity of land called for thereby; and upon the application of said agent or official, the Commissioner of the General Land Office shall proceed to have the survey or surveys so applied for made, as in the case of surveys of other public lands; and the lands that may be found to fall within the limits of such townships or parts of townships as ascertained by the survey shall be reserved, upon the filing of the application for survey from any adverse appropriation by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from date of filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim for the satisfaction of its school grant, as aforesaid, with the condition, however, that the agent or official of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from date of first publication in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such townships or parts of townships giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for, and after the expiration of such sixty days any lands which may remain unselected by the State and not otherwise appropriated according to law shall be subject to disposal under general laws as other public lands: *Provided*, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or parts of townships to the officials of the local land office of the land district in which the land is situated of the withdrawal of such townships or parts of townships for the purpose hereinbefore provided:

Provided further, That nothing herein shall be deemed to authorize the Commissioner of the General Land Office to survey any lands within the exterior boundaries of the Everglades, as defined in Everglades patent numbered one hundred and thirty-seven, issued to the State of Florida by the United States under the Swamp Land Act of 1850.

For Swamp Land Act of 1850 mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 708.

An Act To amend acts to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes.

[Act of March 1, 1921.]

[Rights of way for irrigation and drainage — permits for adjoining land for dwellings, etc.— lands in national forests.] That in addition to the rights of way granted by sections 18, 19, 20, and 21 of the Act of Congress entitled "An Act to repeal timber-culture laws, and for other purposes," approved March 3, 1891 (Twenty-sixth Statutes, page 1095), as amended by the Act of Congress entitled "An Act to amend the Irrigation Act of March 3, 1891 (Twenty-sixth Statutes, page 1095, section 18), and to amend section 2 of the Act of May 11, 1898 (Thirtieth Statutes, page 404)," approved March 4, 1917 (Thirty-ninth Statutes, page 1197), and, subject to the conditions and restrictions therein contained, the Secretary of the Interior is authorized to grant permits or easements for not to exceed five acres of ground adjoining the right of way at each of the locations, to be determined by the Secretary of the Interior, to be used for the erection thereon of dwellings or other buildings or corrals for the convenience of those engaged in the care and management of the works provided for by said Acts: *Provided*, That this Act shall not apply to lands within national forests.

For Act of March 3, 1891, secs. 18-21, see 8 Fed. Stat. Ann. (2d ed.) 803.

For Act of March 4, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 713.

An Act For the relief of bona fide settlers who intermarry after having complied with the homestead law for one year.

[Act of March 1, 1921.]

[Homesteads — marriage of entryman and entrywoman — impairment of right to patent — Act of April 6, 1914 amended.] That the Act entitled "An Act providing that the marriage of a homestead entryman to a homestead entrywoman shall not impair the right of either to a patent, after compliance with the law a year, to apply to existing entries," approved April 6, 1914 (Thirty-eighth Statutes, page 312), be, and the same is hereby, amended by adding thereto the following: "*Provided further*, That in the administration of this Act the terms 'entryman' and 'entrywoman' shall be construed to include bona fide settlers who have complied with the homestead law for at least one year next preceding such marriage."

For Act of April 6, 1914, here amended, see 8 Fed. Stat. Ann. (2d ed.) 620.

An Act To authorize certain homestead settlers or entrymen who entered the military or naval service of the United States during the war with Germany to make final proof of their entries.

[*Act of March 1, 1921.*]

[Homestead settlers or entrymen in World War — final proof of entries.]

That any settler or entryman under the homestead laws of the United States, who, after settlement, application, or entry and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to return to the land, may make proof, without further residence, improvement, or cultivation, at such time and place as may be authorized by the Secretary of the Interior, and receive patent to the land by him so entered or settled upon: *Provided*, That no such patent shall issue prior to the survey of the land.

This Act was amended by Act of Dec. 15, 1921, set out infra, this title, p. 273.

An Act Validating certain homestead entries.*

[*Act of March 4, 1921.*]

[SEC. 1.] **[Homestead entries — validation.]** That all pending homestead entries made in good faith prior to January 1, 1916, under the provisions of the enlarged homestead laws, and all rights to enter land under said laws, based on settlement made thereon in good faith before said date, and while the land was unsurveyed, by persons who, before making such enlarged homestead entry, had acquired title to land under the homestead laws, and therefore were not qualified to make an enlarged homestead entry, or such settlement, be, and the same are hereby, validated, if in all other respects regular, in all cases where the original homestead entry was for less than one hundred and sixty acres of land, *Provided*, That no settlement claim shall be validated hereby where adverse claim for the land has been initiated before the passage of this Act.

SEC. 2. **[Additional entry by homesteaders commuting first entry — cancellation.]** That no homestead entry heretofore made under the provisions of section 2 of the Act of Congress entitled "An Act for the relief of the Colorado Cooperative Colony, to permit homestead entries in certain cases, and for other purposes," approved June 5, 1900, shall be cancelled for the reason that the former entry made by the entryman was commuted under the provisions of an Act entitled "An Act relating to the public lands of the United States," approved June 15, 1880 (Twenty-first Statutes, page 237). And all entries heretofore canceled on the ground that an entryman who commuted under the provisions of said Act of June 15, 1880, is not entitled to the benefits of the Act of June 5, 1900, shall be reinstated upon a showing by the entryman or his heirs, within one year from the approval of this Act, that there were no valid grounds for the cancellation of such entries except that a former entry was perfected under the Act of June 15, 1880, in all cases where valid adverse rights

* This Act contains seven sections, but only the two here printed are of a general nature.

have not attached to the lands covered by such second entries since the date of their cancellation.

For Act of June 5, 1900, sec. 2, see 8 Fed. Stat. Ann. (2d ed.) 608.

[SEC. 1.] * * * [Registers and receivers—consolidation of offices at certain places.] That the President is authorized to consolidate the offices of registers and receivers at Alliance, Nebraska, and at Vancouver and Seattle, Washington, and by Executive order to require either officer, upon resignation of the other, to give an additional bond and to perform the duties of both offices. All the powers, duties, obligations, and penalties imposed by law upon both the register and receiver of said office shall be exercised by and imposed upon the officer remaining in control, whose compensation shall be a salary of \$500 per annum, together with the fees and commissions otherwise allowable to both register and receiver, but the salary, fees, and commissions of such officer shall not exceed \$3,000 per annum.

This and the paragraphs which follow are from the Sundry Civil Appropriation Act of March 4, 1921.

* * * [Expenses incurred by registers and receivers—liability of government.] That no expenses chargeable to the Government shall be incurred by registers and receivers in the conduct of local land offices except upon previous specific authorization by the Commissioner of the General Land Office.

See note to preceding paragraph.

* * * [Hearings in land entries—depositions—fees of officers taking.] For hearings or other proceedings held by order of the Commissioner of the General Land Office to determine the character of lands; whether alleged fraudulent entries are of that character or have been made in compliance with law; and of hearings in disbarment proceedings, \$25,000: *Provided*, That where depositions are taken for use in such hearings the fees of the officer taking them shall be 20 cents per folio for taking and certifying same and 10 cents per folio for each copy furnished to a party on request.

See note to first paragraph of this section.

An Act For the consolidation of the offices of register and receiver in district land offices in certain cases, and for other purposes.

[Act of Oct. 28, 1921.]

[SEC. 1.] [District land offices—consolidation of offices of register and receiver.] That the President is authorized to consolidate the offices of register and receiver in any district land office, and to appoint, by and with the advice and consent of the Senate, a register for such land office and to abolish the office of receiver of such land office upon sixty days' notice of such abolition mailed to such register and receiver whenever the total compensation for both register and receiver of such land office shall fall below the sum of \$4,000 per annum, and in his opinion the interests of the service warrant such abolition.

Within sixty days after the mailing of such notice the office of receiver of such land office shall cease to exist, and all the powers, duties, obligations, and penalties imposed by law upon both register and receiver of such office shall be exer-

cised by and imposed upon the register so appointed, who shall be paid a salary of \$500 per annum, together with the fees and commissions otherwise allowable to both register and receiver: *Provided*, That the salary, fees, and commissions of such register shall not exceed \$3,000 per annum.

Sec. 2. [Vacancy in office of register — designation.] That in case of a vacancy in the office of register by reason of death, resignation, or removal, or in case of inability to act, the Secretary of the Interior may designate for the period of such vacancy or inability to act the chief clerk of such office, or any other qualified employee of the Department of the Interior to act as register, subject to the filing of such bond or bonds as the Secretary of the Interior may prescribe, and the same authority is conferred upon the person so designated which such register lawfully possesses, except that no contest or protest shall be decided or disposed of by such clerk or employee, but all such decisions shall be deferred until the appointment or return of the register.

An Act To authorize certain desert-land claimants who entered the military or naval service of the United States during the war with Germany to make final proof of their entries.

[*Act of Dec. 15, 1921.*]

[Desert-land claimants in World War — final proof of entries.] That the Act of March 1, 1921 (Forty-first Statutes, page 1202), entitled "An Act to authorize certain homestead settlers or entrymen who entered the military or naval service of the United States during the war with Germany to make final proof of their entries," be, and the same is hereby, amended by adding thereto at the end thereof the following matter, which shall be known and designated as section 2 of said Act:

"**SEC. 2.** That any entryman under the desert-land laws, or any person entitled to preference right of entry under section 1 of the Act approved March 28, 1908 (Thirty-fifth Statutes at Large, page 52), who after application or entry for surveyed lands or legal initiation of claim for unsurveyed lands, and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to accomplish reclamation of and payment for the land, may make proof without further reclamation thereof or payments thereon under such rules and regulations as may be prescribed by the Secretary of the Interior, and receive patent for the land by him so entered or claimed, if found entitled thereto: *Provided*, That no such patent shall issue prior to the survey of the land."

For Act of March 1, 1921, here amended, see *supra*, this title, p. 271.

PUBLIC OFFICERS AND EMPLOYEES

Act of March 3, 1921 (Legislative, Executive and Judicial Appropriation Act), 274.

- Sec. 2. Government Employees — Pay — Telephone Operators — Assistant Messengers — Firemen — Watchmen — Laborers — Charwomen, 274.*
- 3. Employees Permanently Incapacitated — Right to Compensation, 274.*
- 6. Civilian Employees of United States and District of Columbia — Increase of Salary — Conditions — Exceptions — Appropriations, 274.*

CROSS-REFERENCES

See also *CENSUS; CIVIL SERVICE; EXECUTIVE DEPARTMENTS; JUDICIAL OFFICERS; LIGHTS AND BUOYS; MINERAL LANDS, MINES AND MINING; POSTAL SERVICE.*

SEC. 2. [Government employees — pay — telephone operators — assistant messengers — firemen — watchmen — laborers — charwomen.] That the pay of telephone-switchboard operators, assistant messengers, firemen, watchmen, laborers, and charwomen provided for in this Act, except those employed in mints and assay offices, unless otherwise specially stated, shall be as follows: For telephone-switchboard operators, assistant messengers, firemen, and watchmen, at the rate of \$720 per annum each; for laborers, at the rate of \$660 per annum each; assistant telephone-switchboard operators, at the rate of \$600 each, and for charwomen, at the rate of \$240 per annum each.

This and secs. 3 and 6 which follow are from the Legislative, Executive and Judicial Appropriation Act of March 3, 1921.

SEC. 3. [Employees permanently incapacitated — right to compensation.] That the appropriations herein made for the officers, clerks, and persons employed in the public service shall not be available for the compensation of any persons incapacitated otherwise than temporarily for performing such service.

See note to section 2 of this Act.

SEC. 6. [Civilian employees of United States and District of Columbia — increase of salary — conditions — exceptions — appropriations.] That all civilian employees of the Governments of the United States and the District of Columbia who receive a total of compensation at the rate of \$2,500 per annum or less, except as otherwise provided in this section, shall receive, during the fiscal year ending June 30, 1922, additional compensation at the rate of \$240 per annum: *Provided*, That such employees as receive a total of annual compensation at a rate more than \$2,500 and less than \$2,740 shall receive additional compensation at such rate per annum as may be necessary to make their salaries, plus their additional compensation, at the rate of \$2,740 per annum, and no employee shall receive additional compensation under this section at a rate which is more than 60 per centum of the rate of the total annual compensation received by such employee: *Provided further*, That the increased compensation at the rate of \$240 per annum for the fiscal year ending June 30, 1921, shall not be computed as salary in construing this section: *Provided*

further, That where an employee in the service on June 30, 1920 has received during the fiscal year 1921, or shall receive during the fiscal year 1922, an increase of salary at a rate in excess of \$200 per annum, or where an employee whether previously in the service or not, has entered the service since June 30, 1920, whether such employee has received an increase in salary or not, such employees shall be granted the increased compensation provided herein only when and upon the certification of the person in the legislative branch or the head of the department or establishment employing such persons of the ability and qualifications personal to such employees as would justify such increased compensation.

The provisions of this section shall not apply to the following: Employees paid from the postal revenues and sums which may be advanced from the Treasury to meet deficiencies in the postal revenues; employees whose pay is adjustable from time to time through wage boards or similar authority to accord with the commercial rates paid locally for the same class of service; employees of the Panama Canal on the Canal Zone; employees of the Alaskan Engineering Commission in Alaska; employees paid from lump-sum appropriations in bureaus, divisions, commissions, or any other governmental agencies or employments created by law since January 1, 1916, except employees of the United States Tariff Commission and the Bureau of War Risk Insurance, who shall be included, and officers and members of the Metropolitan police of the District of Columbia and the United States park police who receive the compensation fixed by the Act approved December 5, 1919, and officers and members of the fire department of the District of Columbia who receive the compensation fixed by the Act approved January 24, 1920, shall receive increased compensation at the rate allowed by this section for other employees. The provisions of this section shall not apply to employees whose duties require only a portion of their time, except charwomen, who shall be included; employees whose services are utilized for brief periods at intervals; persons employed by or through corporations, firms, or individuals acting for or on behalf of or as agents of the United States or any department or independent establishment of the Government of the United States in connection with construction work or the operation of plants; employees who receive a part of their pay from any outside sources under cooperative arrangements with the Government of the United States or the District of Columbia; employees who serve voluntarily or receive only a nominal compensation and employees who may be provided with special allowances because of their service in foreign countries. The provisions of this section shall not apply to employees of the railroads, express companies, telegraph, telephone, marine cable, or radio system or systems taken over by the United States, and nothing contained herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable, or radio system or systems as employees of the United States.

Section 6 of the Legislative, Executive, and Judicial Appropriation Act approved May 10, 1916, as amended by the Naval Appropriation Act approved August 29, 1916, shall not operate to prevent anyone from receiving the additional compensation provided in this section who otherwise is entitled to receive the same.

Such employees as are engaged on piecework, by the hour, or at per diem rates, if otherwise entitled to receive the additional compensation, shall receive

the same at the rate to which they are entitled in this section when their fixed rate of pay for the regular working hours and on the basis of three hundred and thirteen days in the said fiscal year would amount to \$2,500 or less: *Provided*, That this method of computation shall not apply to any per diem employees regularly paid a per diem for every day in the year.

So much as may be necessary to pay the additional compensation provided in this section to employees of the Government of the United States is appropriated out of any money in the Treasury not otherwise appropriated.

So much as may be necessary to pay the increased compensation provided in this section to employees of the government of the District of Columbia is appropriated, 40 per centum out of any money in the Treasury not otherwise appropriated and 60 per centum out of the revenues of the District of Columbia, except to employees of the Washington Aqueduct and the water department, which shall be paid entirely from the revenues of the water department, and to employees of the Minimum Wage Board, the community center department, and the playgrounds department, which shall be paid wholly out of the revenue of the District of Columbia.

So much as may be necessary to pay the increased compensation provided in this section to persons employed under trust funds who may be construed to be employees of the Government of the United States or of the District of Columbia is authorized to be paid, respectively, from such trust funds.

Reports shall be submitted to Congress on the first day of the next regular session showing for the first four months of the fiscal year the average number of employees in each department, bureau, office, or establishment receiving the increased compensation at the rate of \$240 per annum and the average number by grades receiving the same at each other rate.

See note to section 2 of this Act.

For sec. 6 of the Act of May 10, 1916, as amended by Act of Aug. 29, 1916, see 1918 Supp. Fed. Stat. Ann. 719.

PUBLIC PARKS

Act of March 4, 1921 (Sundry Civil Appropriation Act), 276.

Sec. 1. Hot Springs Reservation — Change of Name, 276.

CROSS-REFERENCE

See also *WATERS*

[SEC. 1.] * * * [Hot Springs Reservation — change of name.] Hereafter the Hot Springs Reservation shall be known as the Hot Springs National Park.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

PUBLIC PRINTING

Act of March 4, 1921 (Sundry Civil Appropriation Act), 277.

Sec. 1. Payments for Work Done for Different Departments and Establishments—Advancements, 277.

Illustrations Accompanying Memorial Addresses Delivered in Congress, 277.

Bureau of Engraving and Printing—Proceeds from Work—Disposition, 277.

Act of June 16, 1921 (Deficiency Appropriation Act), 277.

Sec. 4. Annual and Special Reports of Departments—Temporary Discontinuance of Printing, 277.

[SEC. 1.] * * * [Payments for work done for different departments and establishments—advancements.] During the fiscal year 1922, any department or independent establishment of the Government ordering printing and binding from the Government Printing Office (other than that specifically provided for by allotment) shall advance to the Public Printer, upon written request, 90 per centum of the estimated cost of the work at the time the order is placed and upon completion of such work shall pay to the Public Printer a sum sufficient to complete payment of the actual cost thereof. The sums so advanced to the Public Printer shall be placed to the credit of the appropriation "Public printing and binding," on the books of the Treasury Department and be subject to requisition by the Public Printer.

This and the paragraphs which follow are from the Sundry Civil Appropriation Act of March 4, 1921.

* * * [Illustrations accompanying memorial addresses delivered in Congress.] The illustrations to accompany bound copies of memorial addresses delivered in Congress shall be made at the Bureau of Engraving and Printing and paid for out of the appropriation for that bureau, or, in the discretion of the Joint Committee on Printing, shall hereafter be obtained elsewhere by the Public Printer and charged to the allotment for printing and binding for Congress.

See note to preceding paragraph.

* * * [Bureau of Engraving and Printing—proceeds from work—disposition.] During the fiscal year 1922 all proceeds derived from work performed by the Bureau of Engraving and Printing, by direction of the Secretary of the Treasury, not covered and embraced in the appropriation for said bureau for the said fiscal year, instead of being covered into the Treasury as miscellaneous receipts, as provided by the Act of August 4, 1886 (Twenty-fourth Statutes, page 227), shall be credited when received to the appropriation for said bureau for the fiscal year 1922.

See note to first paragraph of this section.

For Act of Aug. 4, 1886, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 1061.

[SEC. 4.] * * * [Annual and special reports of departments—temporary discontinuance of printing.] In order to keep the expenditures within or under the appropriations for the fiscal year 1922 for printing and binding, the heads of the various executive departments and Government establishments are

hereby authorized to discontinue the printing of any annual or special reports under their respective jurisdiction: *Provided*, That where the printing of said reports is discontinued, the original copy thereof shall be kept on file in the offices of the heads of the respective departments or Government establishments for public inspection.

This is from the Deficiency Appropriation Act of June 16, 1921.

PUBLIC PROPERTY, BUILDINGS AND GROUNDS

Act of March 3, 1921 (Legislative, Executive and Judicial Appropriation Act), 278.

Sec. 1. "Superintendent of the Capitol Building and Grounds"—Change of Title—"Architect of the Capitol," 278.

CROSS-REFERENCE

See also *DIPLOMATIC AND CONSULAR OFFICERS*

[SEC. 1.] * * * ["Superintendent of the Capitol Building and Grounds"—change of title—"Architect of the Capitol."] The title of "Superintendent of the Capitol Building and Grounds" is hereby changed to "Architect of the Capitol," but this change shall not affect the status of the present incumbent or require his reappointment.

This is from the Legislative, Executive and Judicial Appropriation Act of March 3, 1921

QUARANTINE

See *HEALTH AND QUARANTINE*

RADIO STATIONS

See *NAVY*

RAILROADS

See *ALASKA; CEMETERIES; HIGHWAYS; INTERSTATE COMMERCE; PENAL LAWS*

RECLAMATION

See *WATERS*

RED CROSS

See CHARITIES

"REVENUE ACT OF 1921"

See INTERNAL REVENUE

RIVERS, HARBORS AND CANALS*Act of Feb. 16, 1921, 279.*

- Sec. 1. Platte River, Missouri, Declared Non-navigable, 279.*
2. Amendment or Repeal, 279.

Act. of Feb. 25, 1921, 279.

- Sec. 1. Bayou Cocodrie, Louisiana, Declared Non-navigable, 279.*
2. Amendment or Repeal, 280.

Res. of July 25, 1921, No. 10, 280.

- Sec. 1. Grand River in Colorado — Change of Name, 280.*
2. Preservation of Rights Existing under Former Name, 280.

Act. of Aug. 19, 1921, 280.

- Sec. 1. Waters of Colorado River — Permission for Agreement between States for Apportionment, etc., 280.*
2. Reservation of Power to Amend Act, 281.

An Act Declaring Platte River to be a nonnavigable stream.**[Act of Feb. 16, 1921.*]*

[SEC. 1.] [Platte River, Missouri, declared non-navigable.] That the Platte river in the State of Missouri be, and the same is hereby, declared to be a non-navigable stream within the meaning of the Constitution and laws of the United States, and jurisdiction over said river is hereby declared to be vested in the State of Missouri.

SEC. 2. [Amendment or repeal.] That the right of Congress to alter, amend, or repeal this Act is hereby expressly reserved.

An Act To declare Bayou Cocodrie nonnavigable from its source to its junction with Bayou Chicot.*[Act of Feb. 25, 1921.]*

[SEC. 1.] [Bayou Cocodrie, Louisiana, declared non-navigable.] That Bayou Cocodrie, from its source to its junction with Bayou Chicot, in the State

* This Act was received by the President Dec. 30, 1921, and became a law without his approval as it was not returned to the House of Congress in which it originated within the time prescribed by the Constitution.

of Louisiana, is hereby declared to be not a navigable water of the United States within the meaning of the laws enacted by the Congress for the preservation and protection of such waters.

SEC. 2. [Amendment or repeal.] That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Joint Resolution To change the name of the Grand River in Colorado and Utah to the Colorado River.

[Res. of July 25, 1921, No. 10.]

[SEC. 1.] [Grand river in Colorado—change of name.] That from and after the passage of this Act the river heretofore known as the Grand River, from its source in the Rocky Mountain National Park in Colorado to the point where it joins the Green River in the State of Utah and forms the Colorado River, shall be known and designated on the public records as the Colorado River.

SEC. 2. [Preservation of rights existing under former name.] That the change in the name of said river shall in nowise affect the rights of the State of Colorado, the State of Utah, or of any county, municipality, corporation, association, or person; and all records, surveys, maps, and public documents of the United States in which said river is mentioned or referred to under the name of the Grand River shall be held to refer to the said river under and by the name of the Colorado River.

An Act To permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes.

[Act of Aug. 19, 1921.]

[SEC. 1.] [Waters of Colorado river—permission for agreement between states for apportionment, etc.] Whereas the Colorado River and its several tributaries rise within and flow through or from the boundaries between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; and

Whereas the territory included within the drainage area of the said stream and its tributaries is largely arid and in small part irrigated, and the present and future development necessities and general welfare of each of said States and of the United States require the further use of the waters of said streams for irrigation and other beneficial purposes, and that future litigation and conflict respecting the use and distribution of said waters should be avoided and settled by compact between said States; and

Whereas the said States, by appropriate legislation, have authorized the governors thereof to appoint commissioners to represent said States for the purpose of entering into a compact or agreement between said States respecting the

future utilization and disposition of the waters of the Colorado River and of the streams tributary thereto; and

Whereas the governors of said several States have named and appointed their respective commissioners for the purposes aforesaid, and have presented their resolution to the President of the United States requesting the appointment of a representative on behalf of the United States to participate in said negotiations and to represent the interests of the United States: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into a compact or agreement not later than January 1, 1923, providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto, upon condition that a suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations, as the representative of and for the protection of the interests of the United States, and shall make report to Congress of the proceedings and of any compact or agreement entered into, and the sum of \$10,000, or so much thereof as may be necessary, is hereby authorized to be appropriated to pay the salary and expenses of the representative of the United States appointed hereunder: *Provided*, That any such compact or agreement shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been approved by the legislature of each of said States and by the Congress of the United States.

SEC. 2. [Reservation of power to amend act.] That the right to alter, amend, or repeal this Act is herewith expressly reserved.

ROADS

See HIGHWAYS

SALES

See AGRICULTURE

SCHOOLS

See INDIANS

SEAMEN

Act of Dec. 26, 1920, 282.

Diseased Alien Seamen—Treatment in Hospitals—Expenses by Whom Borne, 282.

An Act To provide for the treatment in hospital of diseased alien seamen.

[*Act of Dec. 26, 1920.*]

[**Diseased alien seamen—treatment in hospitals—expenses by whom borne.**] That alien seamen found on arrival in ports of the United States to be afflicted with any of the disabilities or diseases mentioned in section 35 of the Act of February 5, 1917, entitled “An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States,” shall be placed in a hospital designated by the immigration official in charge at the port of arrival and treated, all expenses connected therewith, including burial in the event of death, to be borne by the owner, agent, consignee, or master of the vessel, and not to be deducted from the seamen’s wages, and no such vessel shall be granted clearance until such expenses are paid or their payment appropriately guaranteed and the collector of customs so notified by the immigration official in charge: *Provided*, That alien seamen suspected of being afflicted with any such disability or disease may be removed from the vessel on which they arrive to an immigration station or other appropriate place for such observation as will enable the examining surgeons definitely to determine whether or not they are so afflicted, all expenses connected therewith to be borne in the manner hereinbefore prescribed: *Provided further*, That in cases in which it shall appear to the satisfaction of the immigration official in charge that it will not be possible within a reasonable time to effect a cure, the return of the alien seamen shall be enforced on or at the expense of the vessel on which they came, upon such conditions as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall prescribe, to insure that the aliens shall be properly cared for and protected, and that the spread of contagion shall be guarded against.

For section 35 of Act of Feb. 5, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. p. 239.

Act as limited to passenger vessels.—This act is not limited to passenger vessels. *Franco v. Seas Shipping Corp.*, (D. C. Md. 1921) 272 Fed. 542, wherein the court said:

“It is suggested on behalf of the ship that the act in question is nothing but an amendment to the earlier Immigration Act of 1917, which was by its terms limited to passenger vessels, which the *Robin Hood* was not. I can see nothing in the terms of the act of December 26, 1920, to sustain this contention. It is true that, without explanation of the reasons for such legislation, it may seem unfair for the Congress to impose upon the owners of ships the duty of paying hospital bills to cure alien seamen of diseases due to their own vices, but the courts may not substitute their judgment for that of Congress. The act declares that all expenses connected with the hospital treatment, as well as some other things, shall be borne by the owner, agent, consignee, or master of the

vessel ‘and not to be deducted from the seamen’s wages.’ Such language is too clear to require construction.”

Penalty for delay in payment of expenses.—In a libel by alien seamen for full wages and compensation at the rate of two days’ wages for one for delay in making payment for hospital expenses arising under this act, the libel was sustained in so far as it required the payment of wages in full without deduction for the hospital charges and it was dismissed in so far as it asked damages or penalty for delay in paying the wages, it appearing that the owner of the vessel delayed payment because of a contention that it was entitled to have the hospital expenses deducted from the wages, and that it united with the libelants in bringing the question to the attention of the court at the earliest possible moment. *Franco v. Seas Shipping Corp.*, (D. C. Md. 1921) 272 Fed. 542.

SEARCH WARRANTS

See INTOXICATING LIQUORS

SELECTIVE SERVICE ACT

See the Resolution of March 3, 1921, set out in the title WAR DEPARTMENT AND MILITARY ESTABLISHMENT, *infra*, this volume. This Resolution repealed much war time legislation but provided, "That nothing therein contained shall be construed as effective to terminate the liability to prosecution and punishment under the selective service law, * * * of any person who failed to comply with the provisions of said Act." The Selective Service Law is set out in 9 Fed. Stat. Ann. 1133.

SHIPPING AND NAVIGATION

Act of Dec. 22, 1920, 283.

- Sec. 1. Merchant Marine — Medals of Merit to Personnel, 283.*
2. Successive Deeds of Service — Number of Medals Awarded to One Person, 284.
3. Period within Which Medals May Be Issued, 284.
4. Issuance of Medal to Representative of Deceased Person, 284.
5. Rules and Regulations — Authority of President, 284.

Act of March 4, 1921 (Sundry Civil Appropriation Act), 284.

- Sec. 1. United States Emergency Fleet Corporation — Expenses — Sources of Payment — Additional Vessels — Rent of Buildings — Expenditures for Printing — Cost Plus Contracts, 284.*

Act of Aug. 24, 1921 (Deficiency Appropriation Act), 285.

United States Shipping Board and Emergency Fleet Corporation — Officers and Employees — Compensation, 285.

CROSS-REFERENCES

See also *HEALTH AND QUARANTINE; SEAMEN*

An Act To provide for the award of a medal of merit to the personnel of the Merchant marine of the United States of America.

[*Act of Dec. 22, 1920.*]

[SEC. 1.] [Merchant marine — medals of merit to personnel.] That the President of the United States be, and he is hereby, authorized to present, but

not in the name of Congress, a medal of merit of appropriate design with a bar and ribbon, together with a rosette or other device to be worn in lieu thereof, to any person who in the merchant marine of the United States between the 6th day of April, 1917, and the 11th day of November, 1918, distinguished himself by extraordinary heroism or distinguished service at sea in the line of duty.

SEC. 2. [Successive deeds of service — number of medals awarded to one person.] That no more than one medal of merit shall be issued to any one person, but for each succeeding deed or service sufficient to justify the award of a medal, the President may award a suitable bar or other suitable emblem or insignia to be worn with the decoration and the corresponding rosette or other device.

SEC. 3. [Period within which medals may be issued.] That, except as otherwise prescribed herein, no medal or bar or suitable emblem or insignia in lieu of said medal shall be issued to any person after three years from the passage of this Act, unless a specific statement or report distinctly setting forth the act or distinguished service and suggesting or recommending official recognition thereof shall have been made and substantiated at the time of the act or service or within three years after the passage of this Act.

SEC. 4. [Issuance of medal to representative of deceased person.] That in case an individual who shall distinguish himself dies before the making of the award to which he may be entitled, the award nevertheless may be made and the medal or bar or other emblem or insignia presented to such representative of the deceased as the President may designate.

SEC. 5. [Rules and regulations — authority of President.] The President is authorized to make from time to time any and all rules, regulations, and orders which he shall deem necessary to carry into effect the provisions of this act.

[SEC. 1.] * * * [United States Emergency Fleet Corporation — expenses — sources of payment — additional vessels — rent of buildings — expenditures for printing — cost plus contracts.] The expenses of the United States Shipping Board Emergency Fleet Corporation during the fiscal year ending June 30, 1922, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges and miscellaneous adjustments, maintenance and operation of vessels, the completion of vessels now under construction, and for carrying out the provisions of the Act entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes," approved June 5, 1920, shall be paid from the following sources: (a) The amount on hand July 1, 1921; (b) the amount received during the fiscal year 1922 from the operation of ships, and (c) not to exceed \$55,000,000 from deferred payments on ships sold prior to the approval of this Act, from plant and material sold during the fiscal year 1922, and from ships sold during

the fiscal year 1922: *Provided*, That after the approval of this Act no contract shall be entered into or work undertaken for the construction of any additional vessels for the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation.

No part of the funds of the United States Shipping Board Emergency Fleet Corporation shall be available for rent of buildings in the District of Columbia during the fiscal year 1922 if suitable space is provided for the said corporation by the Public Buildings Commission.

No part of the funds made available in this Act for the Shipping Board or the Emergency Fleet Corporation shall be expended for the preparation, printing, or publication of any bulletins, newspapers, magazines, or periodicals, or for services in connection with same, not including preparation and printing of reports or documents authorized by law.

No contracts for ship construction to be entered into shall provide that the compensation of the contractor shall be the cost of construction plus a percentage thereof for profit, or plus a fixed fee for profit.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

For Act of June 5, 1920, mentioned in the text, see 1920 Supp. Fed. Stat. Ann. (2d ed.) 236.

* * * [United States Shipping Board and Emergency Fleet Corporation — officers and employees — compensation.] That not more than six officers or employees of the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation shall be paid an annual salary or compensation in excess of \$11,000.

This is from the Deficiency Appropriation Act of Aug. 24, 1921.

SOLDIERS AND SAILORS' CIVIL RELIEF ACT

See the Resolution of March 3, 1921, set out in the title WAR DEPARTMENT AND MILITARY ESTABLISHMENT, *infra*, this volume. This Resolution repealed much of the war legislation.

STAMP TAXES

See INTERNAL REVENUE

STANDARD TIME

See TIME

STATE DEPARTMENT

Act of March 2, 1921 (Diplomatic and Consular Appropriation Act), 286.

Sec. 1. Pan-American Union — Moneys Received from Other American Republics — Disposition — Monthly Bulletin, 286.

CROSS-REFERENCE

See CUSTOMS DUTIES for statute abolishing War Trade section of Department of State.

[SEC. 1.] * * * [Pan-American Union — moneys received from other American Republics — disposition — monthly bulletin.] Pan American Union, \$100,000: *Provided*, That any moneys received from the other American Republics for the support of the union shall be paid into the Treasury as a credit, in addition to the appropriation, and may be drawn therefrom upon requisitions of the chairman of the governing board of the union for the purpose of meeting the expenses of the union and of carrying out the orders of the said governing board: *And provided further*, That the Public Printer is authorized to print an edition of the monthly bulletin not to exceed 6,000 copies per month, for distribution by the union during the fiscal year ending June 30, 1922.

This is from the Diplomatic and Consular Service Appropriation Act of March 2, 1921

STATES

Res. of March 4, 1921, No. 68, 286.

Boundary Waters between States — Agreements as to Jurisdiction, 286.

Joint Resolution Giving consent of the Congress of the United States to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of said States, to agree upon the jurisdiction to be exercised by said States over boundary waters between any two or more of said States.

[*Res. of March 4, 1921, No. 68.*]

[**Boundary waters between states — agreements as to jurisdiction.**] That the consent of the Congress is hereby given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is hereby, given to the con-

current jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the legislature of the State of Minnesota approved April 20, 1917, and the act of the legislature of the State of South Dakota approved February 13, 1917.

STATUTE OF LIMITATIONS

See CRIMINAL LAW

STOCK MARKETS

See AGRICULTURE

STOCKYARDS

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An Act To regulate interstate and foreign commerce in live stock, live-stock products, dairy products, poultry, poultry products, and eggs, and for other purposes.

[Act of Aug. 15, 1921.]

TITLE I.—DEFINITIONS.

[SEC. 1.] [Title of Act — “Packers and Stockyards Act, 1921.”] This Act may be cited as the “Packers and Stockyards Act, 1921.”

SEC. 2. (a) [Various terms defined.] When used in this Act —

(1) [“Person.”] The term “person” includes individuals, partnerships, corporations, and associations.

(2) [“Secretary.”] The term “Secretary” means the Secretary of Agriculture;

(3) [“Meat food products.”] The term “meat food products” means all products and by-products of the slaughtering and meat-packing industry — if edible;

(4) [“Live stock.”] The term “live stock” means cattle, sheep, swine, horses, mules, or goats — whether live or dead;

(5) [“Live-stock products.”] The term “live-stock products” means all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from live stock; and

(6) [“Commerce.”] The term “commerce” means commerce between any State, Territory, or possession, or the District of Columbia, and any place out-

side thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

(b) [**Transaction in respect to any article when in commerce.**] For the purpose of this Act (but not in any wise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries, whereby live stock, meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of live stock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

TITLE II.—PACKERS.

SEC. 201. [**"Packer" defined.**] When used in this Act —

The term "packer" means any person engaged in the business (a) of buying live stock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing live-stock products for sale or shipment in commerce, or (d) of marketing meats meat food products, live-stock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing live-stock products or in such marketing business shall be considered a packer unless —

(1) Such person is also engaged in any business referred to in clause (a) or (b) above, or unless

(2) Such person owns or controls, directly or indirectly through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) above, or unless

(3) Any interest in such business of manufacturing or preparing live-stock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) above, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing live-stock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) above.

SEC. 202. [**Enumeration of practices by packers declared unlawful.**] It shall be unlawful for any packer to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or buy or otherwise receive from or for any other packer, any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivision (a), (b), (c), (d), or (e).

SEC. 203. (a) [Violation of provisions of title — complaint — hearing before Secretary of Agriculture — intervention.] Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this title, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. Any person for good cause shown may on application be allowed by the Secretary to intervene in such proceeding, and appear in person or by counsel. At any time prior to the close of the hearing the Secretary may amend the complaint; but in case of any amendment adding new charges the hearing shall, on the request of the packer, be adjourned for a period not exceeding fifteen days.

(b) [Findings — report — order — filing of testimony.] If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture.

(c) [**Amendment of report or order.**] Until a transcript of the record in such hearing has been filed in a circuit court of appeals of the United States, as provided in section 204, the Secretary at any time, upon such notice and in such manner as he deems proper, but only after reasonable opportunity to the packer to be heard, may amend or set aside the report or order, in whole or in part.

(d) [**Service of complaints, orders and other processes.**] Complaints, orders, and other processes of the Secretary under this section may be served in the same manner as provided in section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

For sec. 5 of the Act of Sept. 26, 1914, above mentioned, see 4 Fed. Stat. Ann. (2d ed.) 577.

SEC. 204. (a) [**Conclusiveness of order — appeal to Circuit Court of Appeals — petition — bond.**] An order made under section 203 shall be final and conclusive unless within thirty days after service the packer appeals to the circuit court of appeals for the circuit in which he has his principal place of business, by filing with the clerk of such court a written petition praying that the Secretary's order be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such packer will pay the costs of the proceedings if the court so directs.

(b) [**Transcript of record — amendment of petition.**] The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the complaint, the evidence, and the report and order. If before such transcript is filed the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

(c) [**Injunction pending appeal.**] At any time after such transcript is filed the court, on application of the Secretary, may issue a temporary injunction restraining, to the extent it deems proper, the packer and his officers, directors, agents, and employees, from violating any of the provisions of the order pending the final determination of the appeal.

(d) [**Evidence on appeal — preferred cause.**] The evidence so taken or admitted, duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way.

(e) [**Disposition of case on appeal.**] The court may affirm, modify, or set aside the order of the Secretary.

(f) [**Reopening hearing — additional evidence — new findings.**] If the court determines that the just and proper disposition of the case requires the taking of additional evidence, the court shall order the hearing to be reopened for the taking of such evidence, in such manner and upon such terms and conditions as the court may deem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings and his recommendations, if any, for the modification or setting aside of his order, with the return of such additional evidence.

(g) [**Affirmance or modification of order by Circuit Court of Appeals.**] If the circuit court of appeals affirms or modifies the order of the Secretary, its decree shall operate as an injunction to restrain the packer, and his officers, directors, agents, and employees from violating the provisions of such order or such order as modified.

(h) [**Review by Supreme Court — certiorari.**] The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders of the Secretary, and the decree of such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in section 240 of the Judicial Code, if such writ is duly applied for within sixty days after entry of the decree. The issue of such writ shall not operate as a stay of the decree of the circuit court of appeals, in so far as such decree operates as an injunction, unless so ordered by the Supreme Court.

(i) [**"Circuit Court of Appeals" as including District of Columbia Court of Appeals.**] For the purposes of this title the term "circuit court of appeals," in case the principal place of business of the packer is in the District of Columbia, means the Court of Appeals of the District of Columbia.

SEC. 205. [**Failure of packer or employee to obey order of Secretary of Agriculture — penalty.**] Any packer, or any officer, director, agent, or employee of a packer, who fails to obey any order of the Secretary issued under the provisions of section 203, or such order as modified —

(1) After the expiration of the time allowed for filing a petition in the circuit court of appeals to set aside or modify such order, if no such petition has been filed within such time; or

(2) After the expiration of the time allowed for applying for a writ of certiorari, if such order, or such order as modified, has been sustained by the circuit court of appeals and no such writ has been applied for within such time; or

(3) After such order, or such order as modified, has been sustained by the courts as provided in section 204: shall on conviction be fined not less than \$500 nor more than \$10,000, or imprisoned for not less than six months nor more than five years, or both. Each day during which such failure continues shall be deemed a separate offense.

TITLE III.—STOCKYARDS.

SEC. 301. [**Definition of terms.**] When used in this Act —

(a) [**"Stockyard owner."**] The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) [**"Stockyard services."**] The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock;

(c) [**"Market agency."**] The term "market agency" means any person engaged in the business of (1) buying or selling in commerce live stock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) [**"Dealer."**] The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce live stock at a

stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) **[Stockyards affected by title.]** When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) **[Public notice of stockyards affected by title.]** The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. **[Registration of persons carrying on business of market agency or dealer at stockyard.]** After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304. **[Duty to furnish reasonable stockyard services.]** It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard.

SEC. 305. **[Rates or charges for stockyard services.]** All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) **[Schedules of rates and charges.]** Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) **[Contents of schedules — posting.]** Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make, such changes in respect thereto as may be found expedient.

(c) **[Changes in rates and charges.]** No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) **[When filing of schedule may be refused.]** The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) **[Hearing concerning lawfulness of rates, charges, etc., after filing of schedule.]** Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) **[Necessity of abiding by rates and charges named in schedules.]** After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner

any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their live stock, subject to such regulations as the Secretary may prescribe) ; nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) [**Failure to comply with provisions of section or regulations thereunder — penalty.**] Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than \$500 for each such offense, and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) [**Failure to comply with provisions of section or regulations thereunder — fine or imprisonment.**] Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than \$1,000, or imprisoned not more than one year, or both.

SEC. 307. [**Reasonable regulations and practices respecting stockyard services.**] It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) [**Damages for violation of provisions of this title.**] If any stockyard owner, market agency, or dealer, violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) [**Remedies for enforcement of liability.**] Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

SEC. 309. (a) [**Complaints against stockyard owners, market agencies or dealers — petition to Secretary of Agriculture — investigation by Secretary.**] Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it

shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) **[Investigation by Secretary of complaints by agency of State or Territory.]** The Secretary, at the request of the live-stock commissioner, Board of Agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) **[Inquiries by Secretary on own motion.]** The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) **[Dismissal of complaint — absence of direct damage.]** No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) **[Order by Secretary after hearing directing payment of damages.]** If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) **[Failure to comply with order for payment of damages — remedies.]** If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. [Unreasonable rates and charges — power of Secretary to remedy.] Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary [sic]—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. [**Rates, charges, etc., in intrastate commerce discriminatory against interstate commerce — power of Secretary to remedy.**] Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce of live stock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in live stock on the one hand and interstate or foreign commerce in live stock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in live stock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) [**Unfair practices by stockyard owners, etc., affecting live stock.**] It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

(b) [**Remedy for such practices.**] Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. [**Orders of Secretary under this title — when in effect — continuance in force.**] Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a speci-

fied period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) [Failure to obey orders of Secretary — forfeiture of money.] Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of \$500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) [Recovery of forfeitures.] It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. [Failure to obey orders of Secretary — injunction.] If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. [Laws affecting orders of Interstate Commerce Commission as applicable to this title.] For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

TITLE IV.—GENERAL PROVISIONS.

SEC. 401. [Keeping of records by packers, etc.— penalty for failure to keep.] Every packer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than \$5,000, or imprisoned not more than three years, or both.

SEC. 402. [Laws affecting Federal Trade Commission as applicable to this Act.] For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this Act in any part of the United States.

For secs. 6, 8, 9, and 10 of the Act of Sept. 26, 1914, above mentioned, see 4 Fed. Stat. Ann. (2d ed.) 580-583.

SEC. 403. [Act or omission of agent as act or omission of principal.] When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

SEC. 404. [Prosecution of violations by Attorney General.] The Secretary may report any violation of this Act to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay.

SEC. 405. [Provisions of Act as affecting proceedings under other specified Acts.] Nothing contained in this Act, except as otherwise provided herein, shall be construed —

(a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, the Interstate Commerce Act as amended, the Act entitled "An Act to promote export trade, and for other purposes," approved April 10, 1918, or sections 73 to 77, inclusive, of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended by the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February 12, 1913, or

(b) To alter, modify, or repeal such Acts or any part or parts thereof, or

(c) To prevent or interfere with any investigation, proceeding, or prosecution begun and pending at the time this Act becomes effective.

Acts above mentioned are set out as follows in Fed. Stat. Ann. (2d ed.): Act of July 2, 1890, in vol. 9, p. 644; Act of Oct. 15, 1914, in vol. 9, p. 730; Interstate Commerce Act in vol. 4, p. 331, and 1918 Supp. 387; Act of April 10, 1918, in 1918 Supp. 246; secs. 73-77 as amended, in vol. 9, p. 726.

SEC. 406. (a) [Provisions of Act as affecting power of Interstate Commerce Commission.] Nothing in this Act shall affect the power or jurisdiction of

the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

(b) [Provisions of Act as affecting power of Federal Trade Commission.] On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, or under section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case.

For sec. 5 of Act of Sept. 26, 1914, and sec. 11 of Act of Oct. 15, 1914, referred to above, see respectively vol. 4, p. 577, and vol. 9, p. 741, Fed. Stat. Ann. (2d ed.).

SEC. 407. [Miscellaneous powers of Secretary.] The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose.

SEC. 408. [Partial invalidity of Act — effect on remainder.] If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SURETY AND SURETYSHIP

Act of Nov. 23, 1921 ("Revenue Act of 1921"), 301.

Sec. 1329. Deposit of United States Bonds or Notes in Lieu of Surety, 301.

SEC. 1329. **Deposit of United States bonds or notes in lieu of surety.** That wherever by the laws of the United States or regulations made pursuant thereto, any person is required to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called "penal bond," with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds or notes of the United States in a sum equal at their par

value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds or notes in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds or notes deposited hereunder and such other United States bonds or notes as may be substituted therefor from time to time as such security, may be deposited with the Treasurer of the United States, a Federal reserve bank, or other depository duly designated for that purpose by the Secretary, which shall issue receipt therefor, describing such bonds or notes so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds or notes so deposited, shall be returned to the depositor: *Provided*, That in case a person or persons supplying a contractor with labor or material as provided by the Act of Congress, approved February 24, 1905 (33 Stat. 811), entitled "An Act to amend an Act approved August thirteenth, eighteen hundred and ninety-four, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,'" shall file with the obligee, at any time after a default in the performance of any contract subject to said Acts, the application and affidavit therein provided, the obligee shall not deliver to the obligor the deposited bonds or notes nor any surplus proceeds thereof until the expiration of the time limited by said Acts for the institution of suit by such person or persons, and, in case suit shall be instituted within such time, shall hold said bonds or notes or proceeds subject to the order of the court having jurisdiction thereof: *Provided further*, That nothing herein contained shall affect or impair the priority of the claim of the United States against the bonds or notes deposited or any right or remedy granted by said Acts or by this section to the United States for default upon any obligation of said penal bond: *Provided further*, That all laws inconsistent with this section are hereby so modified as to conform to the provisions hereof: *And provided further*, That nothing contained herein shall affect the authority of courts over the security, where such bonds are taken as security in judicial proceedings, or the authority of any administrative officer of the United States to receive United States bonds for security in cases authorized by existing laws. The Secretary may prescribe rules and regulations necessary and proper for carrying this section into effect.

This is from the "Revenue Act of 1921" enacted Nov. 23, 1921.

For Act of Feb. 24, 1905, mentioned in text, see 8 Fed. Stat. Ann. (2d ed.) 374.

TARIFF

See CUSTOMS DUTIES

TAXATION

See CUSTOMS DUTIES; INTERNAL REVENUE

TAX SIMPLIFICATION BOARD

See INTERNAL REVENUE

TELEGRAPHS, TELEPHONES AND CABLES*Act of May 27, 1921, 303.**Sec. 1. Cables — Governmental Control — Landing and Operation — License by President, 303.**2. Grounds for Withholding or Granting License — Exclusiveness of Rights of Landing or of Operation — Transmission of Messages — Interstate Commerce Commission, 303.**3. Prevention of or Illegal Landing or Operation of Cable — Injunction — Jurisdiction of Courts, 304.**4. Violation of Provisions of Section 1 — Penalty, 304.**5. "United States" Defined for Purposes of Act, 304.**6. Rights Accruing under Act — Rescission and Modification, 304.***An Act Relating to the landing and operation of submarine cables in the United States.***[Act of May 27, 1921.]*

[SEC. 1.] **[Cables — governmental control — landing and operation — license by President.]** That no person shall land or operate in the United States any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States: *Provided*, That any such cable now laid within the United States without a license granted by the President may continue to operate without such license for a period of ninety days from the date this Act takes effect: *And provided further*, That the conditions of this Act shall not apply to cables, all of which, including both terminals, lie wholly within the continental United States.

SEC. 2. **[Grounds for withholding or granting license — exclusiveness of rights of landing or of operation — transmission of messages — Interstate Commerce Commission.]** That the President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed: *Provided*, That the license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States: *And provided further*, That nothing herein contained shall be construed to limit the power and jurisdiction heretofor granted the Interstate Commerce Commission with respect to the transmission of messages.

SEC. 3. [Prevention of or illegal landing or operation of cable — injunction — jurisdiction of courts.] That the President is empowered to prevent the landing of any cable about to be landed in violation of this Act. When any such cable is about to be or is landed or is being operated, without a license, any district court of the United States exercising jurisdiction in the district in which such cable is about to be or is landed, or any district court of the United States having jurisdiction of the parties, shall have jurisdiction, at the suit of the United States, to enjoin the landing or operation of such cable or to compel, by injunction, the removal thereof.

SEC. 4. [Violation of provisions of section 1 — penalty.] That whoever knowingly commits, instigates, or assists in any act forbidden by section 1 of this Act shall be guilty of a misdemeanor and shall be fined not more than \$5,000, or imprisoned for not more than one year, or both.

SEC. 5. [“ United States ” defined for purposes of act.] That the term “ United States ” as used in this Act includes the Canal Zone, the Philippine Islands, and all territory, continental or insular, subject to the jurisdiction of the United States of America.

SEC. 6. [Rights accruing under act — rescission and modification.] That no right shall accrue to any Government, person, or corporation under the terms of this Act that may not be rescinded, changed, modified, or amended by the Congress.

TELEPHONES

See INTERSTATE COMMERCE

TERRITORIES

See ALASKA; HAWAIIAN ISLANDS; PHILIPPINE ISLANDS; PORTO RICO; VIRGIN ISLANDS

TIMBER LANDS AND FOREST RESERVES

Act of Jan. 11, 1921, 304.

Protection of Timber — Permits to Cut — Foreign Corporations, 304.

CROSS-REFERENCE

See *HIGHWAYS; PUBLIC LANDS*

An Act Authorizing the cutting of timber by corporations organized in one State and conducting operations in another.

[Act of Jan. 11, 1921.¹]

[Protection of timber — permits to cut — foreign corporations.] That section 1 of an Act entitled “ An Act authorizing the citizens of Colorado, Nevada,

¹ This Act was received by the President Dec. 30, 1920, and became a law without his approval as it was not returned to the House of Congress in which it originated within the time prescribed by the Constitution.

and the Territories to fell and remove timber on the public domain for mining and domestic purposes," approved June 3, 1878, chapter 150, page 88, volume 20, United States Statutes at Large, and section 8 of an Act entitled "An Act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, as amended by an Act approved March 3, 1891, chapter 559, page 1093, volume 26, United States Statutes at Large, and the several Acts amendatory thereof, be, and the same are hereby, extended so that it shall be lawful for the Secretary of the Interior to grant permits to corporations incorporated under a Federal law of the United States or incorporated under the laws of a State or Territory of the United States, other than the State in which the privilege is requested, said permits to confer the same rights and benefits upon such corporations as are conferred by the aforesaid Acts upon corporations incorporated in the State in which the privilege is to be exercised: *Provided*, That all such corporations shall first have complied with the laws of that State so as to entitle them to do business therein; but nothing herein shall operate to enlarge the rights of any railway company to cut timber on the public domain.

For Act of June 3, 1878, affected by the text, see 9 Fed. Stat. Ann. (2d ed.) 624.

For Act of March 3, 1891, affected by the text, see 9 Fed. Stat. Ann. (2d ed.) 629.

TIME

Act of March 4, 1921, 305.

Sec. 1. Standard Central Time — Western Boundary Line, 305.

2. Repeal of Conflicting Laws, 306.

An Act To transfer the Panhandle and Plains section of Texas and Oklahoma to the United States standard central time zone.

[*Act of March 4, 1921.*]

[SEC. 1.] [Standard Central Time — western boundary line.] That the Panhandle and Plains section of Texas and Oklahoma be, and the same are hereby, transferred to and placed within the United States standard central time zone.

The Interstate Commerce Commission is hereby authorized and directed to issue an order placing the western boundary line of the United States standard central time zone in so far as the same affect Texas and Oklahoma as follows:

Beginning at a point where such western boundary time zone line crosses the State boundary line between Kansas and Oklahoma; thence westerly along said State boundary line to the northwest corner of the State of Oklahoma; thence in a southerly direction along the west State boundary line of Oklahoma and the west State boundary line of Texas to the southeastern corner of the State of New Mexico; thence in a westerly direction along the State boundary line between the States of Texas and New Mexico to the Rio Grande River; thence down the Rio Grande River as the boundary line between the United States and Mexico: *Provided*, That the Chicago, Rock Island and Gulf Railway Company and the Chicago, Rock Island and Pacific Railway Company may use Tucumcari, New Mexico, as the point at which they change from central to mountain time and vice versa; the Colorado Southern and Fort Worth and Denver City Railway Com-

panies may use Sixela, New Mexico, as such changing point; the Atchison, Topeka and Santa Fe Railway Company and other branches of the Santa Fe System may use Clovis, New Mexico, as such changing point, and those railways running into or through El Paso may use El Paso as such point: *Provided further*, That this Act shall not, except as herein provided, interfere with the adjustment of time zones as established by the Interstate Commerce Commission.

SEC. 2. [Repeal of conflicting laws.] That all laws and parts of laws in conflict herewith are hereby repealed.

TRADE COMMISSION

See STOCKYARDS

TRADING WITH THE ENEMY

Act of Feb. 27, 1921, 306.

Claims against Property in Hands of Alien Property Custodian or United States Treasurer—Adjudication—Liens, etc.—Women Married to Foreigners—Sec. 9 Amended, 306.

Act of Dec. 21, 1921, 307.

Claims against Alien Custodian—Extension of Time for Beginning Suits—Sec. 9 of Act Amended, 307.

CROSS-REFERENCE

See also *PATENTS*

An Act To amend section 9 of an Act entitled “An Act to define, regulate, and punish trading with the enemy, and for other purposes,” approved October 6, 1917, as amended.

[*Act of Feb. 27, 1921.*]

[Claims against property in hands of Alien Property Custodian or United States Treasurer—adjudication—liens, etc.—women married to foreigners—sec. 9 amended.] That subdivisions (2) and (3) of subsection (b) of section 9 of an Act entitled “An Act to define, regulate, and punish trading with the enemy, and for other purposes,” approved October 6, 1917, as amended, be, and hereby are, amended so as to read as follows:

“(2) A woman who, at the time of her marriage, was a subject or citizen of a nation which has remained neutral in the war, or of a nation which was

* See the Resolution of March 3, 1921, set out in the title WAR DEPARTMENT AND MILITARY ESTABLISHMENT, *infra*, this volume, p. 315. This resolution repealed much war time legislation but excepted “the Act known as the Trading with the Enemy Act, approved October 6, 1917, . . . and all amendments thereto.” The Trading with the Enemy Act with amendments is set out in 1918 Supp. Fed. Stat. Ann. 846, 1919 Supp. Fed. Stat. Ann. 355.

associated with the United States in the prosecution of said war, and who, prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman, either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917.

“(3) A woman who, at the time of her marriage, was a citizen of the United States and who, prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary, and that the money or other property concerned was not acquired by such woman, either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917.”

For sec. 9, here amended, see 1918 Supp. 858. And for other amendments see the Act of Dec. 21, 1921, which follows the text, and also 1919 Supp. 356 and 1920 Supp. 268.

An Act To amend section 9 of an Act entitled “An Act to define, regulate, and punish trading with the enemy, and for other purposes,” approved October 6, 1917, as amended.

[Act of Dec. 21, 1921.]

[Claims against alien custodian — extension of time for beginning suits — sec. 9 of Act amended.] That section 9 of the Act entitled “An Act to define, regulate, and punish trading with the enemy, and for other purposes,” approved October 6, 1917, as amended, is hereby amended by striking out the words “six months” in such section and inserting in lieu thereof “eighteen months.”

For sec. 9, here amended, see 1918 Supp. 858. And for other amendments see the Act of Feb. 27, 1921, which precedes this Act in the text, and also 1919 Supp. 356 and 1920 Supp.

TRANSPORTATION ACT

See INTERSTATE COMMERCE

TREASURY DEPARTMENT

Act of March 1, 1921 (“First Deficiency Act, Fiscal Year 1921”), 308.

Sec. 1. Office of Auditor — Temporary Employees — Compensation, 308.

Act of March 4, 1921 (“Sundry Civil Appropriation Act”), 308.

Sec. 1. Enforcement of Laws — Detail of Persons, 308.

Act of June 16, 1921 (Deficiency Appropriation Act), 308.

Sec. 4. Undersecretary of the Treasury — Creation of Office — Appointment — Compensation — Duties, 308.

Office of Comptroller of Currency — Chief of Examining Division, 308.

CROSS-REFERENCES

See also CONGRESS; CUSTOMS DUTIES; EXECUTIVE DEPARTMENTS;
HOSPITALS AND ASYLUMS; PUBLIC DEBT

[SEC. 1.] * * * [Office of auditor — temporary employees — compensation.] For compensation to be fixed by the Secretary of the Treasury, of such temporary employees (nonapportioned) as may be necessary to audit the accounts and vouchers of the bureaus and officers of the Treasury Department, \$12,600: *Provided*, That no person shall be employed hereunder at a rate of compensation exceeding \$2,000 per annum.

This is from the "First Deficiency Act, fiscal year 1921," approved March 1, 1921.

[SEC. 1.] * * * [Enforcement of laws — detail of persons.] The Secretary of the Treasury is authorized to use for, and in connection with, the enforcement of the laws relating to the Treasury Department and the several branches of the public service under its control, not exceeding at any one time four persons paid from the appropriation for the collection of customs, four persons paid from the appropriation for salaries and expenses of internal-revenue agents or from the appropriation for the foregoing purpose, and four persons paid from the appropriation for suppressing counterfeiting and other crimes, but not exceeding six persons so detailed shall be employed at any one time hereunder: *Provided*, That nothing herein contained shall be construed to deprive the Secretary of the Treasury from making any detail now otherwise authorized by existing law.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

[SEC. 4.] * * * [Undersecretary of the Treasury — creation of office — appointment — compensation — duties.] Undersecretary of the Treasury, to be nominated by the President and appointed by him, by and with the advice and consent of the Senate, who shall receive compensation at the rate of \$10,000 per annum and shall perform such duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law, and under the provisions of section 177, Revised Statutes, in case of the death, resignation, absence, or sickness of the Secretary of the Treasury, shall perform the duties of the Secretary until a successor is appointed or such absence or sickness shall cease, fiscal year 1922, \$10,000.

This and the paragraph which follows are from the Deficiency Appropriation Act of June 16, 1921.

For R. S. sec. 177 mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 255.

* * * [Office of Comptroller of Currency — chief of examining division.] The Comptroller of the Currency may designate a national bank examiner to act as chief of the examining division in his office.

See note to preceding paragraph.

TREASURY SAVINGS CERTIFICATES

See PUBLIC DEBT

UNITED STATES BONDS

See PUBLIC DEBT; SURETY AND SURETYSHIP

UNITED STATES COURTS

See JUDICIAL OFFICERS

UNITED STATES DISTRICT ATTORNEYS

See JUDICIAL OFFICERS

UNITED STATES SHIPPING BOARD

See SHIPPING AND NAVIGATION

VESSELS

See HEALTH AND QUARANTINE; SEAMEN; SHIPPING AND NAVIGATION

VETERANS' BUREAU

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

VIRGIN ISLANDS

Act of July 12, 1921, 309.

Sec. 1. Public Officers — Qualifications — Citizenship, 309.

Income Tax Laws of United States — Applicability to Islands, 310.

[Sec. 1.] * * * [Public officers — qualifications — citizenship.] That no person owing allegiance to any country other than the United States of America shall be eligible to hold office as a member of the colonial councils of the Virgin Islands of the United States nor to hold any public office under the government of said islands:

This and the paragraph which follows are from the Naval Appropriation Act of July 12, 1921.

[Income tax laws of United States — applicability to Islands.] That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

See note to preceding paragraph.

VOCATIONAL REHABILITATION

Act of March 4, 1921 (Sundry Civil Appropriation Act), 310.

Sec. 1. Training — Time of Beginning, 310.

Act of June 16, 1921 (Deficiency Appropriation Act), 310.

Sec. 1. Dependents of Trainee — Support and Maintenance — Payments, 310.

Application for Vocational Training — Time of Making, 311.

Act of June 30, 1921 (Army Appropriation Act), 311.

Sec. 1. Instructors in Vocational Training — Army Officers and Enlisted Men, 311.

Farm Products, etc., Incidental to Vocational Training — Disposition, 311.

CROSS-REFERENCES

See also *HOSPITALS AND ASYLUMS; WAR DEPARTMENT AND MILITARY ESTABLISHMENT*

[SEC. 1.] * * * [Training — time of beginning.] That no person who has been declared eligible for training under the provisions of the Vocational Rehabilitation Act, for whom training has been prescribed, and who has been notified by the board to begin training shall be eligible to the benefits of said Act in the event of his failure to commence training within a reasonable time after notice has been sent such person by the board: *Provided further*, That except when such failure is due, in the opinion of the board, to physical incapacity, such time shall not be longer than twelve months after the passage of this Act for persons already declared eligible and notified to begin training, and twelve months after notice is given for persons hereafter declared eligible and notified to begin training.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

[SEC. 1.] * * * [Dependents of trainee — support and maintenance — payments.] That payments for the support and maintenance of persons dependent upon any trainee of the Board as provided by section 2 of the Act may, in the discretion of the Board, be paid either direct to such dependent or dependents or to the trainee upon whom they are dependent.

This and the paragraph which follows are from the Deficiency Appropriation Act of June 16, 1921.

For Act of June 27, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 875.

[Application for vocational training — time of making.] That any person entitled under the provisions of the Vocational Rehabilitation Act, as amended, to take vocational training must make application therefor within eighteen months from the date of the approval of this Act.

See note to preceding paragraph.

[SEC. 1.] * * * [Instructors in vocational training — army officers and enlisted men.] That whenever possible officers, warrant officers, noncommissioned officers, or other enlisted men shall be detailed as instructors.

This and the paragraph which follows are from the Army Appropriation Act of June 30, 1921.

*** * * [Farm products, etc., incidental to vocational training — disposition.]** That farm products and the increase in live stock (including fowls) which accrue as incidental to vocational training in agriculture and animal husbandry shall be sold under such regulations as the Secretary of War may prescribe, and the proceeds of such sales shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts.

See note to preceding paragraph.

WAR CONTRACTS

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Joint Resolution Directing the Secretary of War to cease enlisting men in the Regular Army of the United States, except in the case of those men who have already served one or more enlistments therein.

[Res. of Feb. 5, 1921, No. 59.]

[Enlistments in Regular Army — cessation of activities.] That the Secretary of War be, and he hereby is, directed and instructed to cease enlisting men in the Regular Army of the United States until the number of enlisted men shall not exceed one hundred and seventy-five thousand: *Provided, however,* That nothing contained herein shall be held to prohibit the reenlistment of those enlisted men who have had one or more enlistments and who desire to reenlist in the Regular Army.

In the House of Representatives
of the United States.

February 5, 1921.

The President of the United States having returned to the House of Representatives, in which it originated, the joint resolution (H. J. Res. 440) entitled "Joint resolution directing the Secretary of War to cease enlisting men in the Regular Army of the United States, except in the case of those men who have already served one or more enlistments therein," with his objections thereto, the House proceeded in pursuance of the Constitution to reconsider the same; and

Resolved, That the said joint resolution pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

WM. TYLER PAGE
Clerk.

In the Senate of the United States.

February 5 (calendar day, February 7), 1921.

The Senate having proceeded, in pursuance of the Constitution, to reconsider the joint resolution (H. J. Res. 440) entitled "Joint Resolution directing the Secretary of War to cease enlisting men in the Regular Army of the United States, except in the case of those men who have already served one or more enlistments therein," returned to the House of Representatives by the President of the United States, with his objections, and sent by the House of Representatives to the Senate with the message of the President returning the joint resolution.

Resolved, That the joint resolution do pass, two-thirds of the Senate agreeing to pass the same.

Attest:

GEORGE A. SANDERSON
Secretary.

SEC. 2. [Loan of tractors to states — use in highway construction.] That the Secretary of War be, and he is hereby, authorized and empowered, at his discretion, and under such rules and regulations as he may prescribe, to loan to any State of the Union, when so requested by the highway department of the State, such tractors as are retained and not distributed under the Act approved March 15, 1920, for use in highway construction by the highway department of such State: *Provided*, That all expenses for repairs and upkeep of tractors so loaned and the expenses of loading and freight shall be paid by the State, both in transfer to the State and the return to the Army.

This is from the Postal Service Appropriation Act of March 1, 1921.

For Act of March 15, 1920, mentioned in the text, see 1920 Supp. Fed. Stat. Ann. 289.

Joint Resolution Declaring that certain Acts of Congress, joint resolutions, and proclamations shall be construed as if the war had ended and the present or existing emergency expired.

[Res. of March 3, 1921, No. 64.]

[Repeal of war time legislation — exceptions — Trading with the Enemy Act — Liberty Bond Acts — War Finance Corporation Act — Selective Service Act—Act amending sec. 3 of Espionage Act—deserters in army and navy.] That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States, in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency; notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination. And any Act of Congress, or any provision of any such Act, that by its terms is in force only during the existence of a state of war, or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the Governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding; excepting, however, from the operation and effect of this resolution the following Acts and proclamations to, wit: Title 2 of the Act entitled "The Food Control and District of Columbia Rents Act," approved October 22, 1919 (Forty-first Statutes, page 297), the Act known as the Trading with the Enemy Act, approved October 6, 1917 (Fortieth Statutes, page 411), and all amendments thereto, and the First, Second, Third, and Fourth Liberty Bond Acts, the Supplement to the Second Liberty Bond Act, and the Victory Liberty Loan Act; titles 1 and 3 of the War Finance Corporation Act (Fortieth Statutes, page 506) as amended by the Act approved March 3, 1919 (Fortieth Statutes, page 1313), and Public Resolution Numbered 55, Sixty-sixth Congress, entitled "Joint resolution directing the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country,

and for other purposes," passed January 4, 1921; also the proclamations issued under the authority conferred by the Acts herein excepted from the effect and operation of this resolution: *Provided, however*, That nothing herein contained shall be construed as effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statutes, page 76), of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof: *Provided further*, That the Act entitled "An Act to amend section 3, title 1, of the Act entitled 'An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 (Fortieth Statutes, page 217), and for other purposes," approved May 16, 1918 (Fortieth Statutes, page 553), be, and the same is hereby, repealed, and that said section 3 of said Act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted.

Nothing herein contained shall be held to exempt from prosecution or to relieve from punishment any offense heretofore committed in violation of any Act hereby repealed or which may be committed while it remains in force as herein provided.

For Act of Oct. 22, 1919, Title 2, excepted from repeal by the text, see 1919 Supp. Fed. Stat. Ann. 80.

For Trading with the Enemy Act, excepted from repeal by the text, see 1918 Supp. Fed. Stat. Ann. 846; 1919 Supp. Fed. Stat. Ann. 355.

For the different Liberty Bond Acts excepted from repeal by the text, see 1918 Supp. Fed. Stat. Ann. 672; 1919 Supp. Fed. Stat. Ann. 309.

For Resolution of Jan. 4, 1921, reviving the War Finance Corporation, excepted from repeal by the text, see *supra* this volume, p. 26.

For section 3 of Act of June 15, 1917, revived by the text, see 1918 Supp. Fed. Stat. Ann. 123 note.

For Act of May 18, 1917 (Selective Service Law), mentioned in the text, see 9 Fed. Stat. Ann. 1133.

An Act Authorizing bestowal upon the unknown, unidentified British soldier buried in Westminster Abbey and the unknown, unidentified French soldier buried in the Arc de Triomphe of the congressional medal of honor.

[Act of March 4, 1921.]

[Congressional medal of honor — bestowal on unknown British and French soldier buried in Westminster Abbey and Arc de Triomphe.] Whereas Great Britain and France, two of the Allies of the United States in the World War, have lately done honor to the unknown dead of their armies by placing with fitting ceremony the body of an unknown, unidentified soldier, respectively, in Westminster Abbey and in the Arc de Triomphe; and

Whereas, animated by the same spirit of comradeship in which we of the American forces fought alongside these allies, we desire to add whatever we can to the imperishable glory won by the deeds of our allies and commemorated in part by this tribute to their unknown dead: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he hereby is, authorized to bestow with appropriate ceremonies, mili-

tary and civil, the congressional medal of honor upon the unknown, unidentified British soldier buried in Westminster Abbey, London, England, and upon the unknown, unidentified French soldier buried in the Arc de Triomphe, Paris, France.

An Act To authorize the Secretary of War to furnish to the National Museum certain articles of the arms, matériel, equipment, or clothing heretofore issued or produced for the United States Army, and to dispose of colors, standards, and guidons of demobilized organizations of the United States Army, and for other purposes.

[Act of March 4, 1921.]

[SEC. 1.] [National Museum furnished with articles issued to Army and of general interest.] That the Secretary of War be, and he hereby is, authorized to furnish to the National Museum, for exhibition, upon request therefor by the administrative head thereof, such articles of arms, matériel, equipment, or clothing as have been issued from time to time to the United States Army, or which have been or may hereafter be produced for the United States Army, and which are objects of general interest or of foreign or curious research, provided that such articles are surplus or can be spared.

SEC. 2. [Colors, standards and guidons of demobilized organizations of Army — disposition.] That the Secretary of War be, and he hereby is, authorized to dispose of all colors, standards, and guidons of demobilized organizations of the United States Army in the following manner: Any which were used during their service by such organizations and which were brought into the service of the United States from the National Guard of any State may be returned to that State upon request therefor from the governor thereof; and all others may be sent, upon request of the governor thereof, to whatever State the Secretary of War may determine to have furnished the majority of men to any such organization at the time of its formation: *Provided, however*, That where it is impossible to determine what State furnished a majority of the men of an organization at the time of its formation, or where any organization was so cosmopolitan in its original make-up that it is impossible to identify it with any particular State, the colors of such organization will be turned in to the Quartermaster General for such national use as the Secretary of War may direct: *Provided further*, That the title to all such colors, standards, and guidons shall remain in the United States: *And provided further*, That the Secretary of War shall require assurance that proper provision has been or will be made for their care and preservation before returning or sending the same as herein authorized.

SEC. 3. [Ratification of prior Acts of Secretary of War disposing of property affected by this Act.] That in all cases in which the Secretary of War has heretofore furnished to the National Museum any property of the kinds described in section 1 hereof, or has disposed of any colors, standards, or guidons of demobilized organizations of the United States Army in the manner provided by section 2 hereof, his acts and doings in the premises are hereby ratified and confirmed.

[SEC. 1.] * * * **[Bureau of War Risk Insurance — allotments to Public Health Service.]** The allotments made by the Bureau of War Risk Insurance to the Public Health Service for the care of beneficiaries of that bureau by the said service shall also be available for expenditure by the Public Health Service on that account for necessary personnel, regular and reserve commissioned officers of the Public Health Service and clerical help in the District of Columbia and elsewhere, maintenance, equipment, leases, fuel, lights, water, printing, freight, transportation and travel, and maintenance and operation of passenger motor vehicles.

This is from the Sundry Civil Appropriation Act of March 4, 1921.

An Act Making appropriations for the support of the Army for the fiscal year ending June 30, 1922, and for other purposes.

[Act of June 30, 1921.]

[SEC. 1.] * * * **[Medical Reserve Corps — officers and nurses — care of beneficiaries of Bureau of War Risk Insurance — pay.]** That pay and allowances of such additional officers and nurses of the Medical Reserve Corps as are required to supplement the like officers and nurses of the Regular Army in the care of beneficiaries of the Bureau of the War Risk Insurance treated in Army hospitals may be paid from the funds allotted to the War Department by that bureau under existing law.

* * * **[Enlisted men under eighteen — discharge — transportation.]** The Secretary of War shall discharge from the military service with pay and with the form of discharge certificate to which the service of each, after enlistment, shall entitle him, all enlisted men under the age of eighteen on the application of either of their parents or legal guardian, and shall also furnish to each transportation in kind from the place of discharge to the railroad station at or nearest to the place of acceptance for enlistment, or to his home if the distance thereto is no greater than from the place of discharge to the place of acceptance for enlistment, but if the distance be greater he may be furnished with transportation in kind for a distance equal to that from place of discharge to place of acceptance for enlistment;

* * * **[Enlisted men — reduction in number.]** The Secretary of War is directed under such reasonable regulations as he may prescribe to grant applications for discharge of enlisted men serving in the continental United States without regard to the provisions of existing law respecting discharges until the number in the Army has been reduced to 150,000 enlisted men, not including the Philippine Scouts. The provisions of this paragraph shall take effect immediately upon the approval of this Act.

* * * **[Enlistment allowance — repeal.]** The provisions of section 27 of the Army Reorganization Act, approved June 4, 1920, providing an enlistment allowance, are hereby repealed.

For sec. 27 of Act of June 4, 1920, see 1920 Supp. Fed. Stat. Ann. 316.

* * * **[Flying cadets — enlistment.]** Nothing contained in Public Resolution Numbered 59 of the Sixty-sixth Congress shall be held to prohibit the enlistment of flying cadets to the number of five hundred.

* * * **[Clerks, messengers and laborers — assignment to duty.]** That no clerk, messenger, or laborer at headquarters of tactical divisions, military departments, brigades, service schools, and office of the Chief of Staff shall be assigned to duty in any bureau of the War Department.

* * * **[Supplies — purchase of fuel.]** That hereafter when, in the opinion of the Secretary of War, it is in the interest of the United States so to do, he is authorized to enter into contracts and to incur obligations for fuel in sufficient quantities to meet the requirements for one year without regard to the current fiscal year, and payments for supplies delivered under such contracts may be made from funds appropriated for the fiscal year in which the contract is made, or from funds appropriated or which may be appropriated for such supplies for the ensuing fiscal year.

* * * **[Transportation on Army transports — members, etc., of Porto Rican Government.]** That hereafter when, in the opinion of the Secretary of War, accommodations are available, transportation on Army transports may be provided for the members and employees of the Porto Rican Government and their families on official business without expense to United States:

* * * **[Motor-propelled vehicles — purchase.]** That none of the funds appropriated or made available under this Act or any of the unexpended balances of any other Act shall be used for the purchase of motor-propelled passenger or freight carrying vehicles for the Army except those that are purchased solely for experimental purposes.

* * * **[Transportation of civilian employees and materials — cost charged to what appropriation.]** That hereafter the cost of transportation of civilian employees and of materials in connection with the construction or maintenance of seacoast fortifications, or the acquisition of land therefor, by the Engineer Department, or with the manufacturing and purchase activities of the Ordnance Department and the Chemical Warfare Service, shall be charged to the appropriations for the work in connection with which such transportation charges are incurred.

* * * **[Clothing accounts of enlisted men — settlement.]** That hereafter the settlement of clothing accounts of enlisted men, including charges for clothing drawn in excess of clothing allowance and payments of amounts due them when they draw less than their allowance, shall be made at such periods and under such regulations as may be prescribed by the Secretary of War.

* * * **[Issuance of uniforms to discharged enlisted men — repeal of Act of Feb. 28, 1919.]** That portion of the Act of February 28, 1919, relating to the issuance of uniforms to discharged enlisted men is hereby repealed: *Provided*, That such uniforms shall be issued in accordance with the provisions of said Act to those enlisted men who served in the Army of the United States at any time between April 6, 1917, and January 1, 1920, whose applications therefor shall have been received at the War Department prior to June 1, 1921: *Provided further*, That there may be transferred during the fiscal year 1922 from the appropriations contained herein for "Subsistence of the Army," "Regular Supplies, Quartermaster Corps," "Incidental Expenses, Quartermaster Corps," "Water and sewers at military posts," and "Clothing and

camp and garrison equipage," to the appropriation for "Transportation of the Army and its supplies," such amounts as may be necessary.

For Act of Feb. 28, 1919, repealed in part by the text, see 1919 Supp. Fed. Stat. Ann. 370.

* * * [**Riding horses — encouragement of breeding — donations and prizes.**] That the Secretary of War may, in his discretion, and under such rules and regulations as he may prescribe, accept donations of animals for breeding and donations of money or other property to be used as prizes or awards at agricultural fairs, horse shows, and similar exhibitions, in order to encourage the breeding of riding horses suitable for Army purposes:

* * * [**National Guard — Federal pay.**] That members of the National Guard who have or shall become entitled for a continuous period of less than one month to Federal pay at the rates fixed for the Regular Army, whether by virtue of a call by the President, of attendance at school or maneuver, or of any other cause, and whose accounts have not yet been settled, shall receive such pay for each day of such period; and the thirty-first day of a calendar month shall not be excluded from the computation:

* * * [**National Guard — clothing and equipment.**] That the Secretary of War is hereby directed to issue from surplus or reserve stores and matériel now on hand and purchased for the United States Army such articles of clothing and equipment and Field Artillery matériel and ammunition as may be needed by the National Guard organized under the provisions of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, as amended by the Act approved June 4, 1920. This issue shall be made without charge against militia appropriations.

For Act of June 3, 1916, as amended, see 1920 Supp. Fed. Stat. Ann. 279.

Joint Resolution Authorizing and directing the accounting officers of the Treasury to allow credit to the disbursing clerk of the Bureau of War Risk Insurance in certain cases.

[*Res. of July 26, 1921, No. 11.*]

[**Bureau of War Risk Insurance — accounts of disbursing clerk — credits.**] That for such reasonable time as may be fixed by the Secretary of the Treasury, but not extending beyond the fiscal year ending June 30, 1922, the accounting officers of the Treasury are hereby authorized and directed to allow credit in the accounts of the disbursing clerk of the Bureau of War Risk Insurance for all payments of insurance installments heretofore or hereafter made under the provisions of article 4 of the War Risk Insurance Act in advance of the verification of the deduction on the pay rolls or of the payment otherwise of all premiums.

For Art. 4 of the War Risk Insurance Act, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1325.

An Act To establish a Veterans' Bureau * and to improve the facilities and service of such bureau, and further to amend and modify the War Risk Insurance Act.

[Act of Aug. 9, 1921.]

TITLE I.—VETERANS' BUREAU.

SECTION 1. [Creation of bureau — appointment of director — salary — powers — abolishment of director of bureau of War Risk Insurance.] There is hereby established an independent bureau under the President to be known as the Veterans' Bureau, the director of which shall be appointed by the President, by and with the advice and consent of the Senate. The director of the Veterans' Bureau shall receive a salary of \$10,000 per annum, payable monthly.

The word "director," as hereinafter used in this Act, shall mean the Director of the Veterans' Bureau.

The powers and duties pertaining to the office of the Director of the Bureau of War Risk Insurance now in the Treasury Department are hereby transferred to the director, subject to the general direction of the President, and the said office of the Director of the Bureau of War Risk Insurance is hereby abolished.

There shall be included on the technical and administrative staff of the director such staff officers, experts, and assistants as the director shall prescribe; and there shall be in the Veterans' Bureau such sections and subdivisions thereof as the director shall prescribe.

SEC. 2. [Execution of provisions of Act by director — rules and regulations.] The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes and shall decide all questions arising under this Act except as otherwise provided herein.

SEC. 3. [Transfer of functions, powers and duties of other bureaus and boards to Veterans' Bureau — War Risk Insurance — vocational education.] The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made a part of the Veterans' Bureau.

The functions, powers, and duties conferred upon the Federal Board of Vocational Education by the Act entitled "An Act to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, and amendments thereto, are hereby transferred to and made a part of the Veterans' Bureau.

For Act of June 27, 1918, and amendments, above mentioned, see 1918 Supp. 875 and 1919 Supp. 359.

SEC. 4. [Transfer of personnel, facilities, obligations, etc., of other bureaus and boards to Veterans' Bureau — War Risk Insurance — Public Health Service — Rehabilitation Division of Vocational Education Board.] All personnel,

* *Name of Bureau changed.*— By Resolution of August 24, 1921, No. 19, it was provided: "That the Veterans' Bureau, created by the Act entitled 'An Act to establish a Veterans' Bureau and to improve the facilities and service of such bureau, and further to amend and modify the War Risk Insurance Act,' approved August 9, 1921, shall be known as the 'United States Veterans' Bureau,' and whenever used in such Act the term 'Veterans' Bureau' shall mean 'United States Veterans' bureau.'"

facilities, property, and equipment, including leases, contracts, and other obligations and instrumentalities in the District of Columbia and elsewhere of the Bureau of War Risk Insurance, of the United States Public Health Service, as described and provided in a written order of the Treasury Department issued and signed by the Secretary of the Treasury on April 19, 1921, and designated "Order relative to the transfer of certain activities of the United States Public Health Service, relating to the Bureau of War Risk Insurance, including the trainees of the Rehabilitation Division of the Federal Board for Vocational Education," and of the Rehabilitation Division of the Federal Board for Vocational Education, as a result of the administration of the Act approved June 27, 1918, and amendments thereto, are hereby transferred to and made a part of the Veterans' Bureau under the control, management, operation, and supervision of the director, and subject to such change in designation and organization as he may deem necessary in carrying out the provisions of this Act: *Provided*, That all commissioned personnel detailed or hereafter detailed from the United States Public Health Service to the Veterans' Bureau, shall hold the same rank and grade, shall receive the same pay and allowances, and shall be subject to the same rules for relative rank and promotion as now or hereafter may be provided by law for commissioned personnel of the same rank or grade or performing the same or similar duties in the United States Public Health Service.

For Act of June 27, 1918, and amendments, above mentioned, see 1918 Supp. 875 and 1919 Supp. 359.

SEC. 5. [Transfer of records, etc., from other bureaus and boards to Veterans' Bureau.] All records, files, documents, correspondence, and other papers relating to service rendered or to be rendered by the United States Public Health Service in the medical examination, assignment to hospitals, and treatment of persons who are now or have been patients and beneficiaries of the Bureau of War Risk Insurance or of the Rehabilitation Division of the Federal Board for Vocational Education, as a result of the administration of the Act approved June 27, 1918, and amendments thereto, and as described and provided in a written order of the Treasury Department issued and signed by the Secretary of the Treasury on April 19, 1921, and designated "Order relative to the transfer of certain activities of the United States Public Health Service relating to the Bureau of War Risk Insurance, including the trainees of the Rehabilitation Division of the Federal Board for Vocational Education," shall be transferred to the Veterans' Bureau.

All records, files, documents, correspondence, and other papers in the possession of the Bureau of War Risk Insurance, and those which as a result of the administration of the Act approved June 27, 1918, and amendments thereto, are in the possession of the Rehabilitation Division of the Federal Board for Vocational Education shall be transferred to the Veterans' Bureau.

For Act of June 27, 1918, and amendments, above mentioned, see 1918 Supp. 875 and 1919 Supp. 359.

SEC. 6. [Offices and suboffices — regional offices.] The director shall establish a central office in the District of Columbia, and not more than fourteen regional offices and such suboffices, not exceeding one hundred and forty in number, within the territory of the United States and its outlying possessions as may be deemed necessary by him and in the best interests of the work committed to the Veterans' Bureau and to carry out the purposes of this Act.

Such regional offices may, pending final action by the director in case of an appeal, under such rules and regulations as may be prescribed by the director, exercise such powers for hearing complaints and for examining, rating, and awarding compensation claims, granting medical, surgical, dental, and hospital, care, convalescent care, and necessary and reasonable after care, making insurance awards, granting vocational training, and all other matters delegated to them by the director as could be performed lawfully under this Act by the central office. The suboffices shall have such powers as may be delegated to them by the director, except to make compensation and insurance awards and to grant vocational training.

The regional offices and suboffices, with all authority to establish such offices, shall terminate on June 30, 1926, but nothing herein shall prevent the director from terminating any regional offices or suboffices when in his judgment this may be done without detriment to the administration of this Act, and upon such termination all records and supplies pertaining thereto shall be delivered to the central office.

SEC. 7. [Beneficiaries of Veterans' Bureau, who are — individual records.] The beneficiaries of the Bureau of War Risk Insurance and the Rehabilitation Division of the Federal Board for Vocational Education shall hereafter be the beneficiaries of the Veterans' Bureau, and complete individual record of each beneficiary shall be kept by the Veterans' Bureau.

SEC. 8. [Appropriations and expenditures.] All sums heretofore appropriated for carrying out the provisions of the War Risk Insurance Act and amendments thereto, and to carry out the provisions of the Act entitled "An Act to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, and amendments thereto, shall, where unexpended, be made available for the Veterans' Bureau, and may be expended in such manner as the director deems necessary in carrying out the purposes of this Act, with the restrictions heretofore imposed as to number of persons that may be employed at stated salaries.

For Act of June 27, 1918, and amendments, above mentioned, see 1918 Supp. 875 and 1919 Supp. 359.

SEC. 9. [Responsibility of director for care of beneficiaries — hospital and other facilities — inspection service.] The director, subject to the general directions of the President, shall be responsible for the proper examination, medical care, treatment, hospitalization, dispensary, and convalescent care, necessary and reasonable after care, welfare of, nursing, vocational training, and such other services as may be necessary in the carrying out of the provisions of this Act, and for that purpose is hereby authorized to utilize the now existing or future facilities of the United States Public Health Service, the War Department, the Navy Department, the Interior Department, the National Homes for Disabled Volunteer Soldiers, and such other governmental facilities as may be made available for the purposes set forth in this Act; and such governmental agencies are hereby authorized and directed to furnish such facilities, including personnel, equipment, medical, surgical, and hospital services and supplies as the director may deem necessary and advisable in carrying out the provisions of this Act, in addition to such governmental facilities as are hereby made available.

In order to standardize the character of examination, medical care, treatment, hospitalization, dispensary, and convalescent care, nursing, vocational training, and such other services as may be necessary for beneficiaries under this Act, the director shall maintain an inspection service, with authority to examine all facilities and services utilized in carrying out the purpose of this Act, and for this purpose, with the approval of the President, may utilize such other Government or private agencies as may be deemed practicable and necessary. The head of the inspection service shall report to the director in the manner the director may prescribe the result of each examination of facilities and services, and shall recommend to him methods of standardizing such facilities and services.

When, in the opinion of the director, the facilities and services utilized for the hospitalization, medical care, and treatment for beneficiaries under this Act are unsatisfactory, the director shall make arrangements for the further hospitalization, care, and treatment of such beneficiaries by other means.

In the event that there is not sufficient Government hospital and other facilities for the proper medical care and treatment of beneficiaries under this Act, and the director deems it necessary and advisable to secure additional Government facilities, he may, within the limits of appropriations made for carrying out the provisions of this paragraph, and with the approval of the President, improve or extend existing governmental facilities, or acquire additional facilities by purchase or otherwise. Such new property and structures as may be so improved, extended, or acquired shall become part of the permanent equipment of the Veterans' Bureau or of some one of the now existing agencies of the Government, including the War Department, Navy Department, Interior Department, Treasury Department, the National Homes for Disabled Volunteer Soldiers, in such a way as will best serve the present emergency, taking into consideration the future services to be rendered the veterans of the World War, including the beneficiaries under this Act.

In the event Government hospital facilities and other facilities are not thus available or are not sufficient, the director may contract with State, municipal, or private hospitals for such medical, surgical, and hospital services and supplies as may be required, and such contracts may be made for a period of not exceeding five years and may be for the use of a ward or other hospital unit or on such other basis as may be in the best interest of the beneficiaries under this Act.

The President is hereby authorized, should he deem it necessary and advisable for the proper medical care and treatment of beneficiaries under this Act, to transfer to the director the operation, management, and control of specifically designated hospitals now under the jurisdiction of the Public Health Service. Such hospitals when transferred shall be used exclusively for beneficiaries under this Act and shall be under the operative control of the director for such period of time as the President may prescribe.

SEC. 10. [Examination of compensation and insurance claims—detail of clerks.] For the purpose of this Act, the director is authorized to detail from time to time clerks or persons employed in the bureau, to make examinations into the merits of compensation and insurance claims, whether pending or adjudicated, as he may deem proper, and to aid in the preparation, presentation, or examination of such claims; and any such person so detailed shall have power to administer oaths, take affidavits, and certify to the correctness of the papers and documents pertaining to the administration of this Act. Nothing in this section shall be construed to authorize a travel allowance to clerks or persons

for transportation or subsistence outside of the district in which they are employed.

SEC. 11. [Rules and regulations for good conduct of beneficiaries receiving treatment or training—penalties for breach—board of discipline and morale.] The director is hereby authorized to make such rules and regulations as may be deemed necessary in order to promote good conduct on the part of persons who are receiving care or treatment in hospitals, homes, or institutions as patients or beneficiaries of said bureau during their stay in such hospitals, homes, institutions, or training centers. Penalties for the breach of such rules and regulations may, with the approval of the director, extend to a forfeiture by the offender of such portion of the compensation payable to him, not exceeding three-fourths of the monthly installment per month for three months, for a breach committed while receiving treatment in such hospital, home, institution, or training center as may be prescribed by such rules and regulations: *Provided*, That the offender shall have the right to appeal the decision involving the forfeiture of a part of his compensation to a board of three persons which shall be established and appointed by the director in September of each year for each regional district. Such board shall be known as the Board on Discipline and Morale. It shall serve without compensation, and at least one of the members of such board shall be an ex-service man and a member of some war veterans' organization. No person who is in the employ of the United States shall be a member of such board. The decision of such board, after hearing all the evidence presented by the offender and those charging a breach of the rules and regulations, shall be final.

SEC. 12. [Allotment by beneficiaries of monthly compensation—regulations prescribing conditions and limitations.] The director may set forth in regulations to be prescribed by him the conditions and limitations whereby all patients or beneficiaries of the Veterans' Bureau who are receiving treatment through the bureau as inmates of a hospital may allot any proportion or proportions or any fixed amount or amounts of their monthly compensation for such purposes and for the benefit of such person or persons as they may direct.

In case such inmate has not allotted three-fourths of his monthly compensation, regulations to be made by the director may provide that any unallotted portion of such three-fourths compensation may be deposited to his credit with the Treasurer of the United States to accumulate at such rate of interest as the Secretary of the Treasury may determine but at a rate never less than 3½ per centum per annum, payable for no period, however, of less than six months, and when payable shall be paid, principal and interest, to such patient if living; otherwise, to any beneficiary or beneficiaries he may have designated, or, if there be no such beneficiary, then to the executor or administrator of the estate of such deceased person: *Provided*, That this paragraph shall not be so construed as to prevent payment by the bureau from the amounts due to the decedent's estate of his funeral expenses, expenses of last illness, board, rent, lodging, or other household expenses for which decedent is liable, provided a claim therefor is presented by the creditors or by the person or persons who actually paid the same before settlement by the Veterans' Bureau.

The Secretary of the Treasury is hereby authorized to invest and reinvest the said allotments deposited with him, or any part thereof, in interest-bearing

obligations of the United States and to sell the obligations for the purposes of said funds.

SEC. 13. [Treatment by bureau of disabled members of military and naval forces.] In addition to the care, treatment, and appliances now authorized by law, said bureau also shall provide without charge therefor hospital, dental, medical, surgical, and convalescent care and treatment and prosthetic appliances for any member of the military or naval forces of the United States separated therefrom under honorable conditions disabled by reason of any wound or injury received or disease contracted, or by reason of any aggravation of a preexisting injury or disease, specifically noted at examination for entrance into or employment in the active military or naval service, while in the active military or naval service of the United States on or after April 6, 1917: *Provided*, That the wound or injury received or disease contracted, or aggravation of a preexisting injury or disease, for which such hospital, dental, medical, surgical, and convalescent care and treatment and prosthetic appliances shall be furnished, was incurred in line of duty and not caused by his own willful misconduct: *Provided further*, That application for such care and treatment and appliances provided for in this section shall be made within one year from date of separation from service or from the date this Act goes into effect, whichever is the later.

SEC. 14. [Reports to Congress by director — false and fraudulent claims, etc.] The director shall file with the Clerk of the House and the Secretary of the Senate on the first day of the next regular session after this Act takes effect an itemized account of all expenditures, classified by regional offices and suboffices, made under this Act, including names, classifications, and salaries of all staff officers, experts, assistants, and employees, and the nature and terms of all contracts made under the authority of this Act, and the names and principal place of business of the parties thereto. Thereafter, on the first Monday in December of each year, the director shall make a report to Congress of his doings under this Act for the preceding fiscal year.

Any person who shall knowingly make or cause to be made, or conspire, combine, aid or assist in, agree to, arrange for, or in anywise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper or writing purporting to be such, concerning any claim or the approval of any claim for compensation or the payment of any money, for himself or for any other person, under Article III of the War Risk Insurance Act, or any Acts amendatory of or supplemental to such Article III, shall forfeit all rights, claims, and benefits under such Article III, and in addition to any and all other penalties imposed by law shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or by both such fine and imprisonment, for each such offense.

For Art. III of the War Risk Insurance Act with amendments, see 9 Fed. Stat. Ann. (2d ed.) 1317; 1919 Supp. Fed. Stat. Ann. 383. And see *infra*, this title.

TITLE II.—AMENDMENTS TO THE WAR RISK INSURANCE ACT.

SEC. 15. [Discharge or dismissal from military or naval forces as affecting right to compensation — enemy aliens — Sec. 29 amended.] Section 29 of the War Risk Insurance Act is hereby amended to read as follows:

"SEC. 29. The discharge or dismissal of any person from the military or naval forces on the ground that he is an enemy alien, conscientious objector, or a deserter, or is guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, shall terminate any insurance granted on the life of such person under the provisions of Article IV, and shall bar all rights to any compensation under Article III or any insurance under Article IV: *Provided*, That, as to converted insurance, the cash surrender value thereof, if any, on the date of such discharge or dismissal shall be paid the insured, if living, and if dead to the designated beneficiary: *Provided further*, That an enemy alien who volunteered or who was drafted into the Army, Navy, or Marine Corps of the United States during the World War, and who was not discharged from the service on his own application or solicitation, by reason of his being an enemy alien, and whose service was honest and faithful, shall be entitled to the benefit of the War Risk Insurance Act and all amendments thereto: *Provided further*, That in case any person has been dishonorably discharged from the military or naval forces as a result of a court-martial trial, and it is thereafter established to the satisfaction of the director that at the time of the commission of the offense resulting in such court-martial trial and discharge that such person was insane, such person shall be entitled to the compensation and insurance benefits of the War Risk Insurance Act."

For sec. 29 as it read previous to this amendment, see 9 Fed. Stat. Ann. (2d ed.) 1311.

SEC. 16. [Persons provisionally accepted in military or naval service as entitled to benefits of Act — Sec. 31 amended.] Section 31 of the War Risk Insurance Act is hereby amended by adding thereto a subsection to be known as subsection (a) and to read as follows:

"(a) Any person who between the 6th day of April, 1917, and the 11th day of November, 1918, applied for enlistment or enrollment in the military or naval forces, and who was accepted provisionally and directed or ordered to a camp, post, station, or other place for final acceptance into such service, shall be deemed to have the same status as an inducted man not yet accepted and enrolled for active service during the period while such person was complying with such order or direction, and during such compliance, and until his final acceptance or rejection for enlistment or enrollment into the military or naval forces, shall be entitled to the same benefits under Articles III and IV of the War Risk Insurance Act as an inducted man not yet accepted and enrolled for active service."

For sec. 31 as it read previous to this amendment, see 1919 Supp. Fed. Stat. Ann. 384.

SEC. 17. [Investigation of application for family allowance — Sec. 210 amended.] Section 210 of the War Risk Insurance Act as amended is hereby amended to read as follows:

"SEC. 210. Upon receipt of any application for family allowance, the director shall make all proper investigations and shall make an award, on the basis of which award the amount of the allotments to be made by the man shall be certified to the War Department or Navy Department, as may be proper. Whenever the director shall have reason to believe that an allowance has been improperly made or that the conditions have changed, he shall investigate or reinvestigate and may modify the award. The amount of each monthly allotment and allowance shall be determined according to the family conditions existing on the first

day of the month: *Provided*, That whenever an award of allotment or allowance, or both, covering any period has been paid to, or on behalf of, a person designated by the enlisted man as beneficiary of his allotment, no recovery of the allotments paid in such cases shall hereafter be made for any reason whatsoever; and no recovery of the allowances paid in such cases shall hereafter be made for any reason whatsoever except where it is shown that the person receiving the allowance does not bear the relationship to the enlisted man which is required by the War Risk Insurance Act, and except, also, in cases of manifest fraud."

For sec. 210 as it read previous to this amendment, see 9 Fed. Stat. Ann. (2d ed.) 1316.

SEC. 18. [Compensation for death or disability — Sec. 300 amended.] Section 300 of the War Risk Insurance Act is hereby amended to read as follows:

"**SEC. 300.** For death or disability resulting from personal injury suffered or disease contracted in the line of duty on or after April 6, 1917, or for an aggravation of a disability existing prior to examination, acceptance, and enrollment for service, when such aggravation was suffered and contracted in the line of duty on or after April 6, 1917, by any commissioned officer or enlisted man, or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay to such commissioned officer or enlisted man, member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) or, in the discretion of the director, separately to his or her dependents, compensation as hereinafter provided; but no compensation shall be paid if the injury, disease, or aggravation has been caused by his own willful misconduct. That for the purposes of this section every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department who was discharged or who resigned prior to the date of approval of this amendatory Act, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who hereafter is discharged or resigns, shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities, made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record: *Provided further*, That an ex-service man who is shown to have an active pulmonary tuberculosis or neuropsychiatric disease (of more than 10 per centum degree of disability in accordance with the provisions of subdivision (2) of section 302 of the War Risk Insurance Act, as amended) developing within two years after separation from the active military or naval service of the United States shall be considered to have acquired his disability in such service, or to have suffered an aggravation of a preexisting pulmonary tuberculosis or neuropsychiatric disease in such service, but nothing in this proviso shall be construed to prevent a claimant from receiving the benefits of compensation and medical care and treatment for a disability due to these diseases of more than 10 per centum degree (in accordance with the provisions of subdivision (2) of section 302 of the War Risk Insurance Act, as amended) at a date more than two years after separation from such service, if the facts of the case substantiate his claim. This section shall be deemed to be in effect as of April 6, 1917."

For sec. 300 as it read previous to this amendment, see 1919 Supp. Fed. Stat. Ann. 386.

SEC. 19. [Review of awards — Sec. 305 amended.] Section 305 of the War Risk Insurance Act is hereby amended to read as follows:

“ SEC. 305. Upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation is increased, or, if compensation has been refused, reduced or discontinued, may award compensation in proportion to the degree of disability sustained as of the date such degree of disability began, but not earlier than the date of discharge or resignation.”

For sec. 305 as it read previous to this amendment, see 9 Fed. Stat. Ann. (2d ed.) 1321.

SEC. 20. [Time of death or disability as affecting compensation — Sec. 306 amended.] Section 306 of the War Risk Insurance Act is hereby amended to read as follows:

“ SEC. 306. No compensation shall be payable for death or disability which does not occur prior to or within one year after discharge or resignation from the service, except that where, after a medical examination made pursuant to regulations, a certificate has been obtained from the director at the time of discharge or resignation from the service, or within one year thereafter, or within one year after the passage of this amendatory Act, whichever is the later, to the effect that the injured person at the time of his discharge or resignation was suffering from injury likely to result in death or disability, compensation shall be payable for death or disability whenever occurring, proximately resulting from such injury.”

For sec. 306 as it read previous to this amendment, see 9 Fed. Stat. Ann. (2d ed.) 1321.

SEC. 21. [Assignment to United States of right of action for injuries or death — fees and mileage to witnesses, etc. — Sec. 313 amended.] Section 313 of the War Risk Insurance Act, as amended, is hereby amended by adding thereto, immediately following subsection (2) thereof, a new subsection to be known as subsection (2a) and to read as follows:

“(2a) The Veterans' Bureau is hereby authorized to pay the beneficiary or other person or persons in whose name an action may have been commenced or prosecuted, and to all witnesses in such action, fees and mileage, the same as is now paid and allowed to witnesses in the United States courts, in going to, remaining at, and returning from, place of trial, and without any regard to whether the action, if any, is brought or prosecuted in a court of the United States or some other court.

“ In all cases of assignment of causes of action under this section, whether the assignment be heretofore or hereafter made, where it shall appear to the director to be to the best interests of the beneficiary so to do, the director, acting for and in the name of the United States, may assign the cause of action back to the beneficiary or to his personal representatives.”

For sec. 313, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1323.

SEC. 22. [Persons admitted into military or naval forces after passage of this amendatory Act — right to benefits of Act — Sec. 315 added.] A new section is hereby added to Article III of the War Risk Insurance Act to be known as section 315, and to read as follows:

“ SEC. 315. That no person admitted into the military or naval forces of the United States after six months from the passage of this amendatory Act shall

be entitled to the compensation or any other benefits or privileges provided under the provisions of Article III of the War Risk Insurance Act, as amended."

For Art. III of the War Risk Insurance Act, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1317.

SEC. 23. [Change of status of designated beneficiary — permitted class — Sec. 402 amended.] Section 402 of the War Risk Insurance Act is hereby amended by adding thereto a subsection to be known as subsection (a) and to read as follows:

"(a) Where a beneficiary at the time of designation by the insured is within the permitted class of beneficiaries and is the designated beneficiary at the time of the maturity of the insurance because of the death of the insured, such beneficiary shall be deemed to be within the permitted class even though the status of such beneficiary shall have been changed."

For sec. 402, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1326 and 1919 Supp. Fed. Stat. Ann. 389.

SEC. 24. [Form of insurance — Sec. 404 amended.] Section 404 of the War Risk Insurance Act is hereby amended to read as follows:

"SEC. 404. During the period of the war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and into other usual forms of insurance, and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

"In case where an insured whose yearly renewable term insurance has matured by reason of total permanent disability is found and declared to be no longer permanently and totally disabled, and where the insured is required under regulations to renew payment of premiums on said term insurance, and where this contingency is extended beyond the five-year period during which said yearly renewable term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to convert said term insurance as hereinbefore provided."

For sec. 404 as it read previous to this amendment, see 9 Fed. Stat. Ann. (2d ed.) 1328.

SEC. 25. [Payment of benefits — liability of United States — transfer of moneys by director — Sec. 406 added.] A new section is hereby added to Article IV of the War Risk Insurance Act to be known as section 406, and to read as follows:

"SEC. 406. Whenever benefits under United States Government life insurance (converted insurance) become or have become payable because of total permanent disability of the insured or because of the death of the insured as a result of disease or injury traceable to the extra hazard of the military or naval service as such hazard may be determined by the director, the liability shall be borne by the United States, and the director is hereby authorized and directed to

transfer from the military and naval insurance appropriation to the United States Government life insurance fund a sum which, together with the reserve of the policy at the time of maturity by total permanent disability or death, will equal the then value of such benefits. When a person receiving total permanent disability benefits under a United States Government life policy (converted policy) recovers from such disability and is then entitled to continue a reduced amount of insurance, the director is hereby authorized and directed to transfer to the military and naval insurance appropriation all of the loss reserve to the credit of such policy claim except a sum sufficient to set up the then required reserve on the reduced amount of insurance that may be continued, which sum shall be retained in the United States Government life insurance fund for the purpose of such reserve."

For Art. IV, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1325.

SEC. 26. [Failure of beneficiaries of permitted class to survive insured — payment to estate — escheat — Sec. 407 added.] A new section is hereby added to Article IV of the War Risk Insurance Act (including therein section 14 of the Act entitled "An Act to amend and modify the War Risk Insurance Act," approved December 24, 1919), to be known as section 407, and to read as follows:

"SEC. 407. If no person within the permitted class of beneficiaries survive the insured, then there shall be paid to the estate of the insured the monthly installments payable and applicable under the provisions of Article IV of the War Risk Insurance Act: *Provided*, That in cases where the estate of the insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate of the insured, but shall escheat to the United States and shall be credited to the United States Government life insurance fund or the military and naval insurance appropriation, as may be proper. This section shall be deemed to be in effect as of October 6, 1917."

For sec. 14 of Act of Dec. 24, 1919, see 1919 Supp. Fed. Stat. Ann. 389.

Art. IV, here amended, is set out in 9 Fed. Stat. Ann. (2d ed.) 1325.

SEC. 27. [Reinstatement of lapsed or cancelled yearly renewable term insurance — Sec. 408 added.] A new section is hereby added to Article IV of the War Risk Insurance Act, to be known as section 408, and to read as follows:

"SEC. 408. In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with, an application for reinstatement of lapsed or canceled yearly renewable term insurance or application for United States Government life insurance (converted insurance) hereafter made may be approved: *Provided*, That the applicant's disability is the result of an injury or disease or of an aggravation thereof suffered or contracted in the active military or naval service during the World War: *Provided further*, That the applicant during his lifetime submits proof satisfactory to the director showing the service origin of the disability or aggravation thereof and that the applicant is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest

at the rate of 5 per centum per annum compounded annually on each premium from the date said premium is due by the terms of the policy: *Provided further*, That where any soldier has heretofore allowed his insurance to lapse, while suffering from wounds or disease suffered or contracted in line of service, and was at the time he allowed his said policy to lapse entitled to compensation on account thereof in a sum equal to or in excess of the amount due from him in premiums on his said insurance, and has since died from said wounds or disease without collecting or making claim for said compensation, or being allowed to reinstate his said policy on account of his physical condition, then and in that event said policy shall not be considered as lapsed, and the Veterans' Bureau is hereby authorized and directed to pay to the beneficiaries of said soldier under said policy the amount of said insurance less the premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law."

Art. IV, here amended, is set out in 9 Fed. Stat. Ann. (2d ed.) 1325.

SEC. 28. [Payment of premiums — waiver — interest — Sec. 409 added.] A new section is hereby added to Article IV of the War Risk Insurance Act to be known as section 409, and to read as follows:

"**SEC. 409.** The Veterans' Bureau is authorized to make provision in accordance with regulations, whereby the payment of premiums on yearly renewable term insurance and United States Government life insurance (converted insurance) on the due date thereof may be waived and the insurance may be deemed not to lapse in the cases of the following persons, to wit: (a) Those who are confined in a hospital under said bureau for a compensable disability during the period while they are so confined; (b) those who are rated as temporarily totally disabled by reason of an injury or disease entitling them to compensation during the period of such total disability and while they are so rated: *Provided*, That such relief from payment of premiums on renewable term insurance on the due date thereof shall be for full calendar months, beginning with the month in which said confinement to hospital, or temporary total disability rating begins, and ending with that month during the half or major fraction of which the person is confined in hospital, or is rated as temporarily totally disabled: *Provided further*, That all premiums, the payment of which when due is waived as above provided, shall bear interest at the rate of 5 per centum per annum compounded annually from the due date of each premium, and if not paid by the insured shall be deducted from the insurance when the same matures either because of permanent total disability or death."

Art. IV, here amended, is set out in 9 Fed. Stat. Ann. (2d ed.) 1325.

SEC. 29. [Authority of Postmaster General to receive premiums and applications for reinstatement of lapsed insurance, etc.— Sec. 410 added.] A new section is hereby added to Article IV of the War Risk Insurance Act to be known as section 410, and to read as follows:

"**SEC. 410.** Under such rules and regulations as the Director of the Veterans' Bureau and the Postmaster General may prescribe, the Postmaster General is hereby authorized to receive the premiums on yearly renewable term insurance and United States Government life insurance (converted insurance) and to act for and turn over to the Treasurer of the United States the money so received, and if the money-order system is used as an agency for the transmission of such money, the Postmaster General may adopt a specially-designed money-order

form for such purpose, and he also is authorized to received [sic] and transmit to the Veterans' Bureau applications for reinstatement of lapsed insurance and applications for conversion of yearly renewable term insurance."

Art. IV, here amended, is set out in 9 Fed. Stat. Ann. (2d ed.) 1325.

SEC. 30. [Incontestability of policies of insurance — Sec. 411 added.] A new section is hereby added to Article IV of the War Risk Insurance Act to be known as section 411, and to read as follows:

"**SEC. 411.** Subject to the provisions of section 29 of the War Risk Insurance Act and amendments thereto policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums."

Art. IV, here amended, is set out in 9 Fed. Stat. Ann. (2d ed.) 1325.

WAR FINANCE CORPORATION

See CORPORATIONS

WAR RISK INSURANCE

See HOSPITALS AND ASYLUMS; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

WATERS

Act of March 3, 1921, 333.

Federal Power Act Amended — Permits Relating to Use of Water in National Parks — Specific Authorization of Congress, 333.

Act of March 4, 1921 (Sundry Civil Appropriation Act), 334.

Sec. 1. Reclamation Service — Expenditures for Projects, 334.

Traveling Expenses — Automobiles and Motor Cycles — Mileage, 334.

Reclamation Fund — Sources — Expenditures — Purposes, 334.

CROSS-REFERENCES

See also *PUBLIC LANDS; RIVERS, HARBORS AND CANALS; STATES*

An Act To amend an Act entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," approved June 10, 1920.

[*Act of March 3, 1921.*]

[Federal Power Act amended — permits relating to use of water in national parks — specific authorization of Congress.] That hereafter no permit, license,

lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as now constituted of any national park or national monument shall be granted or made without specific authority of Congress, and so much of the Act of Congress approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," approved June 10, 1920, as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission is hereby repealed.

For Act of June 10, 1920, affected by the text, see 1920 Supp. Fed. Stat. Ann. 367.

For section 18 of Act of Aug., 1917, affected by the text, see 1918 Supp. Fed. Stat. Ann. 775.

[SEC. 1.] * * * [Reclamation service — expenditures for projects.] Under the provisions of this Act no greater sum shall be expended, nor shall the United States be obligated to expend, during the fiscal year 1922, on any reclamation project appropriated for herein at amount in excess of the sum herein appropriated therefor, nor shall the whole expenditures or obligations incurred for all of such projects for the fiscal year 1922 exceed the whole amount in the "reclamation fund" for that fiscal year;

This and the paragraphs which follow are from the Sundry Civil Appropriation Act of March 4, 1921.

* * * [Traveling expenses — automobiles and motor cycles — mileage.] Whenever, during the fiscal year ending June 30, 1922, the Director of the Reclamation Service shall find that the expenses of travel can be reduced thereby, he may, in lieu of actual traveling expenses, under such regulations as he may prescribe, authorize the payment of not to exceed 3 cents per mile for a motor cycle or 7 cents per mile for an automobile, used for necessary travel on official business;

See note to preceding paragraph.

* * * [Reclamation fund — sources — expenditures — purposes.] All moneys hereafter received from any State, municipality, corporation, association, firm, district, or individual for investigations, surveys, construction work, or any other development work incident thereto involving operations similar to those provided for by the reclamation law shall be covered into the reclamation fund and shall be available for expenditure for the purposes for which contributed in like manner as if said sums had been specifically appropriated for said purposes;

See note to first paragraph of this section.

WEIGHTS AND MEASURES

Act of March 3, 1921 (Legislative, Executive and Judicial Appropriation Act), 335.

Sec. 1. Bureau of Standards—Investigations for Departments and Independent Establishments—Transfer of Funds, 335.

[SEC. 1.] * * * [Bureau of Standards—investigations for departments and independent establishments—transfer of funds.] During the fiscal year 1922 the head of any department or independent establishment of the Government having funds available for scientific investigations and requiring cooperative work by the Bureau of Standards on scientific investigations within the scope of the functions of that bureau and which it is unable to perform within the limits of its appropriations may, with the approval of the Secretary of Commerce, transfer to the Bureau of Standards such sums as may be necessary to carry on such investigations. The Secretary of the Treasury shall transfer on the books of the Treasury Department any sums which may be authorized hereunder and such amounts shall be placed to the credit of the Bureau of Standards for the performance of work for the department or establishment from which the transfer is made.

This is from the Legislative, Executive and Judicial Appropriation Act of March 3, 1921.

WEST INDIAN ISLANDS

See VIRGIN ISLANDS

SUPPLEMENTAL NOTES TO STATUTES

Throughout these Notes references to 1st ed. Fed. Stat. Ann. and Supplements thereto are indicated in []. A complete table of these references, numerically arranged, appears among the tables at the beginning of this volume.

AGRICULTURE

1918 Supp., p. 8, sec. 4.

State act as invalid.—In *Farmers' Grain Co. v. Langer*, (C. C. A. 8th Cir. 1921) 273 Fed. 635, a law of North Dakota attempting to regulate the shipment of grain by imposing certain license fees and providing for the establishment of uniform grades and weights and for the inspection of grain was held to be invalid as being both contrary to the commerce clause of the Federal Constitution and also as being in conflict with the United States Grain Standards Act. The court said as to the question of conflict with the federal act:

"There remains to be considered the question as to whether the state law conflicts with the United States Grain Standards Act. As we have said with reference to the question as to whether the law is a burden on interstate commerce, so we say now that if the purchase of grain in North Dakota under the evidence in this case, and the shipment thereof to the terminal markets mentioned for sale, is a unit in interstate commerce, then of course any attempt to regulate that commerce by the state of North Dakota is in direct conflict with the Grain Standards Act, wherein Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce. Both acts ought not to be and cannot be enforced, without confusion and embarrassment as the state inspector declared. Section 4 of the Grain Standards Act, heretofore quoted, makes it unlawful to ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale, or consigned for sale by grade, unless the grain shall have been inspected and graded by an inspector licensed under the act. By the second proviso of said section such grain may be shipped or delivered for shipment in interstate or foreign commerce without inspection at point of shipment by an inspector licensed under the act to or through any place at which an inspector licensed under the act is located, subject to be inspected by a licensed inspector at the place to which shipped or at some convenient point through which shipped for inspection, which inspection shall be under such rules and regulations as the Secretary of Agriculture shall prescribe. This proviso, as we understand it, would authorize a shipment of grain in interstate commerce from a point in North Dakota where there was no licensed inspector under the federal act to Minneapolis or Duluth, in Minnesota, to be there inspected by a federal inspector. The state law, however, declares that one may not even buy a bushel of wheat for shipment in

interstate commerce without taking out a license to do so and promising to obey all the provisions of the state law and the regulations of the state inspector, and the wheat purchased must be inspected in North Dakota and again at Duluth or Minneapolis. This brings the two laws clearly in conflict, if they both have to do with interstate commerce.

"As we have said before, the state law authorizes the state inspector to establish grades for grain and the Secretary of Agriculture by the Grain Standards Act is vested with the same power. These powers are directly in conflict, if they both relate to interstate commerce in grain. The United States Grain Standards Act provides that no person licensed by the Secretary of Agriculture to inspect or grade grain during the term of such license or employment shall be interested, financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse. The state law provides that the term 'deputy inspector of grades, weights and measures,' within the meaning of the law, shall mean any firm, person, company, corporation, or association that buys, weighs, and grades grain, seeds, and other agricultural products who holds a license issued therefor by the state inspector of grades, weights and measures. Thus one law requires that the inspector shall have no interest in the business and the other law requires that he shall. Which law is to prevail? Certainly the federal law, if the business is interstate commerce. It is useless to discuss further the matter of conflict, for the reason that, if both laws relate to the same subject, the state law attempts to regulate something that the state has no power to regulate, and, Congress having acted, the state law is in direct conflict with the federal law.

"It is our opinion that the state law is invalid for the reasons stated, and that the decree below should be reversed, and the case remanded, with directions to the court below to issue a permanent injunction, as prayed in the appellant's complaint."

Right to add terms to description.—In *Hayes Grain Co. v. Rea Patterson Milling Co.*, (1920) 145 Ark. 65, 223 S. W. 390, the court, in sustaining the right of a buyer of corn to stipulate that it should be "choice 3 white kiln-dried," referred to sundry departmental rulings and said:

"Of course, these departmental rulings are no part of the law; but we do not interpret the ruling as sustaining appellant's contention that the explanatory words 'choice' and

'kiln-dried' must be treated as surplusage. The department appears to hold that it is not a violation of the federal act to add prefixes or suffixes to the terms designating the official grade, provided such explanatory words are not false or misleading as to the official grade of the grain.

"This appears to be the fair and reasonable construction to give the act of Congress, as the testimony at the trial was to the effect that a wide difference may exist in corn falling within the same official classification or grade. The official inspector at Coffeyville, Kan., who inspected the corn in question, testified at the trial and exhibited to the court three pans of corn, all of which graded No. 3 white; yet he explained that one pan was suitable for milling, and another pan was not, for the reason that it would color the meal.

"On December 1, 1916, the Department of Agriculture was asked whether the following classification was permissible under the federal act: 'Yellow milling corn, subject to discount for moisture over 17½ per cent.' After expressing the opinion that the provisions of the act were applicable to transactions involving the delivery for shipment in interstate commerce of shelled corn that was sold or consigned for sale by any grade whatever, the department ruled that—

"It would seem that your transactions could easily be so framed as to state the grade of the corn involved, according to the grades of the official grain standards of the United States, and that at the same time you could make the specific requirements which must be met by corn of the designated grade for the purposes of your business."

"We think this ruling conforms to our interpretation that it was not the intention of the statute to deprive persons of the right to contract for specific requirements, pro-

vided the specifications employed were not false or misleading and conformed to the classifications previously adopted by the Department.

"We conclude, therefore, that the requirements of the memorandum that the corn should be 'choice' and 'kiln-dried' did not offend against the provisions of the federal statute and are not to be disregarded as surplusage."

1918 Supp., p. 14, sec. 1.

Constitutionality.—The creation of Federal land banks and joint stock land banks by this act, as amended by the act of January 18, 1918, (1918 Supp. Fed. Stat. Ann. 41) and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. *Smith v. Kansas City Title, etc., Co.*, (1921) 255 U. S. 180, 41 S. Ct. 243, 65 U. S. (L. ed.) —.

1918 Supp., p. 36, sec. 26.

Exemption from state taxation sustained.—Federal land banks and joint stock land banks, having been created by Congress in the exercise of its legitimate authority by this act, as amended by the act of January 18, 1918, (1918 Supp. Fed. Stat. Ann. 41) the power to make the farm loan bonds issued by them under the authority of those acts on the security of farm mortgages and notes exempt as to principal and interest from federal, state, municipal, and local taxation necessarily follows. *Smith v. Kansas City Title, etc., Co.*, (1921) 255 U. S. 180, 41 S. Ct. 243, 65 U. S. (L. ed.) —.

ALASKA

Vol. I, p. 251, sec. 3. [First ed., 1914 Supp., p. 19.]

Double taxation.—A manufacturer of fish oil, fertilizer, and fish meal from herring may not complain that he is doubly taxed, first by the United States and then by the territory of Alaska, in view of the provisions of this section, giving the territorial legislature power to impose taxes or licenses other than and additional to federal taxes on business and trade. *Alaska Fish, etc., Co. v. Smith*, (1921) 255 U. S. 44, 41 S. Ct. 219, 65 U. S. (L. ed.) —.

License tax law not impairment of fish law.—License taxes of \$2 a barrel and \$2 a ton,

respectively, upon persons manufacturing fish oil, fertilizer, and fish meal, in whole or in part, from herring, imposed by the territorial legislature of Alaska, cannot be deemed to be repugnant to this section, as an attempt to modify or repeal the fish laws of the United States, or the laws of the United States providing for taxes on business or trade, on the theory that federal statutes imposing a tax on fish oil works and on fertilizer works in general terms (which can hardly be considered fish laws), import a license to a specific kind of works deemed undesirable by the local powers,—especially since such section expressly declares that its provisions shall not operate to prevent the

territorial legislature from imposing other and additional taxes or licenses. *Alaska Fish, etc., Co. v. Smith*, (1921) 255 U. S. 44, 41 S. Ct. 219, 65 U. S. (L. ed.) —.

Vol. I, p. 255, sec. 9. [First ed., 1914 Supp., p. 21.]

Uniformity of taxation.—The requirement of this section, that all taxes in Alaska shall be uniform upon the same class of subjects, is not violated by treating the making of oil and fertilizer from herring as a different class, for purposes of license taxes, from the making of the same from salmon offal. *Alaska Fish, etc., Co. v. Smith*, (1921) 255 U. S. 44, 41 S. Ct. 219, 65 U. S. (L. ed.) —.

Taxation in excess of one per cent.—The restriction against taxation in excess of 1 per cent of the assessed valuation of property in Alaska, which is made by this section, does not apply to a license tax upon the manufacture of fish oil, fertilizer, and fish meal from herring. *Alaska Fish, etc., Co. v. Smith*, (1921) 255 U. S. 44, 41 S. Ct. 219, 65 U. S. (L. ed.) —.

Session law as to forfeiture invalid.—"The act of the territorial Legislature of 1915 is in conflict with the general law of the United States which gives to the owner of a located mining claim the right to hold and occupy the same so long as he shall perform the requisite annual assessment work thereon, and Congress reaffirmed that law as applicable to the territory of Alaska by the act of 1907, adding thereto only the provision above quoted. That act permits the filing of affidavits which shall be prima facie proof of the performance of annual work. But it makes provision for forfeiture only upon failure to perform the work. The act of the Alaskan Legislature set that provision aside, and declared that performance of the work shall not be sufficient, that forfeiture shall follow the failure to file an affidavit. To legislate thus was to transcend the authority conferred by the Enabling Act, was to interfere with the right of Congress to dispose of the public domain, was to destroy an estate which Congress grants in public lands, and was to exercise a power which Congress never intended to delegate, the power to declare the forfeiture of mining claims." *Betsch v. Umphrey*, (C. C. A. 9th Cir. 1921) 270 Fed. 45.

Vol. I, p. 264, sec. 6. [First ed., vol. I, p. 24.]

Jurisdiction of commissioners.—The court of the commissioner in Alaska is one of limited jurisdiction and a compliance with the requirements of the statute is essential to vest any jurisdiction in it. *Tuppela v. Chichagoff Min. Co.*, (C. C. A. 9th Cir. 1920) 267 Fed. 753.

Vol. I, p. 355, sec. 5. [First ed., 1909 Supp., p. 22.]

Refusal to allow continuance in a prosecution under this section held proper, see *Alaska Pac. Fisheries v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 778.

1918 Supp., p. 51, sec. 1. [*Intoxicating liquors, etc.*]

The National Prohibition Act did not repeal the provisions of this act. *Koppitz v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 96; *Abbate v. U. S.*, (C. C. A. 9th Cir. 1921) 270 Fed. 735. In the latter case the court said:

"Congress enacted the Bone Dry Law for Alaska, and 20 months later it enacted the National Prohibition Act. In enacting the latter Congress was adopting legislation for the whole United States to carry out the provisions of the Eighteenth Amendment. In enacting the Bone Dry Law, on the other hand, Congress was pursuing its policy of prohibition in Indian country. That policy as to Alaska was first manifested by legislation enacted on July 27, 1868, for the prevention of the importation and sale of intoxicating liquors in Alaska, the population of which was largely composed of Indians, and it was continued without interruption until the enactment of the Bone Dry Law of February 14, 1917. That act contains provisions peculiarly applicable to Alaska, and which are more drastic and far-reaching, and involve severer penalties for the same offense, than do the provisions of the National Prohibition Act.

"What is there to show that the National Prohibition Act was intended to replace the Bone Dry Law of the territory of Alaska? It is not to be found in the statute, which provides that the Constitution of the United States and all the laws thereof 'which are not locally inapplicable' shall have the same force and effect within the said territory as elsewhere in the United States. That is a general provision which is found in the organic act of all the territories. It is simply an extension of the laws of the United States to the territory. It does not stand in the way of or affect the construction of special congressional legislation solely for the territory.

"The provision of the National Prohibition Act for the punishment of selling liquor in Alaska is 'locally inapplicable' in Alaska, for the reason that Congress has provided for a severer penalty for the act when committed there. * * * In brief, we think that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaskan act than it does the state acts."

ALIENS

Vol. I, p. 365, sec. 1. [First ed., vol. I, p. 437.]

Right of British subject, resident of Canada, to inherit real property in United States.—British subjects, citizens and residents of Canada, do not inherit real property in the United States, contrary to local laws, by virtue of the stipulations of the treaty with Great Britain of March 2, 1899, nor by reason of the most-favored-nation clause of said treaty, in the absence of notice of adhesion to the treaty on behalf of the Dominion of Canada, as required by art. 4, which provides that the stipulations of such treaty shall not be applicable to any British colonies or

foreign possessions unless notice to that effect shall be given on behalf of such colony or foreign possession by the British representative at Washington to the Secretary of State of the United States. *Sullivan v. Kidd*, (1921) 254 U. S. 433, 41 S. Ct. 158, 65 U. S. (L. ed.) —.

Treaty right to hold realty.—*State prohibition of alien ownership.*—A treaty giving the right to hold realty in states "in which foreigners shall be entitled to hold or inherit real estate" does not invalidate a state constitutional provision against the holding of real estate by aliens. *State v. Staeheli*, (Wash. 1920) 102 Pac. 991.

ANIMALS

Vol. I, p. 377, sec. 1. [First ed., 1909 Supp., p. 43.]

Request of shipper extending time.—A request by the shipper extending to 36 hours the time for unloading does not create an agreement by the carrier not to unload for 36 hours, so that in the absence of negligence a carrier taking a shipment with such a request attached to the contract is not liable for unloading the live stock before the end of that period at a place where they contract disease. *Bradford v. Hines*, (Mo. 1921) 227 S. W. 889.

Vol. I, p. 386, sec. 2. [First ed., 1909 Supp., p. 44.]

Duty of caretakers.—It is the duty of the caretakers furnished free transportation to assist in unloading, feeding, watering, resting and reloading the cattle, and if the caretakers, by using their reasonable diligence and the means at their command could have prevented or diminished the damage done, then any such damage which might have been so prevented, or the amount in which such damage might have been diminished, the defendant is not responsible for. *Atchinson, etc., R. Co. v. Merchants' Live Stock Co.*, (C. C. A. 8th Cir. 1921) 273 Fed. 130.

Evidence.—It has been held in an action to recover damages for failure to comply with this Act that evidence is not admissible in behalf of the shipper of the time consumed in transporting a subsequent shipment or as to the difference in shrinkage in weight. *Atchinson, etc., R. Co. v. Merchants' Live Stock Co.*, (C. C. A. 8th Cir. 1921) 273 Fed. 130. The court said:

"The effect of this was to bring into the case many collateral issues, to present issues

of fact which the Railway Company was not prepared to meet, and to lead the jury aside on an inquiry of facts which would not furnish it a safe guide in reaching a correct and just conclusion on the questions which it was called to hear and determine. What were the comparative ages and physical strength of the cattle in the two shipments? What were the comparative conditions as to flesh? When and to what extent had the cattle in each shipment been fed and watered prior to being put on the cars? Was three days the average run from Avalon to Kansas City or was it exceptionally short? The first would be a fair guide, the latter misleading. How much time was consumed in driving the last shipment in from the range and what were the conditions as to feed and water on the way, as compared to the first shipment? What was the difference in weather conditions, and its effect? Even if these inquiries had not been collateral and therefore irrelevant, the defendant could not have been expected to be prepared to meet them. We think the challenged proof was irrelevant, misleading and prejudicial."

Vol. I, p. 397, sec. 1. [*Meat, etc.*] [First ed., 1909 Supp., p. 46.]

Duty to destroy condemned animal.—"After the inspector discovered symptoms of disease in said hog, it became his duty to have said hog slaughtered and to then further inspect the same, and, upon then finding the same to be in a diseased condition and unfit for human food, to condemn said hog and cause the same to be destroyed for food purposes. It would have been a violation of the duty of said inspector, under the federal statute, if, after discovery of symptoms of disease in said hog he had returned the same to re-

spondent, as the statute plainly directs the inspector what to do when he finds symptoms of disease in live animals." *Wess v. South Dakota Packing, etc., Co.*, (S. D. 1920) 180 N. W. 510.

Vol. I, p. 408, sec. 3. [First ed., vol. I, p. 452.]

Validity of regulations.—"Pursuant to this authority the United States Bureau of Animal Industry appointed an inspector with supervision over the Kansas City Stockyards at Kansas City, Mo. His duties required him to inspect all cattle from southern points before they were unloaded, and to place cattle which were clean and free from ticks in certain pens, and those infected with fever ticks in other pens. Such laws are valid." *Payne v. Cotner*, (1921) 148 Ark. 401, 230 S. W. 275.

1918 Supp., p. 61. [*Act of March 4, 1917.*]

Contractual obligation of United States to pay for seized serum.—No contractual obli-

gation on the part of the United States to pay for anti-hog-cholera serum, anti-cholera virus, and serum blood, seized without agreement to purchase by agents of the Bureau of Animal Industry, and thereafter destroyed, can be implied from the provisions of the Act of March 4, 1915, which was similar to the provision in the text, that, in case of an emergency arising out of the existence of certain contagious or infectious diseases of animals, which, in the opinion of the Secretary of Agriculture, threatens the live-stock industry, he may expend a specified sum, which sum is thereby appropriated, or so much thereof as he deems to be necessary, in the arrest and eradication of any such disease, including the payment of claims growing out of past and future purchases and destruction, in co-operation with the states, of animals affected by, or exposed to, or of materials contaminated by or exposed to, any such disease. *Great Western Serum Co. v. U. S.*, (1920) 254 U. S. 240, 41 S. Ct. 65, 65 U. S. (L. ed.) —, affirming (1918) 54 Ct. Cl. 203.

ARTICLES FOR THE GOVERNMENT OF THE NAVY

Vol. I, p. 426, art. 14. [*Other fraud.*] [First ed., vol. I, p. 466.]

Effect of release from active duty of member of reserve force.—The release from active duty of a member of the naval reserve force is equivalent to an honorable discharge, after which he cannot be recalled into service, except upon the intervention of some actual continuation of service in time of war or of national emergency, nor can he be brought to trial by court-martial for an offense alleged to have been committed prior to his

release. Hence, a member of the naval reserve force who is recalled to active service for use as a witness in a case before a court-martial and to answer any charge that may be brought against himself, is entitled to be discharged on habeas corpus when it is attempted to bring him to trial before a court-martial for a violation of this article alleged to have been committed prior to his release from active service. *U. S. v. MacDonald*, (E. D. N. Y. 1920) 265 Fed. 695. To same effect, see *U. S. v. Warden, etc.*, (E. D. N. Y. 1920) 265 Fed. 787.

ARTICLES OF WAR

Vol. I, p. 458, art. 58. [First ed., vol. I, p. 492.]

Jurisdiction of assaults.—A general court-martial has no jurisdiction under this article to impose a sentence of imprisonment upon a civilian teamster found guilty of assaulting another person by cutting him with a knife and by shooting at him with a pistol with intent to kill. *Anderson v. Crawford*, (C. C. A. 8th Cir. 1920) 265 Fed. 504.

Regarding the jurisdiction of a general court-martial under this article, the court said:

"Upon a comparison of the specifications of the offense charged against appellee, and of the findings made, with the terms of the article of war under which he was tried and sentenced, it will be observed that as to specification 1, he was acquitted of the charge of felonious assault upon Watkins by cutting him with a knife with intent to kill, but found guilty of assaulting him by cutting

him with a knife. This was clearly not an offense under this article of war, because there must have been an 'assault and battery with an intent to kill' or 'wounding, by shooting or stabbing, with an intent to commit murder.' The appellee was found guilty under the second specification, in that he feloniously assaulted Watkins by shooting at him with a pistol with intent to kill. The article of war conferred jurisdiction upon a general court-martial to try and to punish the offense of assault and battery with an intent to kill, but it did not confer jurisdiction over a charge of assault with intent to kill. It was not alleged that in making the assault by shooting at Watkins the appellee wounded him, or in any way caused any force to be exerted upon the person of Watkins. While a battery always included an assault, assaults often fall short of a battery. An assault is an attempt, which, if consummated, would result in a battery. *Mr. Justice Washington, in United States v. Hand, 2 Wash. C. C. 435, 437, 26 Fed. Cas. 103, No. 15,297, made the distinction in these words:*

"The definition of an assault (1 Bac. Abr. tit. "Assault," 242) is an offer or attempt by

force to do a corporal injury to another, as if one person strike at another with his hands, or with a stick, and misses him; for, if the other be stricken, it is a battery which is an offense of a higher grade.'

"It is essential to a battery that some force shall be actually applied, not merely threatened or attempted to be applied, to the person of another, or to some article so closely connected with his person as to be regarded as a part of it. 1 Hawk. P. C. c. 62, § 2; 1 Russell on Criminal Law (7th Eng. & Can. Ed.) 881; 2 Whart. Cr. Law (11th Ed.) § 811; 2 Bishop, Cr. Law, § 72-(1).

"It is not necessary to invoke the rule that penal laws are to be strictly construed, although a trial by court-martial in the state of Mexico for an offense alleged to have been committed there would present an appropriate occasion for the application of that salutary rule of construction, for in this case the plain words of the statute include a battery as an essential element of the offense, before there can be a legal conviction and sentence, and none was alleged or found."

ATTACHMENT

Vol. I, p. 485, sec. 931. [First ed., vol. I, p. 515.]

Application.—This section merely relates

to the release on bond of property attached in certain postal suits. *U. S. v. One Chevrolet Automobile, (M. D. Tenn. 1920) 267 Fed. 1021.*

AVIATION

1918 Supp., p. 65. [*Aviation stations, etc.*]

Taking of tidelands.—Tidelands as well as uplands must be deemed to have been taken by the government in condemnation proceedings begun under this act, which provides for the taking of "the whole of" a specified island, and for the determination and ap-

praisement of any rights private parties may have in such island, where the bill follows the act, and prays that if the defendant company has any right to the tract or any part thereof, the right and "the whole thereof" may be "appraised and condemned." *U. S. v. Coronada Beach Co., (1921) 255 U. S. 472, 41 S. Ct. 378, 65 U. S. (L. ed.) —, affirming (S. D. Cal. 1919) 274 Fed. 230.*

BAIL AND RECOGNIZANCES

Vol. I, p. 490, sec. 1015. [First ed., vol. I, p. 521.]

Duty to admit to bail.—Construing this section with 1016 and 1019 of the Revised Statutes the Circuit Court of Appeals has said:

"We find the intent of the lawmakers to declare that a person under indictment for a noncapital offense shall not be imprisoned prior to his trial if he is willing and able to give bail. The word 'shall' in section 1015 is mandatory. This is apparent not only from the word itself, but from the contrast with the permissive word 'may' in section 1016. To abscond and forfeit one's bail is not included in the list of federal crimes. Even if it were, a person could not be punished therefor by imprisonment in advance of his indictment, trial, and sentence for that offense. If he were indicted for absconding and forfeiting bail, he would be absolutely entitled to be set at large pending his trial upon furnishing bail, unless the punishment for such absconding was death.

"Refusal to admit appellant to bail means that the District Court has adjudged a forfeiture of appellant's otherwise clear right under section 1015 solely by reason of finding that there is such a high degree of probability that appellant will again abscond that he should now be held without bail. It seems to us utterly immaterial on what character of evidence the trial court should base a finding that there is a high degree of probability that a defendant in a noncapital case will abscond. The question is what is the duty of the trial court when any showing is made that would justify such a finding of probability. And the answer is found in section 1019. It then becomes the duty of the judge to exercise his sound discretion under the law in fixing the amount of the bail. That is as far as his discretion goes. Taking all of the circumstances into consideration the trial court should fix the bail at such an amount as would be reasonably likely to assure the presence of the defendant when the case is called for trial." *Rowan v. Randolph*, (C. C. A. 7th Cir. 1920) 268 Fed. 527.

Vol. I, p. 492, sec. 1020. [First ed., vol. I, p. 523.]

Historical.—"This power of remission came to us from the English law, as asserted by Chief Justice Marshall, in 1813, in *United States v. Feely*, Fed. Cas. No. 15,082, 1 Brock. 255, and was but redeclared by the statute of February 22, 1839, now R. S. § 1020."

Griffin v. U. S., (N. D. Ga. 1921) 270 Fed. 263.

Construction.—The statute being highly remedial ought to be liberally construed and not in favor of the forfeiture. *Griffin v. U. S.*, (N. D. Ga. 1921) 270 Fed. 263.

Discretion of court.—The power here given is a discretion to remit in whole or in part under stated conditions a forfeiture which has really occurred. The provision for remission is not of law but of grace. *Griffin v. U. S.*, (N. D. Ga. 1921) 270 Fed. 263.

"Willful default."—The original statute of 1839 made the relief conditional on there being "no willful default of the parties," meaning possibly that all the parties to the recognizance who could be in default, both the principal and his sureties, must appear to be free of willful fault. Yet under the act so written it was held in 1863 (*U. S. v. Duncan*, Fed. Cas. No. 15,004) that a surety who was himself free from willful fault might be relieved; the forfeiture standing as to the principal. All doubt was removed by the Revised Statutes changing the word "parties" to "party," plainly meaning that party who was applying for the remission. Had the defendant or the principal been meant, a term definitely referring to him would have been used, instead of one that would apply as well to the surety. *Griffin v. U. S.*, (N. D. Ga. 1921) 270 Fed. 263.

Penalty alone remitted.—The judgment is not vacated or set aside. It must always stand as to costs, the penalty alone being capable of remission. *Griffin v. U. S.*, (N. D. Ga. 1921) 270 Fed. 263.

Time of applying for remission.—*In general.*—"No doubt the proper time to apply for the remission is on the return of the rule nisi, if the facts exist and are known which are to be relied on, and a failure to apply promptly ought to be considered as an unfavorable circumstance, and if injury has occurred to the public interests by the delay, the application ought to be denied." *Griffin v. U. S.*, (N. D. Ga. 1921) 270 Fed. 263.

After term.—The power of remission after term does not involve a question of the power to set aside a judgment after the term nor conflict with the executive power of pardon. The relief may be had in the discretion of the court as well after, as at, the term of the rule absolute. "The judgment on the rule absolute necessarily involves only the well-known absolute defenses to the recognizance, such as impossibility of performance by the act of God or of the law, and these only are concluded by the judgment." *Griffin v. U. S.*, (N. D. Ga. 1921) 270 Fed. 263.

BANKRUPTCY

Vol. I, p. 504. [First ed., 1912 Supp., p. 464.]

General purposes of the Act.—To the same effect as the first paragraph of original annotation, see *Farnsworth v. Union Trust, etc., Co.*, (C. C. A. 4th Cir. 1921) 272 Fed. 92.

"One of the general purposes of the bankruptcy law is to provide a uniform national law by which insolvent debtors can make a pro rata distribution of their assets among creditors. Prior to this amendment if a corporation sought to wind up its affairs and distribute its assets by means of a receivership, such a proceeding did not constitute an act of bankruptcy, and, consequently, creditors were entirely deprived of the valuable rights and safeguards provided by the bankruptcy law. This amendment was designed to correct that evil." *In re Sedalia Farmers' Co.-op. Packing, etc., Co.*, (W. D. Mo. 1919) 268 Fed. 898.

"Congress enacted the bankruptcy statute in the exercise of a public policy, for the benefit, not of debtors and creditors, but of society at large. It realized, of course, that unscrupulous and dishonest men would take advantage wherever they could of its provisions. Equally of course, it was not intended to enable a debtor to rush into bankruptcy just in time to prevent his creditors from satisfying their claims out of property he was about to come into possession of. But the difficulty in any law upon so complicated a subject as business relations is to make it cover every particular case that may possibly arise. It does not seem to us that the act takes into account the motives of creditors in involuntary proceedings, or of debtors in voluntary proceedings; but instead of that, in view of the fact that such a practical subject as business relations between debtor and creditor is being dealt with, it concerns itself rather with conditions as they exist, and undertakes to fix definitely the obligations of the debtor and the rights and remedies of the creditor. In our judgment, it was thought best by Congress to prescribe general rules, which would usually promote satisfactory results, notwithstanding the fact that in isolated instances it would be difficult, if not impossible, to attain to the high standards of exact justice." *Elberton Bank v. Swift*, (C. C. A. 5th Cir. 1920) 268 Fed. 305.

Vol. I, p. 510, sec. 1 (9). [First ed., 1912 Supp., p. 465.]

Finding as conclusive that petitioner not creditor.—The legal presumption is that the finding of the court below that a petitioner was not a creditor of the company was correct, and that finding should not be reversed or dismissed by an appellate court, unless the

record clearly shows that in making it the chancellor fell into a controlling error of law or made a decisive mistake of fact. *Cutler v. Nu-Gold Ring Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 836.

Vol. I, p. 511, sec. 1a (15). [First ed., 1912 Supp., p. 465.]

Fair valuation.—As the term is used in this section it means a value that can be made promptly effective by the owner of property to pay debts. *In re Sedalia Farmers' Co.-op. Packing, etc., Co.*, (W. D. Mo. 1919) 268 Fed. 898. It is said that "The inquiry is simply this: What in the actual circumstances was the fair value of the assets of the debtor (afterwards the bankrupt) when he paid or secured the antecedent debt?" *In re Fred D. Jones Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 818.

Contingent assets.—Where the assets consisted principally of claims and choses in action many of which were disputed and the total of which was much less than the established liabilities, the evidence was held to show insolvency. *Walker Grain Co. v. Gregg Grain Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 510.

Vol. I, p. 516, sec. 2. [First ed., 1912 Supp., p. 469.]

Equitable jurisdiction.—To the same effect as the original annotation, see *In re Schilling*, (N. D. Ohio 1920) 264 Fed. 357; *Greif Bros. Cooperage Co. v. Mullinix*, (C. C. A. 8th Cir. 1920) 264 Fed. 391; *Regal Cleaners, etc., v. Merlis*, (C. C. A. 2d Cir. 1921) 274 Fed. 915.

Vol. I, p. 518, sec. 2 (1). [First ed., 1912 Supp., p. 470.]

Corporation's principal place of business.—*In general.*—The state in which a corporation is licensed to do business and maintains its plant is regarded as the state in which it has its principal place of business and not the state in which it is not licensed to do business but in which it maintains its corporate offices, keeps its books and records and holds its stockholders', directors', and executive committees' meetings and directs its business. And the situation is not affected by the appointment of a receiver by a court of the former state. *In re Monarch Oil Corp.*, (S. D. Ohio 1920) 272 Fed. 524. The state in which a corporation is incorporated and in which it names its principal place of business in its articles of incorporation, at which place its producing plant is located and an office is maintained in which all of its books and records are kept, its

banking done and from which all of its official business is conducted, is held to be the corporation's principal place of business. *In re Devonian Mineral Spring Co.*, (N. D. Ohio 1920) 272 Fed. 527, wherein the court said:

"What is the principal place of business of a corporation must be determined from a consideration of all of the facts; the place fixed in its articles of incorporation, the character of the corporation, its purposes, especially its dominant purpose, the kind of business it is engaged in, where its manufacturing plant and business offices are, its principal and not incidental transactions, in carrying on its business."

Burden of proof.—It is the rule that, when the articles of incorporation name a place as the principal place of business of a corporation, the burden is upon the petitioning creditors to show it is elsewhere. *In re Devonian Mineral Spring Co.*, (N. D. Ohio 1920) 272 Fed. 527.

Domicil of corporation.—A state in which a corporation is organized and which is the only one in which it has an office or does business is the domicil of the corporation. *In re Devonian Mineral Spring Co.*, (N. D. Ohio 1920) 272 Fed. 527.

Vol. I, p. 522, sec. 2 (3). [First ed., 1912 Supp., p. 472.]

Receivers' powers and duties in general.—*"The receivers are officers of the court, appointed to conserve the property, and are not successors in title to the bankrupts, nor charged with notice of how or by what means such possession or title was acquired."* *In re Fosgate*, (S. D. Fla. 1920) 268 Fed. 985.

Vol. I, p. 528, sec. 2 (5). [First ed., 1912 Supp., p. 475.]

Order to continue business.—The court has jurisdiction to authorize the trustee to operate the bankrupt's property as a going concern for a limited period. *In re People's Warehouse Co.*, (S. D. Miss. 1921) 273 Fed. 611.

Vol. I, p. 529, sec. 2 (7). [First ed., 1912 Supp., p. 476.]

Money paid to trustee through mistake.—The court has jurisdiction under this section to order the trustee to refund money which he has received on a conveyance made by him of real estate in which he and all parties concerned mistakenly supposed the bankrupt had a vested interest, such mistake being regarded under the state law to be one of fact and not purely one of law. *In re Russell*, (E. D. Pa. 1921) 273 Fed. 724.

Vol. I, p. 531, sec. 2 (8). [First ed., 1912 Supp., p. 476.]

The proceeding to reopen an estate authorized by this section need not be formal.

In re Carlucci Stone Co., (M. D. Pa. 1920) 269 Fed. 795.

The order may be based on a petition without technical conformity of any kind, if it contains sufficient information to satisfy the court of the necessary jurisdictional fact, to wit, that the estate was closed before it was fully administered. *In re Carlucci Stone Co.*, (M. D. Pa. 1920) 269 Fed. 795.

Discretion of court.—When the petition contains allegations of fact satisfying the conscience of the court, *prima facie*, that assets of the bankrupt remain unadministered, the court, in the exercise of its discretion, may reopen the proceedings. *In re Carlucci Stone Co.*, (M. D. Pa. 1920) 269 Fed. 795.

It is only for the abuse of discretion that the court will be reversed; that is, where the court acts arbitrarily, or without apparent reason and authority. *In re Carlucci Stone Co.*, (M. D. Pa. 1920) 269 Fed. 795.

Vol. I, p. 533, sec. 2 (11). [First ed., 1912 Supp., p. 478.]

Extent of jurisdiction—Generally.—Unless the situation discloses a formal waiver and a failure to claim exemption in the bankruptcy court it is bound to act on the mandate of the Bankruptcy Act and set off the exempt property. *In re Dautz*, (D. C. Ind. 1921) 272 Fed. 348.

Vol. I, p. 538, sec. 2 (20). [First ed., 1912 Supp., p. 480.]

Under the amendment of 1910.—To the same effect as the original annotation, see *In re Flaherty*, (N. D. Ia. 1920) 265 Fed. 741.

Vol. I, p. 544, sec. 3a (2). [First ed., 1912 Supp., p. 483.]

Preferences in general.—To the same effect as the first paragraph of the original annotation see *In re Saludes Lumber Co.*, (E. D. N. Y. 1921) 273 Fed. 303.

Transfer of stolen automobile sold to bankrupt.—Where a bankrupt bought an automobile in good faith not knowing it was stolen and, after adding various accessories to it which he paid for, transferred it to a creditor, it was held that the automobile was "property" within the meaning of this section and the transfer a preferential one and an act of bankruptcy. *In re Schenderlein*, (D. C. Mass. 1920) 268 Fed. 1018.

Who may object to transfer—Subsequent creditors.—Where a corporation transfers a part of its property to one of its principal stockholders, who is also a creditor, other creditors whose claims arise subsequently to such transfers, may not attack it as being a preference and an act of bankruptcy. *Phillips v. Carter*, (S. D. Ga. 1920) 266 Fed. 444.

Vol. I, p. 555, sec. 3a (4). [First ed., 1912 Supp., p. 488.]

II. APPOINTMENT OF RECEIVER OR TRUSTEE
(p. 558)

"Because of insolvency."—"The words 'because of insolvency' should be, and are, broad enough to include all cases where the requisite degree of insolvency is present, and was the proximate cause of the receivership." *In re Sedalia Farmers' Co-op. Packing, etc., Co.*, (W. D. Mo. 1919) 268 Fed. 898. Where a receiver is appointed for an indefinite period to marshal the assets, collect the indebtedness, and realize on the assets in order to pay debts and distribute the proceeds for the benefit of the stockholders, creditors and all concerned, it is held that he is appointed because of insolvency within the meaning of this Act. *In re Sedalia Farmers' Co-op. Packing, etc., Co.*, (W. D. Mo. 1919) 268 Fed. 898. It has been held that a receiver is appointed "because of insolvency" where it was alleged and admitted, on the application for a receiver in a state court, that the debtor's property was so mortgaged and pledged that the debtor was insolvent and could not meet its obligations and that its officers had abandoned its business. *Stewart Petroleum Co. v. Boardman*, (C. C. A. 8th Cir. 1920) 264 Fed. 826. The word "insolvency" as here used does not necessarily mean insolvency within the definition of that word in the Bankruptcy Act. *In re Sedalia Farmers' Co-op. Packing, etc., Co.*, (W. D. Mo. 1919) 268 Fed. 898. The court said:

"It will be noted that Congress herein nowhere says that the word 'insolvent' (or, by analogy, 'insolvency'), as used within the provisions of this act, shall be defined thus and so. It merely declares under what conditions a person shall be deemed insolvent to such extent as to bring him within its provisions. This may be a fine distinction, but it is a significant one, because in the provision in question we are dealing with a proceeding in a court of a state in which 'insolvency' has its common-law meaning; to wit, inability to meet obligations as they become due; and the petitioning creditors charge that the receiver was put in charge of this property under the laws of this state because of such insolvency. It is a matter of common knowledge at the bar that receivers are appointed by state courts under precisely such circumstances. This is done because of such insolvency; and it would probably rarely, if ever, occur that the exclusive form of insolvency, as defined in the Bankruptcy Act, would be specifically stated in a petition addressed to a circuit court of this state; particularly would this be true if the pleader desired the estate to be administered and distributed by the state court and not by a court of bankruptcy. This would open an obvious avenue for evasion of one

of the most important provisions of the national act."

Insolvency essential—*In general*.—It is, "of course, necessary to find that the bankrupt was actually insolvent, within the meaning of the Bankruptcy Act, both at the time of the alleged act and at the time of filing the involuntary petition." *In re Sedalia Farmers' Co-op. Packing, etc., Co.*, (W. D. Mo. 1919) 268 Fed. 898.

The act of bankruptcy is complete where a receiver is appointed because of insolvency and the property is placed in his charge though the court may have been without jurisdiction and the appointment have been improvidently made. *In re Sedalia Farmers' Co-op. Packing, etc., Co.*, (W. D. Mo. 1919) 268 Fed. 898.

Liquidating commissioners.—*In Standard Warehouse, etc., Co. v. George H. McFadden Bros. Agency*, (C. C. A. 5th Cir. 1921) 272 Fed. 251, it was held that acts of liquidating commissioners appointed by the board of directors of a corporation in filing a petition in pursuance of which they were appointed judicial liquidators under the Louisiana statutes were not the acts of the alleged bankrupt so as to authorize an adjudication of bankruptcy under this section.

The application of a corporation for dissolution under the statutes of a state is not an act of bankruptcy which will authorize involuntary proceedings under the Bankruptcy Act. *Baker v. Monarch Wholesale Mercantile Co.*, (C. C. A. 5th Cir. 1921) 289 Fed. 794. The court said:

"The bankruptcy statute was not enacted for the purpose of enabling creditors to harass a debtor, or to prevent a debtor corporation from resorting to the laws of the state which created it for the purpose of winding up its affairs and procuring its dissolution. It would be mere officious interference with salutary statutory provisions of Texas to force the dissolution of appellees through bankruptcy proceedings."

Vol. I, p. 568, sec. 4a. [First ed., 1912 Supp., p. 495.]

Motive as immaterial.—Undoubtedly any person owing debts has the right to seek the bankruptcy court for the purpose of winding up his affairs, and his motive in doing so is immaterial. *In re People's Warehouse Co.*, (S. D. Miss. 1921) 273 Fed. 611.

Solvent person.—On a voluntary petition an adjudication may be made as to a perfectly solvent person. *In re People's Warehouse Co.*, (S. D. Miss. 1921) 273 Fed. 611.

Corporations—Power of directors to file petition.—"Whether the directors of a corporation, without the authority from the stockholders, have power to file a petition in voluntary bankruptcy, must be determined by the law of the state in which the corporation is organized. *Home Powder Co. v. Geis*, 204 Fed. 568, 570, 123 C. C. A. 94

(Eighth Circuit); *Dodge v. Kenwood Ice Co.*, 204 Fed. 577, 123 C. C. A. 103.

"In *Home Powder Co. v. Geis*, *supra*, this court said:

"It is not to be presumed that there will be found in the general laws of the state, or in the articles of incorporation or by-laws, any express provision authorizing such admission; but under the general law the board of directors or trustees of a corporation have the power to authorize execution of an assignment of all property of the corporation for the benefit of its creditors, when such a step is advisable, unless such an assignment is prohibited by law, the articles, or by-laws."

"This is, we understand, the general rule. See *Dodge v. Kenwood Ice Co.*, *supra*; *Rudebeck v. Sanderson*, Trustee, 227 Fed. 575, 142 C. C. A. 207; *In re Foster Paint Co.* (D. C.) 210 Fed. 652; *In re Russell Wheel Co.* (D. C.) 222 Fed. 569." *Fitts v. Custer Slide Min. etc., Co.*, (C. C. A. 9th Cir. 1920) 266 Fed. 864, holding that under the laws of Colorado the directors had such power.

A corporation in the hands of a state receiver will not be allowed to make a surrender in bankruptcy. *In re Associated Oil Co.*, (E. D. La. 1921) 271 Fed. 788, wherein it was said:

"In the exercise of discretion, I think I should decline to interfere with the state court in this matter. To allow the adjudication to stand would undo all that has been accomplished in the state court. The receiver was appointed because of the mismanagement of the officers. It was alleged and admitted that the officers of the Oil Company and the Adey Johnson Company are the same. That company is the sole ordinary creditor shown on the schedules. Necessarily, if the sworn schedules are true, it would elect the trustee. In that event the custody and control of the assets of the Oil Company would in effect be restored to the very men from whom the state court saw fit to take them. This would enable the officers of the Oil Company to perpetrate a fraud on the state court through the agency of the bankruptcy court, something unthinkable."

Vol. I, p. 569, sec. 4b. [First ed., 1912 Supp., p. 495.]

I. Generally.

II. Statutory exceptions.

IV. Corporations and unincorporated companies.

I. GENERALLY (p. 569)

Purpose of section.—The intent of Congress to protect men engaged in agriculture, who might fall behind from the failure of crops for one or two seasons, has always been recognized as the basis for this provision in the statute. *In re Doroski*, (E. D. N. Y. 1921) 271 Fed. 8.

II. STATUTORY EXCEPTIONS (p. 570)

Date of status of statutory exceptions.—

The time from which the status of exemptions under this section is to be determined must be either the date of the commission of an act of bankruptcy or the date at which the debts to which the act of bankruptcy relate were incurred. Hence a man engaged in farming at the time his debts were incurred is not subject to involuntary proceedings therefor, though immediately after the expiration of the four months' exemption period, the same individual might be adjudicated a bankrupt for acts of bankruptcy while insolvent and after he had ceased the occupation of farming, and in that proceeding the debts accruing during his farming operations might be proven in connection with the debts accruing thereafter. *In re Doroski*, (E. D. N. Y. 1921) 271 Fed. 8.

Persons engaged chiefly in farming or the tillage of the soil.—*What is farming or tillage of soil.*—*In re Sutter*, (E. D. Mo. 1920) 270 Fed. 248, a person was held to be within this exception where, in connection with other evidence, it appeared that he had cultivated a farm of about 300 acres for a period of twenty years during which he had bought, fed and sold cattle and hogs and had produced farm fruit, garden vegetables and poultry.

Persons engaged chiefly in farming or the tillage of the soil.—*A person engaged chiefly in farming.*—To the same effect as the first paragraph of the original annotation, see *In re Sutter*, (E. D. Mo. 1920) 270 Fed. 248.

IV. CORPORATIONS AND UNINCORPORATED COMPANIES (p. 574)

Prior to the enactment of the amendment of June 25, 1910.—*Mining corporations.*—To the same effect as the original annotation, see *In re Jutte*, (C. C. A. 3d Cir. 1920) 266 Fed. 367.

Unincorporated companies.—To the same effect as the first paragraph of the original annotation, see *In re Tidewater Coal Exch.*, (S. D. N. Y. 1921) 274 Fed. 1008.

It is not necessary that an association must be an entity recognized by the law as a legal person in order to fall within the phrase "unincorporated company." *In re Tidewater Coal Exch.*, (S. D. N. Y. 1921) 274 Fed. 1008.

Insurance corporation.—There is such an absence of jurisdiction in a court of bankruptcy, where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation, and therefore within the exception of this section, that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated, and the proceeding be dismissed upon the motion of the bankrupt, after the time for appeal has expired. *Valley v. Northern F., etc., Ins. Co.*, (1920) 254 U. S.

348, 41 S. Ct. 116, 65 U. S. (L. ed.) —, wherein it was held that the insurance company by acquiescing in the adjudication of bankruptcy, and aiding the trustee in the performance of his duties in administering the estate, was not estopped thereby from thereafter questioning the adjudication, and the power of the bankruptcy court and the trustee to proceed.

Vol. I, p. 578, sec. 4b. [*Liability of officers, etc.*] [First ed., 1912 Supp., p. 501.]

Discharge of bankrupt corporation as releasing individual liability of officers and directors.—See annotations under section 16a, *infra*, p. 360.

Vol. I, p. 578, sec. 5a. [First ed., 1912 Supp., p. 501.]

Construction.—“After much discussion among the authorities as to the separate entity of the partnership, as such, they are now practically unanimous in holding that the adjudication of the firm as an entity is provided for by this act.” *In re Ollinger*, (S. D. Ala. 1921) 274 Fed. 970.

Petition by one partner.—It is said that when the court wrote general order No. 8 it must have intended that, where a partner of a firm refuses to join in the petition with the other partners or partner, the petition must contain the statement of facts contained in form No. 3 wherein is a charge of insolvency and the commission of an act of bankruptcy, which such nonassenting partner may deny. *In re Ollinger*, (S. D. Ala. 1921) 274 Fed. 970.

Vol. I, p. 583, sec. 5c. [First ed., 1912 Supp., p. 504.]

Jurisdiction over nonresident partner.—Where a bankruptcy court has jurisdiction of a partnership and one of the partners, it may adjudicate the partnership a bankrupt in involuntary proceedings, if it has committed an act of bankruptcy, and by ancillary proceedings compel the partner outside of its jurisdiction to file a schedule of his assets with the bankrupt's trustee and contribute to the payment of claims of creditors against the bankrupt estate. *In re Flaherty*, (N. D. Ia. 1920) 265 Fed. 741.

Vol. I, p. 591, sec. 5h. [First ed., 1912 Supp., p. 508.]

Bankruptcy of several partners as releasing solvent partner and surety from liability.—The bankruptcy of several members of a partnership does not relieve a remaining solvent member from the duty of completing contracts made by the firm, nor does it release from liability a surety on a partnership

bond. *Kimmel v. State*, (Ind. App. 1921) 130 N. E. 239.

Vol. I, p. 592, sec. 6a. [First ed., 1912 Supp., p. 508.]

III. Matters affecting right to exemption.

IV. Recognition of state and federal exemption law.

III. MATTERS AFFECTING RIGHT TO EXEMPTION (p. 596)

Fraud—Homestead purchased with non-exempt funds.—The right to a homestead exemption has been denied where the bankrupt ceased to make further payments on trade obligations and retained the proceeds for merchandise sold in his personal possession with which funds the homestead was purchased. *Kangas v. Robie*, (C. C. A. 8th Cir. 1920) 264 Fed. 92.

Assignment for benefit of creditors.—A voluntary assignment for the benefit of creditors which is set aside does not affect the right of the bankrupt to claim his exemption. *In re Dautz*, (D. C. Ind. 1921) 272 Fed. 348.

An execution creditor has no rights superior to those of the bankrupt in exempt property. Such a creditor, with a lien by levy on personal property prior to an adjudication in bankruptcy, cannot claim funds secured by the trustee to the extent of the difference between the property set aside to the bankrupt, and his exemption allowed by the state law, when the bankrupt has not made any further claim for exemption. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

Right cannot be assigned.—*In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

Waiver.—The right to exemption is regarded as a personal privilege which may be waived. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

Where a bankrupt fails to make claim for his exemption in the manner and within the time provided by the Bankruptcy Act and General Orders in Bankruptcy, the right of exemption is waived. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

Where the bankrupt files no schedule or makes no request on the trustee to set aside specific articles as exempt until after a sale he must be regarded as having waived his right of exemption. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

A bankrupt by making a claim to certain articles as exempt waives claim to exemption on any other property than that specified. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

IV. RECOGNITION OF STATE AND FEDERAL EXEMPTION LAW (p. 601)

State law adopted—*Michigan*.—While, however, the bankruptcy court will follow and adopt the statutes of a state, as con-

strued and applied by the highest courts thereof, in determining the nature and extent of the exemptions created by the laws of such state, yet the manner in which such exemptions are to be claimed, set apart, and awarded is regulated and determined by the federal courts, as matter of procedure in the course of bankruptcy administration, as to which they are not bound or limited by state decisions or statutes. *In re Moore*, (E. D. Mich. 1921) 274 Fed. 645.

Pennsylvania.—Under the law in Pennsylvania the bankrupt must take the property which is claimed as exempt and cannot take the proceeds of a sale of the property. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

Texas.—To the same effect as the original annotation, see *Stratton v. Ermis*, (C. C. A. 5th Cir. 1920) 268 Fed. 533.

Homestead exemptions—Colorado.—To the same effect as the original annotation. see *Edgington v. Taylor*, (C. C. A. 8th Cir. 1920) 270 Fed. 48.

Lease of part for business purposes.—Where by the state law the homestead of every resident of the state, with the improvements and appurtenances, not exceeding in value a stated sum, may be claimed and set aside as exempt from levy and sale under process for the collection of debts, and, after the homestead shall have been claimed in the manner prescribed, the act of the owner in leaving it temporarily or in leasing it does not operate as an abandonment, the mere fact that part of the premises on which the owner resides is adapted to and is used for business purposes does not stand in the way of the property being considered as his homestead, unless the use of a part as a place of habitation is incidental or secondary to the business use of the remainder. *Burrow, etc., Shoe Co. v. Wallace*, (C. C. A. 5th Cir. 1920) 268 Fed. 532.

Unsevered crops.—Where the decisions of a state are to the effect that unsevered crops on land embraced in a rural homestead are included in the homestead exemption, such construction of the state law will be followed in bankruptcy proceedings. *Stratton v. Ermis*, (C. C. A. 5th Cir. 1920) 268 Fed. 533.

Vol. I, p. 612, sec. 7a (8). [First ed., 1912 Supp., p. 520.]

I. SCHEDULE OF ASSETS (p. 612)

Failure to file claim for exemption as waiver.—Where an involuntary bankrupt neglects to file his claim for exemption within the time specified by this section, or before a sale of his assets as required by the state law, his rights thereto are waived. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

Vol. I, p. 618, sec. 7a (9). [First ed., 1912 Supp., p. 524.]

Incriminating answers—Constitutional protection.—To the same effect as the original

annotation see *Arndstein v. McCarthy*, (1920) 254 U. S. 71, 379, 41 S. Ct. 26, 136, 65 U. S. (L. ed.) —, wherein it was further held that an involuntary bankrupt did not, by filing schedules of assets and liabilities without objection, waive his constitutional privilege to refuse to answer questions respecting them that might tend to incriminate and degrade him.

Vol. I, p. 626, sec. 9a. [First ed., 1912 Supp., p. 529.]

Construction.—The word "arrest" in this section covers imprisonment. *Ex p. Harrison*, (D. C. Mass. 1921) 272 Fed. 543.

This provision as to exemption from "arrest" becomes effective at the time of adjudication and authorizes the release of a debtor imprisoned in a state court on poor debtor proceedings prior to his becoming a bankrupt. *Ex p. Harrison*, (D. C. Mass. 1921) 272 Fed. 543.

Vol. I, p. 627, sec. 9a (2). [First ed., 1912 Supp., p. 530.]

Judgment for negligent injury as debt.—There has been some difference of judicial opinion as to whether a judgment upon a claim for negligent injury constitutes a "debt," which can be proved and is discharged by bankruptcy proceedings; but the weight of authority now appears to be that the judgment can be proved and is discharged and therefore the bankrupt is exempt from arrest. *Ex p. Harrison*, (D. C. Mass. 1921) 272 Fed. 543.

Vol. I, p. 630, sec. 11a. [First ed., 1912 Supp., p. 531.]

- I. In General.
- III. Stay as Dependent on Dischargeability of Debt.
- IV. Stay of Proceedings on Valid Liens.
- V. Where State Court Has Complete Jurisdiction.

I. IN GENERAL (p. 630)

Power to grant stay.—Under the present Bankruptcy Act no authority can be found for staying suits by or against bankrupts except in this section. *In re Havens*, (C. C. A. 2d Cir. 1921) 272 Fed. 975.

Section as mandatory.—"Until after an adjudication or dismissal of the petition against an alleged bankrupt a suit which is founded upon a claim for which a discharge would be a release and which is pending against the alleged bankrupt at the time of filing such petition must be stayed. * * *

The language of the Bankruptcy Act is peremptory." *Star Braiding Co. v. Stienen Dyeing Co.*, (R. I. 1921) 114 Atl. 129.

Application to state court for stay.—In *Star Braiding Co. v. Stienen Dyeing Co.*, (R. I. 1921) 114 Atl. 129, it was claimed that the state court in which a suit was brought against the debtor had no notice of the pendency of bankruptcy proceedings against him. The court said: "The allegations of the defendant's motion supported by the certified copy of the records of the bankruptcy court required the superior court to refrain from proceeding with the trial of the cause."

III. STAY AS DEPENDENT ON DISCHARGEABILITY OF DEBT (p. 632)

Stay of actions on dischargeable debts.—The bankrupt undoubtedly has the right to have a stay of proceedings against him in a state court for such time as may be necessary to secure his discharge. As he has 12 months in which to apply for his discharge, the court should not interfere with his discretion in applying for it within that period. In *re People's Warehouse Co.*, (S. D. Miss. 1921) 273 Fed. 611.

Stay of actions on nondischargeable debts.—To the same effect as the original annotation, see *In re Kalk*, (N. D. N. Y. 1921) 270 Fed. 627.

Under the rule that proceedings on a debt which is not dischargeable should not be stayed by a bankruptcy court, unless they interfere with the administration of the *res* in the possession of the court, proceedings by a creditor for a *capias ad satisfaciendum* against the body of the bankrupt on a claim which would not be released by his discharge in bankruptcy will not be stayed. *Bloemecke v. Applegate*, (C. C. A. 3d Cir. 1921) 271 Fed. 595.

Action for fraud and misappropriation.—An action against a bankrupt for fraud and misappropriation of the funds of a corporation while acting as one of its officers will not be stayed, since a judgment, if obtained, would not be dischargeable under section 17a (4) of the Bankruptcy Act. In *re Bloemecke*, (D. C. N. J. 1920) 265 Fed. 343.

Action for wilful conversion.—Where the pleadings in an action in a state court charge a wilful and deliberate conversion of the property of the plaintiff by the bankrupt, the court should deny the bankrupt's application to stay the plaintiff from the further prosecution of the action. In *re Northrup*, (N. D. N. Y. 1920) 265 Fed. 420. Regarding the granting of such a stay, the court said: "I think the plaintiff, Taylor, in the action brought in the Supreme Court, county of Madison, is entitled to a trial of the issues in that court. The evidence on that trial may satisfy the court and jury that there was no conversion, in which case the claim of the plaintiff will be discharged by a discharge in the bankruptcy proceedings. The evidence may satisfy the court and jury that there was a conversion, but at the same time

the conversion established by the evidence may not be such an act as constitutes a wilful and malicious, or a willful or malicious, injury to the property of another. When the bankrupt applies for a discharge, if a discharge is granted, the claim of the plaintiff in the action referred to will be extinguished by the discharge, unless the record in the suit shows a wilful and malicious injury to the property of the plaintiff in the suit. Whether the discharge in bankruptcy, if granted, operates as a discharge of the claim of the plaintiff in the action referred to, will be a matter for the court to pass upon, when an effort is made by the plaintiff in that suit to enforce any judgment he may obtain against the bankrupt subsequent to his discharge. Then the discharge in bankruptcy can be pleaded as a bar to the enforcement of the judgment, and it will be the duty of the court to pass upon the question whether the plaintiff's claim, whatever the form it assumes, was discharged or released by the discharge in bankruptcy."

IV. STAY OF PROCEEDINGS ON VALID LIENS (p. 635)

Stay allowed.—The fact that the plaintiff in a suit in a state court has obtained an attachment lien upon the defendant's personal property more than four months prior to the filing of bankruptcy proceedings against the latter, which lien is not discharged by the bankruptcy, does not relieve the state court from granting a stay in compliance with the provisions of this section. *Star Braiding Co. v. Stienen Dyeing Co.*, (R. I. 1921) 114 Atl. 129, wherein it was said: "The plaintiff's lien would not have been lost by the stay. If a stay had been granted, after the adjudication of the dismissal of the bankruptcy petition the superior court might remove the stay and permit the suit to proceed. As was held in *Butterick v. Bowen*, 33 R. I. 40, 80 Atl. 277, although the defendant receives a discharge in bankruptcy, which he sets up in a plea *puis darrien* continuance, the suit may still proceed to a qualified or special judgment against the defendant for the purpose of permitting the plaintiff to enforce his lien or for the purpose of enabling the plaintiff to bring suit against sureties on a bond given to release such attachment."

V. WHERE STATE COURT HAS COMPLETE JURISDICTION (p. 636)

Suit commenced after discharge.—Where after a discharge has been granted the bankrupt a suit is commenced against him in the state court and judgment is obtained the federal court will not enjoin the issuance of an execution on the judgment. In such a case it was said:

"In the ordinary case, * * * a discharge is a defense; such defense is one that the state or any other court is bound to con-

sider (*Hill v. Harding*, 107 U. S. 631, 2 Sup. Ct. 404, 27 L. ed. 493), and if error is committed in failing to accord to the discharge its due weight, the way is open to the national Supreme Court (*Dimock v. Revere, etc., Co.*, 117 U. S. 559, 6 Sup. Ct. 855, 29 L. ed. 994). But no authority exists for leaving the tribunal, where the discharge was or might have been pleaded, and enjoining the collection of a judgment against a discharged bankrupt because the bankruptcy court thinks that some other tribunal erred either in fact or law as to the effect of such discharge." *In re Havens*, (C. C. A. 2d Cir. 1921) 272 Fed. 975.

Vol. I, p. 641, sec. 11c. [First ed., 1912 Supp., p. 539.]

Substitution of trustee as plaintiff.—A trustee cannot cause himself to be substituted as party plaintiff in an action commenced by the bankrupt by merely filing a paper asking to be made a party. It takes judicial action of the court and this action evidenced by an order made in the cause. *Western Star Lodge v. Burkes Constr. Co.*, (C. C. A. 5th Cir. 1920) 267 Fed. 550.

Vol. I, p. 643, sec. 11d. [First ed., 1912 Supp., p. 540.]

Time within which trustee may sue.—It is held that this section is confined to suits founded strictly on the Bankruptcy Act and that the state statute of limitations applies to a suit by a trustee under section 70e of the Bankruptcy Act to recover an alleged fraudulent transfer. *Davis v. Willey*, (C. C. A. 9th Cir. 1921) 273 Fed. 397.

Vol. I, p. 643, sec. 12a. [First ed., 1912 Supp., p. 540.]

"Meeting of creditors."—The provisions of this section as to compositions before adjudication contemplate proof at the meeting of the claims of such creditors as are to be counted when the confirmation of the composition is considered. No trustee has been elected at the time of the meeting for allowance of claims, and there is no one to contest their validity except the creditors. They should know what claims may be allowed and counted in connection with the composition, and should be able to contest their validity before the referee allows them or certifies to the court that the composition has been accepted. *In re Chinese Fur Importers*, (S. D. N. Y. 1921) 269 Fed. 669. The court further said:

"If it be said that this interpretation of the statute will impose too heavy a burden upon bankrupts offering a composition, the answer is that, in cases where the facts call for an adjournment of the meeting, so that other claims which any party desires to have considered upon the composition may be

proved, application may be made to the referee for such adjournment. In my opinion, the claims of all creditors that are to be counted in consideration of the composition should be proved before the meeting called for that purpose is finally closed."

Vol. I, p. 647, sec. 12c. [First ed., 1912 Supp., p. 542.]

Practice in cases of composition.—As to the practice in such cases it is said in *In re Bernstein* (D. C. Mass. 1921) 272 Fed. 1018:

"Under our practice, the duties of the referee, after the filing of an offer in composition, are (1) to allow claims; (2) to certify the acceptance of the offer by a majority in number and amount of claims allowed, if it be accepted; (3) to fix the amount of deposit required from the alleged bankrupt; and (4) to return the papers into court with his (the referee's) report. The proceedings are governed by the provisions of the act and General Orders, and by rules in bankruptcy of this court numbered 7, 8, and 9. Rule 8 requires that:

"The deposit shall be sufficient to pay the proposed percentage upon all unsecured debts scheduled by the bankrupt, unless the court should otherwise order."

"In this respect the practice here differs from that in some other districts, where the deposit required need be sufficient to cover only the proposed percentage on debts proved and allowed. The practice here was established by the late Judge Francis C. Lowell, soon after the passage of the act, and has worked well. It has been the custom for referees to keep open the first meeting and allow claims to be proved from time to time, until either the bankrupt applied for a certificate that a majority in number and amount of the claims proved had assented and the required deposit had been made, or upon motion of some creditor, or upon the referee's own motion, the papers were returned to the court because the alleged bankrupt had not diligently followed up his offer.

"In cases of composition after adjudication, the offer is made at a meeting of creditors, further liquidation proceedings are stayed while it is pending, and the practice follows that in cases of composition before adjudication. The proceedings of the learned referee in the present case accord with the established practice."

In this case the meeting of the creditors was held on April 12th, and was adjourned. On April 20th, the meeting being apparently still open, and a majority in number and amount of claims proved being at that time not in favor of the composition, the objecting creditors requested the referee to return the case to the District Court for adjudication. From his refusal to do so the present review was taken. Thereafter further claims were proved and allowed by the referee, and eventually, on May 12th, a majority in num-

ber and amount of claims proved and allowed having assented to the offer in composition, the learned referee returned the papers to the court with a certificate showing the requisite assent by creditors. The court further said:

"The contention of the objecting creditors is that the meeting should have been closed on or before April 20th, and that the referee erred in accepting assents on debts proved and allowed after that date. *In re Chinese Fur Importers, Inc.*, 46 Am. Bankr. Rep. 336, (D. C. S. D. N. Y.) 269 Fed. 669, is cited in support of their position. The practice in that district evidently differs in important particulars from the practice here, as above outlined. A modification of our practice to accord with the opinion in that case would not, in my opinion, be an improvement. Only 10 days' notice is given to creditors of meetings to consider offers in composition, which is a rather short time for those remotely situated. If the composition can be definitely and finally accepted by a majority of the creditors who prove on the date of the meeting, it would give the bankrupt a distinct advantage. He would know what the offer was to be, and could obtain the assents of friendly creditors, while creditors not in his confidence would not know the terms of the offer before the meeting. Moreover, the creditors would naturally be separated and would not be likely to act together until brought together at the meeting. On the other hand, it would be possible for an active organization of creditors to take control of the meeting, and disapprove an offer in composition which was acceptable to a majority in number and amount of all the creditors. These considerations and others which might be mentioned were carefully weighed when the present practice here was established. It does not seem to me that it is inconsistent with the language of the act; and, as above stated, it has worked satisfactorily, both in cases of composition before adjudication and of composition after adjudication.

"It seems to me that it is within the discretion of the referee to adjourn a meeting from time to time within wide limits, which were not exceeded in this case. When, in his opinion, the time has come to close the matter, he can close the meeting and make his certificate. That is what was done in this case.

"Under the practice in this district there is no such distinction between cases of composition before adjudication and composition afterwards as is spoken of in the opinion in *In re Chinese Fur Importers, Incorporated*, *supra*."

Vol. I, p. 653, sec. 14a. [First ed., 1912 Supp., p. 547.]

Historical.—"In the United States the first Bankruptcy Act was passed in 1800, and it

followed in its main features and often in its language the English bankruptcy laws, and it provided under certain limitations for a discharge of the bankrupt. 2 Statutes at Large, pp. 19, 30, 31. Discharge was provided for, too, in the second act, passed in 1841. 5 Statutes at Large, pp. 440, 443. The third act, passed in 1867, also provided for a discharge, but still made it very difficult for the discharge to be obtained. 14 Statutes at Large, pp. 517, 531, 532, 533. And see 15 Stat. at Large, p. 227.

"The main purpose of the bankruptcy statutes of both countries was to furnish a better protection to creditors, and it was not within the purpose to grant a discharge even to honest debtors. The early Bankruptcy Acts were acts for creditors and against debtors. It is surely a matter of some significance, therefore, that when the United States provided for the discharge of bankrupt debtors an assignment for the benefit of creditors, while in England regarded as an act of bankruptcy, was not considered as morally objectionable and did not prevent a discharge. If Congress intended that an assignment for the benefit of creditors should have a different effect under our system, we are inclined to think that intention would have been clearly indicated.

"Under the act of 1867 the grounds for refusing a discharge were collated in ten separate paragraphs. The act of 1898 when it was originally introduced into Congress, specified nine distinct classes of cases in which no discharge was to be granted, and they continued in the bill until its final revision by the conference committee. It provided that the bankrupt should be discharged—

"unless he has * * * (2) given a preference as herein defined, and within six months prior to the filing of the petition against him, which has not been surrendered to the trustee; * * * (4) made a transfer of any of his property which any creditor who has proved his claim in the proceedings might, at the time of the filing of the petition, have impeached as fraudulent if he had been a judgment creditor, unless such property shall have been surrendered to the trustee; * * * or (7) secreted or conveyed any of his property to avoid its being administered in bankruptcy, or any document relating to his property in contemplation of bankruptcy; or (8) transferred any property otherwise than in the ordinary course of his business, in contemplation of bankruptcy. * * *

"As finally adopted there were only two grounds left in the act for denying the charge. These were: (1) That the bankrupt had committed an offense punishable by imprisonment as provided in the act. (2) That with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, he had destroyed, con-

cealed, or failed to keep books of account or records from which his true condition might be ascertained.

"The amendment of February 5, 1903 (32 Stat. 797), enlarged the grounds for refusing a discharge, adding the only one which it is now material for us to consider, and which is found in section 14b, which reads as follows:

"Or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, * * * any of his property, with intent to hinder, delay or defraud his creditors. * * *"
Feder v. Goetz, (C. C. A. 2d Cir. 1920) 264 Fed. 619.

The act necessarily contemplates: (1) That a voluntary petitioner will be discharged from the burden of his debts; and (2) that all the property owned by him at the time he filed his petition will be distributed among his creditors. The discharge of the bankrupt does not affect the rights of the creditors to property which passes into the hands of the trustee. To insure distribution of all the bankrupt's property the trustee is given the power to assert, not only any right which the debtor could have asserted, but also any right, remedy, or power of a creditor holding a lien or unsatisfied execution. The statute, as already pointed out, specifically sets forth the grounds of objection to a discharge. But nowhere is it declared to be a ground of objection that after-acquired property would be unaffected by the claims of creditors. On the contrary, one of the main purposes of the act is to relieve after-acquired property from such claims. *Elberton Bank v. Swift*, (C. C. A. 5th Cir. 1920) 268 Fed. 305.

Vol. I, p. 661, sec. 14b. [First ed., 1912 Supp., p. 549.]

I. Generally.

II. Objections to Bankrupt's Discharge.

IV. Determination.

I. GENERALLY (p. 662)

Discharge as a matter of right.—To the same effect as the first paragraph of original annotation, see *Feder v. Goetz*, (C. C. A. 2d Cir. 1920) 264 Fed. 619.

Summary jurisdiction over bankrupt after discharge.—Although a bankrupt has been discharged, he may be summarily compelled to surrender property which he has concealed from his trustee. *In re Margolies*, (C. C. A. 2d Cir. 1920) 266 Fed. 203. Regarding the jurisdiction of the bankruptcy court in such a case, the court said:

"Bankrupt's doctrine is that because, and solely because, he has a discharge, the court is without power (unless and until the discharge is revoked) to compel him by order to surrender concealed property, which, ex-

cept for the discharge, it would be a contempt for him, after such order, to retain. Sections 2 (7), (13), (15), and 7 (2), of Bankruptcy Act. It is not argued that discharge gives complete immunity for undisclosed wrong; it is admitted that plenary suits under sections 67 and 70 may still be brought; but it is said that the personal control of court over bankrupt, by which he may be summarily required under pain of contempt to surrender whatever he unlawfully retains from his trustee (*In re Schlesinger*, 102 Fed. 117, 42 C. C. A. 207), vanished with, and by reason of, discharge.

"No such quality is expressly given discharge by the act; but by inference from section 14 it is urged that, since a discharge must be refused if a bankrupt has concealed his property with intent to hinder, etc., or has refused to obey lawful orders of the court, it follows that, when the court discharges, it 'certifies' that the applying bankrupt has not concealed, etc., and has obeyed all lawful orders; wherefore it is a disregard of its own judgment summarily to hale a discharged bankrupt before the court that found so much in his favor.

"This view of discharge is merely wrong. In granting discharges the court adjudges or 'certifies' nothing further than that affirmative proof has not been given establishing the existence of one or more of the grounds for refusing discharge. The language of section 14 is that the judge 'shall * * * discharge the applicant unless' he has done a forbidden thing; and that this language has been construed to mean unless the objecting parties show that he has done the forbidden is too well known to require citation. That discharge is not a certificate of character we have recently pointed out. *In re Hughes*, 262 Fed. 500 (opinion Dec. 10, 1919). Indeed the act itself defines 'discharge' to mean a 'release' from provable debts other than those excepted by the statutes. Section 1, subsec. 12. As has recently been said, a 'discharge operates merely to extinguish creditors' claims.' *In re Walsh*, 256 Fed. 654, 168 C. C. A. 47. * * * The whole act should be construed in the spirit of the last paragraph of section 2, which declares that 'nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.' But the court's power over the estate does not end until the estate is closed by the discharge of the trustee upon the settlement of this account (*Clark v. Pidcock*, 129 Fed. 750, 64 C. C. A. 273), or by the reversion of the estate in the bankrupt by the confirmation of a composition (*In re Hollins*, 238 Fed. 787, 151 C. C. A. 637). It is also opposed to the history and spirit of bankruptcy legislation to affix or annex to discharge anything more than the statute explicitly gives to it. All discharges are a

comparatively modern innovation, mitigating the status of bankruptcy, which historically was terminable only by death or annulment.

"The point before us was presented in *Ex parte Walters*, L. R. 18 Eq. 701, in 1874, where one partner, a discharged bankrupt, had used his employment by the creditors' committee to devote funds of the estate to paying his private creditors. He was proceeded against as for a contempt, and it was held:

"There is no distinction by reason of the fact that the debtors' discharge had been granted before this money was misapplied. The discharge only releases them from the debts provable * * * — not from the obligation to perform the duties prescribed by the statute."

"In later English statutes a discharged bankrupt is specifically subjected to punishment as for contempt if he fails to give the trustee such assistance as is required in the 'realization' of the estate—Bankruptcy Act 1914, part I, § 26 (9)—but the *Waters Case* rests on language as general as that of our statute.

"The question argued has been decided adversely to this petitioner in the lower courts—assuming (as we do) that the power to examine a bankrupt as to his estate is fundamentally the same as that which compels him to give up or turn over whatever he has no right to retain. Mr. Olmstead, referee, in the Massachusetts district, considered it at large in *In re Peters*, 1 Am. Bankr. R. 248, as did also Mr. Wise, referee in the Southern district of New York in *In re Westfall*, 8 Am. Bankr. R. 431, and the latter decision was expressly approved and confirmed by Adams, District Judge." To same effect, see *Levy v. Schorr*, (C. C. A. 3d Cir. 1920) 266 Fed. 207.

Grounds for refusing discharge in general.—To the same effect as the original annotation, see *Robinson v. Williston*, (C. C. A. 1st Cir. 1920) 266 Fed. 970.

Laches.—A delay of eighteen months after the application for a discharge is made before a hearing is had has been held not to be neglect or laches which will justify a dismissal. *In re Neal*, (N. D. Ga. 1921) 270 Fed. 289, wherein the court said:

"While undoubtedly the applicant for discharge is under the usual duties of diligence imposed on suitors, they are not to be derived from or measured by the quoted section. The judge is commanded to do three things: (1) Hear the application for discharge and the proofs and pleas in opposition to it; (2) investigate the merits of the application; and (3) discharge the applicant, unless he has done the things named in the statute.

"To dismiss this application unheard would be simply to fly in the face of this mandate. The fact that from some unknown cause the hearing was not had seasonably will not warrant the judge in refusing to

hear at all, in declining to investigate the merits of the application, or to discharge the applicant. It would be to amend the statute and add another specification to the grounds for refusing a discharge, to penalize a want of diligence in pressing for a hearing as heavily as the commission of the crimes and frauds mentioned in the section. A bankruptcy case is one in equity. The extreme penalty for negligence in failing to press for a trial, as fixed by equity rule No. 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv) is dismissal without prejudice; but a dismissal of this application would be to bar a discharge entirely, for a new application could not now be filed in this case, nor could these debts be discharged, even by another bankruptcy, *In re Silverman*, 157 Fed. 675, 85 C. C. A. 224, and cases cited. Parties at interest whose rights are suffering from delay in hearing an application for discharge may move the court to fix a time for the hearing under penalty of dismissal, should the applicant not proceed with the giving of his notices, but there appears in this case only acquiescence in the delay. No sufficient reason to the contrary being shown, the discharge applied for will be granted."

II. OBJECTIONS TO BANKRUPT'S DISCHARGE (p. 664)

Specifications of objections—General requisites.—Specifications of objection are sufficient, if they fairly apprise the bankrupt of the nature and grounds of the objection which is being made to his discharge. *In re Simon*, (D. C. Mass. 1920) 268 Fed. 1006.

IV. DETERMINATION (p. 673)

Motion to vacate order dismissing petition for discharge.—Although the dismissal of a petition for a discharge may have been error yet the court may on the ground of laches refuse to vacate such order of dismissal. *In re Overstreet*, (S. D. Fla. 1920) 268 Fed. 987.

Vol. I, p. 677, sec. 14b (1). [First ed., 1912 Supp., p. 557.]

Making false oath.—In *In re Lundberg*, (C. C. A. 7th Cir. 1920) 272 Fed. 107, "the objections charged that appellant made a false oath in his schedule, in that he denied ownership of any real estate, whereas the objections asserted that he in fact owned lots 23 and 24 in block 4 of Rood & Weston's addition, etc. On July 18, 1917, appellee got a judgment against appellant, which became a lien upon, and for several times the value of, those lots. Within less than 20 days after the making of the alleged false oath, appellee got a tax title to the lots. More than 2 years before he made the alleged false oath, the bankrupt executed a warranty deed to the property in question, but it had never been recorded." It was held that a discharge

was not barred on the ground that the bankrupt had made a false oath.

In *In re Schroeder*, (E. D. N. Y. 1920) 264 Fed. 862, in which case it was claimed that a transfer to the bankrupt's wife was in anticipation of his being drafted, the evidence was held to show that the transfer was made because he feared an action against him would result in a judgment, and that no real transfer was intended, and that he was guilty of making a false oath in failing to set forth in the schedule his rights in the property transferred.

Offense must be knowingly and fraudulently committed—*In general*.—To the same effect as the first paragraph of the original annotation, see *In re Wilson*, (D. C. Md. 1920) 269 Fed. 845.

The making of a false oath is not a ground for denying a discharge, unless it was knowingly and fraudulently made, and that it was so made must be shown by clear and convincing evidence. *Humphries v. Nalley*, (C. C. A. 5th Cir. 1920) 269 Fed. 607.

Making false oath.—Where a bankrupt stated under oath that he had no property when his voluntary petition was filed when in fact \$30 in money was due to him from his employer on account of wages earned, and he had in his possession and owned \$25 in lawful money and household goods and furniture of the value of about \$150, it was held that he was not guilty of wilfully, knowingly and fraudulently making a false oath in regard to his property where it appeared that he used the only money he had in paying costs in the bankruptcy proceedings and that he was entitled to the other property under a claim of exemption. *Humphries v. Nalley*, (C. C. A. 5th Cir. 1920) 269 Fed. 607. The court said:

"No evidence adduced was inconsistent with the conclusion that the bankrupt was innocent of any fraudulent purpose or intent to deprive the trustee or any creditor of any right. So far as appears, the bankrupt, who was a laborer working for wages, voluntarily made a full and true disclosure of his condition when he testified at the meeting of his creditors. The use of the only money he had in paying costs of the proceeding indicates the absence of any intention to improperly withhold that part of his property for his own use or benefit. The only other property he is shown to have been entitled to was such that it could have been retained under a claim of exemption. It was not disclosed that he did anything to conceal or hide any of his property."

Vol. I, p. 683, sec. 14b (2). [First ed., 1912 Supp., p. 558.]

Concealment of financial condition—Alteration of books.—The fact that there was an alteration in two items of one of the ledger accounts has been held not to show a falsifi-

cation of the bankrupt's books of account with intent to conceal his financial condition where there is no evidence showing that the change was made by the bankrupt, and it appeared that the cash book showed the items correctly and that the change in no way affected the status of the business as to its financial condition. *In re Rivas*, (S. D. Fla. 1920) 268 Fed. 690.

Destruction of cancelled checks and stubs.—The fact that a bankrupt destroyed his cancelled checks and stubs when he turned his business over to his largest creditor has been held not to establish an intent to conceal his financial condition where there was no proof that any ledger was destroyed and the bankrupt and his attorney stood ready at all times to produce any or all of the books desired by the trustee. *In re Rivas*, (S. D. Fla. 1920) 268 Fed. 690.

"Failed to keep books of account".—In *In re Simon*, (D. C. Mass. 1920) 268 Fed. 1006, it was said:

"The absence of personal books and papers has made it impossible to trace what became of large amounts of cash received by the bankrupt. I am unable to believe that this result is accidental. I have no doubt that the lack of all data about personal transactions, aggregating many thousand dollars, was intentional, and was brought about by the bankrupt for the purpose of concealing what had been done. The specification based on concealment of books of account is sustained."

Effect of acquittal on charge of fraud.—The fact that the bankrupt was acquitted by direction of the court on the trial of an indictment for fraudulent concealment of assets has no bearing on specifications of objections to discharge based on concealment of financial condition. *In re Simon*, (D. C. Mass. 1920) 268 Fed. 1006.

Vol. I, p. 689, sec. 14b (3). [First ed., 1912 Supp., p. 560.]

Construction.—This provision and section 17, *infra*, are not mutually exclusive. So it is said in a case where the contrary contention was made:

"Although section 17 can have no application to a bankrupt who has been refused a discharge under section 14b, I do not think the two sections are mutually exclusive, or even *in pari materia*. Section 17 is for the benefit of the creditor whose claim is covered thereby, and to be invoked by him only. It comes into operation only after the bankruptcy court has done its work, and can hardly ever be applied by such court, unless in a second bankruptcy. Section 14b is addressed to the bankruptcy court only, and is not for the benefit of any particular creditor or class of creditors, and by its express terms may be invoked on any application for discharge by the trustee or other party in interest to entirely defeat the discharge. The

purpose of the section is to preserve the discharge feature of the Bankruptcy Act from abuse, and deny its benefits to one who has shown himself unworthy of them in any of the ways specified in the section. The section is at bottom one of penalty or forfeiture, and one of the things penalized is the commercial dishonesty manifested by obtaining a credit on a materially false statement in writing, made to induce the credit. This section, having its own purpose, must be construed according to its own terms, and independently of section 17." *In re Day*, (N. D. Ga. 1920) 268 Fed. 871.

Application.—There is nothing in the words of this provision nor in the history of its adoption and its amendment to confine it in its application to merchants. It applies to all who ask for a discharge in bankruptcy. *In re Day*, (N. D. Ga. 1920) 268 Fed. 871.

False statement in writing—*In general.*—"It is plain that the intention of Congress was to extend not the statute to all cases of false written statements where credit happens to be given, and the thought being to confine the statute to cases where the decision to give credit was induced by the false statement. Such statement must be a financial statement, as distinguished from a mere misrepresentation." *In re Morgan*, (C. C. A. 2d Cir. 1920) 267 Fed. 959.

A "materially false statement in writing" cannot be confined to a financial statement made by the bankrupt, or a statement of his financial condition, but may include any "materially false statement in writing" made by the bankrupt for the purpose of obtaining money or property on credit and by which property or money is obtained. Such a false statement, however, should not be created by inference alone from acts of the bankrupt. *Robinson v. Williston*, (C. C. A. 1st Cir. 1920) 266 Fed. 970.

This provision is not to be confined to statements of general financial condition but covers any material statement of fact made in writing to the creditor to induce the credit. *In re Day*, (N. D. Ga. 1920) 268 Fed. 871.

"The phrase 'for the purpose of obtaining credit' contemplates a statement fitted to such purpose. It is intended to mean 'to obtain money or property on credit.' Each of the phrases in the statute must be given its appropriate meaning. The phrases 'on credit' and 'for the purpose of obtaining credit' should not be treated as redundant. The phrase 'upon a materially false statement' follows immediately after 'on credit,' and therefore it is apparent that Congress intended to qualify the whole clause, to 'obtain money or property on credit.' We think it was intended to mean that the credit obtained upon a materially false statement required the falsity to be tested as to its materiality to the obtaining of the credit."

In re Morgan, (C. C. A. 2d Cir. 1920) 267 Fed. 959.

Intent—*Guilty knowledge essential.*—To the same effect as the original annotation, see *In re Matthews*, (C. C. A. 7th Cir. 1921) 272 Fed. 263.

In order to bring a statement within this section it must have been intentionally and knowingly false and coupled with an intention to deceive and the creditor must have relied on the statement when parting with his money or property. *In re Lundberg*, (C. C. A. 7th Cir. 1920) 272 Fed. 107.

Statement negligently made.—Although a statement may have been negligently made yet the bankrupt may be granted a discharge where there is an absence of intent to defraud. *In re Matthews*, (C. C. A. 7th Cir. 1921) 272 Fed. 263.

Statement of amount invested.—A statement made in writing by the bankrupt that he has a specified sum "invested" is a statement of fact, not an estimate of value, and where it appears that it was false and that credit was obtained by means of such statement a discharge is properly refused. *In re Simon*, (D. C. Mass. 1920) 268 Fed. 1006.

False statement to trust company.—A discharge may be refused on a finding that the bankrupt obtained money on credit on a materially false statement in writing made by him to a trust company for the purpose of obtaining credit. *Perlmutter v. Hudspeth*, (C. C. A. 3d Cir. 1920) 264 Fed. 957.

Signing of worthless check.—A bankrupt, by signing a worthless check, does not make a "materially false statement in writing" within the meaning of this section. *Robinson v. Williston*, (C. C. A. 1st Cir. 1920) 266 Fed. 970, wherein it was said:

"Did the bankrupt in this case, by signing a check, which is simply a request to a bank to pay to the payee a certain sum of money upon its presentation, make any 'materially false statement in writing'? It is true that a check purports to be drawn upon a bank where the maker has funds or credit, and from his act in giving the check this may be inferred. If the bankrupt had made an oral statement at the time the check was given, that it was good, or would be paid when presented, or that his account was overdrawn but that he had made arrangements with the bank on which it was drawn by which it would be paid, none of these oral statements would have been a bar to his discharge.

"We think it was the evident design of Congress to confine the objecting creditor to the limits of a specific statement in writing made by the bankrupt, and that such statement cannot be extended beyond the fair and necessary meaning. This is the view taken of this section by the Court of Appeals for the Eighth Circuit in *International Harvester Co. of America v. Carlson*, 217 Fed. 736, 133 C. C. A. 430. In this case the

bankrupt had made a financial statement, and under the head of 'assets' upon one page had listed certain property which he possessed and stated its value; and upon another page, under the heading of 'business liability,' there were numerous subheads, such as 'Owing for merchandise, notes, or accounts past due, owing to banks, borrowed money other than bank, taxes, rent, or other bills payable,' etc., and opposite these various items was a column for the insertion of the proper amount. He left the schedule of liabilities entirely blank in the statement, and it was contended that, because he had done so, he had stated that he owed nothing that could properly come under either of these heads, whereas, in fact, he was indebted in considerable sums under each head; and the court said (217 Fed. at page 739, 133 C. C. A. 432):

"We do not think that an omission constitutes a 'material statement,' within the meaning of section 14 of the Bankruptcy Act. There is nothing in any other part of the form which declares that blanks unfilled are to be construed as representing that nothing is owing under the heading. A 'material statement' means, not a blank, nor an inference from a blank. There must be a direct statement, either negative or positive, which is false, to justify the denial of the bankrupt's discharge."

"We think this is the correct construction to be placed upon this section. In *In re Rea Brothers*, (D. C.) 251 Fed. 431, District Judge Bourquin held that a check drawn upon a bank where the maker had neither money nor credit, while a false representation, was not a false statement which will defeat the bankrupt's right to a discharge.

"While we do not fully concur in the distinction, which is made by the learned judge, between a false representation and a false statement, we think the conclusion that he reached was right. No other reported case has been cited by counsel, and after a careful examination we have been unable to find one in which the exact question which we are considering has been before the court."

Refusal of discharge.—It was not intended that a bankrupt should be refused a discharge from all of his debts because he had contracted one or more fraudulently. *In re Morgan*, (C. C. A. 2d Cir. 1920) 267 Fed. 959.

Vol. I, p. 694, sec. 14b (4). [First ed., 1912 Supp., p. 562.]

What constitutes concealment, removal, or destruction of property.—A suspicion that the bankrupt has concealed assets is not sufficient ground for refusing him his discharge under this section. *McCutcheon v. Townley*, (C. C. A. 8th Cir. 1920) 266 Fed. 985.

What constitutes concealment, removal or destruction of property — Transfer to wife's

brother-in-law.—In *In re Rosenberg*, (S. D. N. Y. 1920) 268 Fed. 658, it was held that concealment of assets was not established by evidence showing a transfer by the bankrupt to his wife's brother-in-law of property which was not listed in the bankrupt's schedules.

Use of money to pay living expenses and debts.—The fact that the bankrupt lived on money collected and paid some individual debts does not constitute concealment of assets with intent to hinder or delay creditors. *In re Rivas*, (S. D. Fla. 1920) 268 Fed. 690.

A general assignment for the benefit of creditors where not made with any actual intent to hinder, delay or defraud creditors, has been held to be no ground for refusing a discharge even though made within four months prior to the commencement of bankruptcy proceedings. If a discharge is to be refused to a bankrupt because he has made an assignment for the benefit of creditors, he is punished for an act which was not illegal at the time it was done, which was neither *malum in se* nor *malum prohibitum*, not being "prohibited by the bankruptcy law absolutely in every event," but "voidable only in case bankruptcy proceedings should be begun"; and as "at the time when it was made the institution of such proceedings was uncertain" it seems to this court a hard and subtle construction to say that such an act, legal when done and morally unobjectionable, shall have the effect of depriving a bankrupt of his discharge in the event of its turning out that bankruptcy proceedings happen to be instituted against him. We will not hold that such a penalty shall be imposed upon the bankrupt, in the absence of a clear provision in the act imposing it upon him. *Feder v. Goetz*, (C. C. A. 2d Cir. 1920) 264 Fed. 619.

Intent.—The word intent as used in this section has been construed as meaning actual intent. *Feder v. Goetz*, (C. C. A. 2d Cir. 1920) 264 Fed. 619.

Evidence — Property in bankrupt must be shown.—In *In re Croonborg*, (C. C. A. 7th Cir. 1920) 268 Fed. 352, it was held that a recommendation made by a special master for a discharge should be sustained where the evidence though conflicting tended to show that certain property which was not scheduled belonged to the wife of the bankrupt.

Vol. I, p. 703, sec. 15a. [First ed., 1912 Supp., p. 568.]

Notice not given of application for discharge.—Where a petition to set aside a discharge is based on the fact that no notice of an application for a discharge was given as required by section 58a (9) of this act but no fraud is alleged the limitation as to time contained in this section is not applicable. *Ellison v. Weintrob*, (C. C. A. 4th Cir. 1921) 272 Fed. 466.

Vol. I, p. 706, sec. 16a. [First ed., 1912 Supp., p. 569.]

Discharge of bankrupt corporation as releasing individual liability of officers and directors.—In view of the provisions of section 4b [1 Fed. Stat. Ann. (2d ed.) 578] and of this section, a confirmation of a composition offered by a bankrupt corporation does not release its president from liability under a state statute providing that the president, treasurer, and directors of every domestic corporation shall be jointly and severally liable for its debts and contracts contracted or entered into while they are officers, if any statement or report required by the provisions of the state statutes was made and signed by them which was false in any material representation, and which they knew, or on reasonable examination could have known, to be false. *E. S. Parks Shellac Co. v. Harris*, (Mass. 1921) 129 N. E. 617.

A surety on a contractor's bond is not released from liability by the contractor's discharge in bankruptcy nor by the confirmation of a composition offered by him. *McClintic-Marshall Co. v. New Bedford*, (Mass. 1921) 131 N. E. 444.

Vol. I, p. 708, sec. 17a. [First ed., 1912 Supp., p. 570.]

Construction.—This section and section 14b (3) are not mutually exclusive. So it is said in a case where the contrary contention was made:

"Although section 17 can have no application to a bankrupt who has been refused a discharge under section 14b, I do not think the two sections are mutually exclusive, or even *in pari materia*. Section 17 is for the benefit of the creditor whose claim is covered thereby, and to be invoked by him only. It comes into operation only after the bankruptcy court has done its work, and can hardly ever be applied by such court, unless in a second bankruptcy. Section 14b is addressed to the bankruptcy court only, and is not for the benefit of any particular creditor or class of creditors, and by its express terms may be invoked on any application for discharge by the trustee or other party in interest to entirely defeat the discharge. The purpose of the section is to preserve the discharge feature of the Bankruptcy Act from abuse, and deny its benefits to one who has shown himself unworthy of them in any of the ways specified in the section. The section is at bottom one of penalty or forfeiture, and one of the things penalized is the commercial dishonesty manifested by obtaining a credit on a materially false statement in writing, made to induce the credit. This section, having its own purpose, must be construed according to its own terms, and

independently of section 17." *In re Day*, (N. D. Ga. 1920) 268 Fed. 871.

The question of the nondischargeability of a debt may be considered by the court on an application of a discharge in bankruptcy. *In re Wilson*, (D. C. Md. 1920) 269 Fed. 845.

Revival of discharged debt—*Moral obligation supporting new promise*.—To the same effect as the original annotation, see *McClintic-Marshall Co. v. New Bedford*, (Mass. 1921) 131 N. E. 444.

Vol. I, p. 716, sec. 17a. (2). [First ed., 1912 Supp., p. 573.]

I. False pretenses or representations.

II. Wilful and malicious injuries.

III. Miscellaneous.

I. FALSE PRETENSES OR REPRESENTATIONS
(p. 716)

Liability for obtaining money by false pretenses or false representations.—*In general*.—To the same effect as the original annotation see *M. C. Kiser Co. v. Gerald*, (1920) 17 Ala. App. 648, 88 So. 49.

"Judgments in actions for frauds."—A judgment in replevin for goods which the bankrupt obtained on a note by a false representation that he was solvent and owned a farm when in fact he was hopelessly insolvent at the time and shortly after filed a petition and schedules in bankruptcy is not released. *In re Kalk*, (N. D. N. Y. 1921) 270 Fed. 627.

Money is "property" within the meaning of this section. *Bloemcke v. Applegate*, (C. C. A. 3d Cir. 1921) 271 Fed. 595.

False report as to purchase price of property.—Money obtained by the president of a corporation by false representation that he paid more for property bought for the corporation than he actually did pay, is obtained by false pretenses and representations within the meaning of this section and therefore is a liability from which a discharge in bankruptcy will not release him. *Bloemcke v. Applegate*, (C. C. A. 3d Cir. 1921) 271 Fed. 595.

II. WILFUL AND MALICIOUS INJURIES (p. 720)

Physical injury.—A judgment for physical injuries caused by a person who was negligently driving an automobile while intoxicated has been held not to be within the exception it being declared that Congress intended to draw a hard and fast line between cases in which the bankrupt intended to do harm and those in which no such intention existed. *In re Wilson*, (D. C. Md. 1920) 269 Fed. 845.

Misappropriation of funds.—An indebtedness "procured unlawfully and by misapplication of funds, credit and property" is not discharged. *Young v. City Nat. Bank*, (Tex. 1920) 223 S. W. 340.

A conversion of property.—The weight of

authority is that judgments grounded in conversion are dischargeable unless actual fraud was the basis of the judgment. *In re Kalk*, (N. D. N. Y. 1921) 270 Fed. 627.

A merchant to whom goods are shipped for sale under a contract that the proceeds thereof should belong to the shipper until all indebtedness was paid cannot be released by a discharge in bankruptcy from his liability to the shipper for misappropriation of the proceeds of the goods sold. *Baker v. Bryant Fertilizer Co.*, (C. C. A. 4th Cir. 1921) 271 Fed. 473.

III. MISCELLANEOUS (p. 722)

Support of wife or child.—To the same effect as the original annotation, see *Blackstock v. Blackstock*, (C. C. A. 8th Cir. 1920) 265 Fed. 249.

Vol. I, p. 728, sec. 17a (4). [First ed., 1912 Supp., p. 578.]

The word "officer" includes an officer of a private corporation. *Bloemcke v. Applegate*, (C. C. A. 3d Cir. 1921) 271 Fed. 595.

Fiduciary capacity—Corporate officer.—An officer of a corporation who purchases property for the corporation for a less sum than he reports and who retains the difference for himself, is liable for a debt created while acting in a fiduciary capacity within the meaning of this section. *Bloemcke v. Applegate*, (C. C. A. 3d Cir. 1921) 271 Fed. 595, affirming *In re Bloemcke* (D. C. N. J. 1920) 265 Fed. 343.

Vol. I, p. 734, sec. 18a. [First ed., 1912 Supp., p. 579.]

Proceedings are governed by equity rules except where prescribed by the statute. *In re Fosgate*, (S. D. Fla. 1920) 268 Fed. 985.

Petition.—In *Stewart Petroleum Co. v. Boardman*, (C. C. A. 8th Cir. 1920) 264 Fed. 826, the claim of the petitioner in involuntary proceedings was held to be sufficiently pleaded where it was alleged that the petitioner's claim was for a certain sum, money had and received by the bankrupt on account of a protested check, representing this indebtedness issued by the bankrupt to the petitioner, a copy of which was attached to the petition.

Necessity of pleading.—An appearance under this section is not recognized without a pleading. *In re Puget Sound Engineering Co.*, (W. D. Wash. 1920) 270 Fed. 353.

Vol. I, p. 738, sec. 18b. [First ed., 1912 Supp., p. 581.]

The time to plead.—This provision does not grant a fixed term of twenty days for appearance and answer. *Stewart Petroleum Co. v. Boardman*, (C. C. A. 8th Cir. 1920) 264 Fed. 826.

Answer—Generally.—An answer which does not put in issue any material allegation of the petition will be disregarded by the court. *In re Tidewater Coal Exch.*, (S. D. N. Y. 1921) 274 Fed. 1011.

Where a subpoena gave the bankrupt the five days to answer before instead of after the return day, it was held that this did not deprive the bankrupt of full notice of the proceeding but was a mere irregularity which presented no substantial ground for an avoidance of the subpoena. *Stewart Petroleum Co. v. Boardman*, (C. C. A. 8th Cir. 1920) 264 Fed. 826.

Intervention.—In *In re Tidewater Coal Exch.*, (S. D. N. Y. 1921) 274 Fed. 1011, the court denied as a matter of discretion a motion to be allowed to intervene and to file an answer where a default of nearly two months had run against the petitioner without any excuse.

Vol. I, p. 740, sec. 18c. [First ed., 1912 Supp., p. 582.]

Verification—Form.—A verification to a petition by the president of a bankrupt corporation for the transfer of the case to another district is sufficient, where it alleges "that the facts therein set out are true to the best of his knowledge, information, and belief." *In re Okmulgee Producing, etc., Co.*, (D. C. Del. 1920) 265 Fed. 736. The court said:

"It is contended that this is not a compliance with section 18c of the Bankruptcy Act which provides: 'All pleadings setting up matters of fact shall be verified under oath.' The form of the oath is not prescribed by the act. Section 30, however, provides that—

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

"In pursuance of the power and authority thus conferred the Supreme Court prescribed certain forms, and by General Order 38 directed:

"The several forms annexed to these General Orders shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

"The form of verification prescribed for an involuntary petition in bankruptcy (form 3) is absolute, namely, 'That the statements contained in the foregoing petition, subscribed by them, are true,' while the form for verification to a voluntary petition (forms 1 and 2) is qualified, thus, 'That the statements contained therein are true according to the best of my [their] knowledge, information and belief.' The Supreme Court thereby recognized both the absolute and the qualified form of oath as being within the meaning of

the statute. *Sabin v. Blake-McFall Co.*, 223 Fed. 501, 505, 139 C. C. A. 49.

"No form was prescribed for a motion or petition to transfer a case to another district. The form of verification annexed to the motion in the case at bar is therefore not in conflict with any form or General Order prescribed by the Supreme Court. It is not in conflict with the statute, unless the verification to a voluntary petition in bankruptcy is also in conflict therewith, which cannot, owing to its origin, be here presumed. The creditors, in support of their contention upon this point, cite *In re Vastbinder* (D. C.) 126 Fed. 417, and *United States v. Collins* (D. C.) 79 Fed. 65. The latter case is not one arising under the Bankruptcy Act, and the former considers the sufficiency of a qualified verification to an involuntary petition in bankruptcy. Such verification, being in conflict with the form prescribed by the Supreme Court, presented a question differing materially from the one now before this court. I am of opinion that, assuming, but not deciding, the motion to transfer to be a pleading, its verification satisfies the statutory requirement. *In re Milgraum & Ost* (D. C.) 129 Fed. 827."

Vol. I, p. 741, sec. 18d. [First ed., 1912 Supp., p. 583.]

Presumption as to insolvency prior to adjudication.—While the general rule is that no presumption of insolvency at a date prior to that of filing the petition in bankruptcy arises from the adjudication, yet this rule does not forbid a presumption, in the absence of countervailing evidence, that such condition existed at the close of the preceding day. *In re Star Spring Bed Co.*, (C. C. A. 3d Cir. 1920) 265 Fed. 133.

Vol. I, p. 745, sec. 18e. [First ed., 1912 Supp., p. 585.]

Vacating adjudications.—An application by the alleged bankrupt to set aside an adjudication *pro confesso* in bankruptcy will be dismissed where an examination of the answer which is presented discloses that the matters therein pleaded are not a defense. *In re Puget Sound Engineering Co.*, (W. D. Wash. 1920) 270 Fed. 353.

Adjudications in voluntary cases.—A creditor has no right to oppose an adjudication in bankruptcy except as expressly given by statute (which gives him no right to contest an adjudication upon a voluntary petition), and so cannot maintain a petition to vacate an adjudication in such case after it is made. *In re Ann Arbor Mach. Corp.*, (C. C. A. 6th Cir. 1921) 274 Fed. 24.

Vol. I, p. 748, sec. 19a. [First ed., 1912 Supp., p. 586.]

Trial according to common law.—The incidents of a jury trial at common law includ-

ing the right of the judge to direct a verdict, as in other jury cases, attend such jury trials in bankruptcy. *Walker Grain Co. v. Gregg Grain Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 510.

Limitation as to questions submitted.—Where on the filing of a petition to have a defendant adjudged a bankrupt a jury trial is demanded on the questions of insolvency and the commission of acts of bankruptcy the trial by jury is confined to these two issues. *Walker Grain Co. v. Gregg Grain Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 510.

Direction of verdict.—Where both the petitioning creditors and the defendant ask for a peremptory instruction on the issue as to acts of bankruptcy, the direction of the court thereon is unassailable unless there is no sufficient evidence to support it. *Walker Grain Co. v. Gregg Grain Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 510.

Waiver of right to jury trial—Failure to demand.—To the same effect as the original annotation, see *In re Flaherty*, (N. D. Ia. 1920) 265 Fed. 741.

Vol. I, p. 751, sec. 21a. [First ed., 1912 Supp., p. 589.]

Purpose and scope of examination—Corporate official.—Where acts inquired of, seemingly personal to a witness, arose out of his close official relations with the bankrupt and out of business dealings between the two which were so closely interwoven that conduct of the bankrupt cannot be fully made known without revealing some personal conduct of the witness, it is imperative to a proper administration of this section that much latitude be permitted in the examination, keeping in mind as the test of its scope that the inquiry concerns, primarily and objectively, "the acts, conduct, or property of [the] bankrupt." *In re Standard Aero Corp.*, (C. C. A. 3d Cir. 1921) 270 Fed. 783, wherein the court so declared in the case of one who besides being president of the corporation was its principal stockholder and had been its active manager in its very substantial business of manufacturing aeroplanes.

Examination of alleged bankrupt before adjudication.—As to the power to order an examination of an alleged bankrupt prior to adjudication it is said that this section, when considered with subdivision (9) of section 7, necessarily grants the authority in question, and, in addition, that the general equity powers with which bankruptcy courts are invested make it within the province of the court to authorize such procedure. *In re Stell*, (E. D. Tex. 1920) 269 Fed. 1008.

Showing an application for examination before adjudication.—It should appear from the application, or from evidence in support of it, that some extraordinary condition exists with reference to the assets of the estate which makes it necessary for an examina-

tion to be made at such time. The alleged bankrupt has the right to have the issue of insolvency tried by a jury, and it would be improper to use the authority of the court to require him to submit to an investigation and analysis of his affairs prior to the determination of that issue, unless an unusual condition is shown. Using the language employed in the Rawlins Case:

"We are not prepared to say that there might not be a case when the utility of such an examination for the purpose intended, even in the absence of a receivership, might not be shown."

But the parties applying for such should allege and show that such an examination is necessary to the rights of the parties interested. *In re Stell*, (E. D. Tex. 1920) 269 Fed. 1008.

Scope of examination before adjudication.—It is said to be clear that the purpose in permitting an examination of an alleged bankrupt prior to adjudication is to "show the condition of the estate, to enable the court to discover its extent and whereabouts, and to get into possession of it, in order that the rights of creditors may be preserved." It cannot be employed to obtain evidence for use on the issue of insolvency. "It would be a perversion of the purpose of section 21a to exercise the power it confers to obtain evidence for use on the trial of the issue of solvency or insolvency." *In re Stell*, (E. D. Tex. 1920) 269 Fed. 1008.

Application for examination.—Any creditor may apply for examination.—To the same effect as the original annotation, see *In re Henderson*, (D. C. Mass. 1919) 266 Fed. 254.

Incriminating evidence.—To the same effect as the original annotation, see *Arndstein v. McCarthy*, (1920) 254 U. S. 71, 379, 41 S. Ct. 26, 136, 65 U. S. (L. ed.) —.

Vol. I, p. 761, sec. 23b. [First ed., 1912 Supp., p. 595.]

- I. Jurisdiction of adverse claims.
- III. Jurisdiction by consent.
- IV. Recovery of preferential and fraudulent transfers.
- V. Summary and plenary jurisdiction.
- VI. Jurisdiction of state courts.

I. JURISDICTION OF ADVERSE CLAIMS (p. 761)

Bona fide adverse claims.—*Claim of assignee for creditors for services and disbursements.*—A court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding, over a protest, the merits of the claim of an assignee for creditors of the bankrupt to retain out of the bankrupt's estate his fees and disbursements under the assignment for administering the estate prior to the bankruptcy proceedings. As to these moneys the assignee is an adverse claimant. *Galbraith v. Vallye*, (1921) 256 U. S. 46,

41 S. Ct. 415, 65 U. S. (L. ed.) —, reversing (C. C. A. 8th Cir. 1919) 261 Fed. 670; (D. C. N. D. 1918) 253 Fed. 390, and following *Louisville Trust Co. v. Comingor* cited in the original annotation. The court said:

"We think the referee was right in holding that the case was governed by *Louisville Trust Co. v. Comingor*, *supra*. In that case a general assignment for the benefit of creditors was made within four months of the bankruptcy proceeding; the assignment was therefore an act of bankruptcy. A receiver was appointed in the bankruptcy court. The assignee turned over the proceeds of sale of the property, retaining his fees as assignee and his disbursements to counsel. A summary proceeding was begun in the District Court, ordering the assignee to show cause why he should not pay to the receiver the amounts retained. This order was made against the objection of the assignee that the court had no authority to proceed in that manner. This court held that the assignee was an adverse claimant as to these amounts, and that the District Court was without jurisdiction to determine the controversy in a summary proceeding. This case has been repeatedly cited as determinative of the law and practice in similar cases.

"The Circuit Court of Appeals made no reference to the *Comingor* Case, and held the case was ruled by *Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165, 23 Sup. Ct. Rep. 740; but that case did not present the question here involved. In that case there had been an assignment prior to the bankruptcy proceedings, and the question presented was whether a claim for professional services, rendered in the course of a general assignment, before the bankruptcy, was entitled to be paid as a preferential claim out of the estate in the hands of the trustee in bankruptcy when the adjudication of bankruptcy had been made within four months after the making of the assignment, and the assignment set aside as in contravention of the Bankruptcy Law. It was held that the claim for compensation could be allowed so far as the services were shown to be beneficial to the estate.

"In *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969, also cited in the opinion of the Circuit Court of Appeals, it was held that books and records of a corporation, upon adjudication in bankruptcy, passed to the trustee, and belonged in the custody of the bankruptcy court, there being no adverse claim to them. Upon that state of facts it was held that, on a rule to show cause, the court could properly make an order compelling the delivery of the books to the trustee. In the opinion in that case, *Louisville Trust Co. v. Comingor*, *supra*, and other cases, are cited for the purpose of showing that a different rule would prevail when an

adverse claimant set up a right to be heard in other than a summary proceeding.

"It may be, as suggested by the Circuit Court of Appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. But the right to recover in such instances only in suits of the ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court. The principle of the *Comingor* Case has never been departed from in this court. It establishes the right of an assignee for the benefit of creditors, to the extent that he asserts rights to expenses incurred and compensation earned under an assignment in good faith, before the bankruptcy proceedings, to have the merits of his claim determined in a judicial proceeding suitable to that purpose, and not by summary proceedings where punishment for contempt is the means of enforcing the order. We see no occasion to depart from this practice. There was no waiver by the assignee of his rights in this respect. He made no attempt to retain the body of the estate as against the trustee in bankruptcy. As to his disbursements and compensation while acting as assignee, he asserted an adverse claim. Under the settled rule of this court he could not be proceeded against summarily for such disbursements and compensation over his protest, duly made, against that method of procedure.

"In our view the courts below erred in deciding otherwise, and the order of the Circuit Court of Appeals is, accordingly, reversed."

Limitations.—A federal court has no jurisdiction of an action by a trustee to recover, on the ground of mental incapacity of the transferor, property transferred by the mother of the bankrupt to his wife, there being no diversity of citizenship and no federal question involved. A trustee must rely for jurisdiction on the exceptions stated. *Kaigler v. Gibson*, (N. D. Ga. 1920) 264 Fed. 240.

Pleading.—While it is true ordinarily that, when a federal court appears on the face of a petition to have jurisdiction because a substantial federal question is involved, it has the right and duty to decide all questions, regardless of how the federal question is decided, or whether it is decided at all, yet it is held that this principle cannot control in an action under section 23b where the only case stated within the exceptions is untruly stated. The court said:

"If a pleader is permitted to state a case within the exceptions untruly, whether by design or by mistake, and then to state it truly and make a case within the rule, and if the court is held to thereby acquire jurisdiction over the whole, it would be possible in every controversy to evade the denial of jurisdiction and

make the exceptions to annul the rule. The denial of jurisdiction is as authoritative and binding as are the permissions of the exceptions to it. If the trustee desired to assert a title at law and also a title in equity, he could not do so in a law case with two counts, but would have to go into a court that might entertain questions of law and equity. So, if he desires to press, at the same time, two alternative views of his right to recover against an adverse claimant, he must seek a court that has jurisdiction to entertain the questions arising in both of the views." *Kaigler v. Gibson*, (N. D. Ga. 1920) 264 Fed. 240.

III. JURISDICTION BY CONSENT (p. 767)

The consent provided for was not intended to enlarge the jurisdiction of the District Courts.—*Kaigler v. Gibson*, (N. D. Ga. 1920) 264 Fed. 240.

Effect of objection to jurisdiction.—Where an answer to the merits is accompanied with a motion to dismiss for want of jurisdiction, which is expressly reserved in the answer, any inference of consent that might have arisen from the filing of an answer to the merits is rebutted. *Kaigler v. Gibson*, (N. D. Ga. 1920) 264 Fed. 240.

IV. RECOVERY OF PREFERENTIAL AND FRAUDULENT TRANSFERS (p. 769)

Jurisdiction to recover property fraudulently or preferentially transferred.—Consent of the defendant is unnecessary to a plenary suit brought by the trustee under section 70e of this act. *In re Eilers Music House*, (C. C. A. 9th Cir. 1921) 274 Fed. 330.

Amount as immaterial.—Transfers by a bankrupt in fraud of his creditors are voided by the Bankruptcy Act and suits to annul them are treated as suits arising under the laws of the United States with no fixed amount required to be involved. *Kaigler v. Gibson*, (N. D. Ga. 1920) 264 Fed. 240.

V. SUMMARY AND PLENARY JURISDICTION (p. 770)

Necessity of plenary action.—To the same effect as the original annotation, see *Looschen Land, etc., Co. v. Milson*, (C. C. A. 3d Cir. 1920) 266 Fed. 359.

Summary jurisdiction.—Where assets are a part of the general estate of the bankrupt the court may by a summary proceeding direct the surrender of such assets to the trustee of the bankrupt though an adverse claim has been set up. *In re Eilers Music House*, (C. C. A. 9th Cir. 1921) 270 Fed. 915.

Estoppel to challenge.—Where a claimant of property in the possession of the bankrupt's receiver submits his claim to the jurisdiction of the bankruptcy court and acquiesces in an order surrendering the property to him and providing for payment in

five days, he cannot thereafter in a summary proceeding challenge the jurisdiction of the court to enforce as against him the terms of the order regarding payment. *In re Barnes Gear Co.*, (C. C. A. 2d Cir. 1920) 265 Fed. 597, wherein the court said:

"The contention of the petitioner is that it has a claim for breach of contract against the bankrupt, and that it should have an opportunity in this proceeding to set up and litigate its claim for damages for this breach and this counterclaim against the bankrupt. It contends that the respondent should pursue his remedy in a plenary action, and that the court has not the power to grant relief in this summary proceeding. The difficulty, however, in this position of the petitioner, is that it invoked the aid of the District Court, obtaining some benefit in the immediate turn-over of its property upon which the bankrupt was performing service, and that upon a condition imposed to pay the amount due for the work performed. It now wishes to avoid the terms of the order under which it accepted these benefits. The order was entered by mutual agreement and it was considered to the mutual benefit of both litigants.

"The petition itself alleged that the brake company had a large contract with the British government for munitions, this being a part of the work covered by its contract with the British government; that the brake company was in default on its contract and had been granted a 60-day extension by the British government; that by reason of the failure of the bankrupt, and its consequent inability to perform its contract, the petitioner was or would be damaged; that the petitioner had furnished material to the bankrupt of the value of \$18,794.84, and this material was to be worked and improved for the consideration set forth in the contract between it and the brake company; that \$4,000 was on deposit with the petitioner for the faithful performance of the contract; that all of the material was in the actual possession of the receiver; that some of it was completed, and some partially completed; that the brake company would be unable to complete its contract with the British government unless it immediately secured possession of this material and that the bankrupt had ceased operations under the contract. From this it conclusively appears that the petitioner could complete its contract with the British government, if it speedily received relief and was not compelled to await the outcome of the involuntary proceedings then pending and undetermined and the appointment of a trustee. In the prayer for relief, it said:

"Your petitioner further shows that considerably less than one fourth in amount of said labor has been performed under said contract, for which labor your petitioner is ready and willing to pay said bankrupt, or its receiver or trustee, at any time upon the order of this court; that it will be imprac-

ticable for said brake company, your petitioner, to procure this material to be properly inspected and passed upon in accordance with the terms of said contract, but that said inspection can be had immediately upon delivery of said partially completed pieces at its plant at Watertown, N. Y."

"From the foregoing proceeding, it is clear that the petitioner instituted this proceeding in bankruptcy. By its petition it became a party thereto, and submitted all its rights to the bankruptcy court for determination. It accepted the benefits derived from the order of July 26, 1917, as well as the condition imposed to pay the amount found to be due. It chose its own proceedings to obtain relief, and the bankruptcy court in which it instituted it. It cannot now be heard in a plea that it wishes to have its counterclaim heard in a plenary action. After the amount was found to be due, the District Court had jurisdiction to direct its payment within 5 days. But for this submission to the jurisdiction of the bankruptcy court, the petitioner had the right to set off its damages against any claim of the bankrupt for work done by it in a plenary action. Its petition was a proceeding in bankruptcy, and the controversy was one arising out of the settlement of the estate. *First Nat. Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051."

Form of proceeding.—It is immaterial that a proceeding by the trustee is denominated a summary proceeding when it is in fact a plenary proceeding where the case is within the jurisdiction of the court and the defendant answers and has ample opportunity, of which it avails itself, to be heard on the merits. *In re Eilers Music House*, (C. C. A. 9th Cir. 1921) 274 Fed. 330.

VI. JURISDICTION OF STATE COURTS (p. 772)

Jurisdiction of state courts.—Where the proceedings to review the referee's order permitting replevin against a trustee were seasonably taken, the rights of the parties are not affected by the fact that the goods have actually been replevied under the order of the referee as replevin action will fall with the order on which it was based. *In re International Piano Mfg. Co.*, (D. C. Mass. 1920) 263 Fed. 430.

Vol. I, p. 774, sec. 24a. [First ed., 1912 Supp., p. 603.]

- I. Relation of section 24a to Circuit Court of Appeals Act and other provisions.
- II. Controversies arising in bankruptcy proceedings.

I. RELATION OF SECTION 24a TO CIRCUIT COURT OF APPEALS ACT AND OTHER PROVISIONS (p. 774)

Exclusiveness of remedy.—The remedies by appeal and by petition to revise under section 24b are mutually exclusive. *Petition of Na-*

tional Discount Co., (C. C. A. 6th Cir. 1921) 272 Fed. 570.

II. CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS (p. 776)

In general.—The Bankruptcy Act distinguishes between an appeal and a petition to revise, and it distinguishes between proceedings in bankruptcy and controversies arising in bankruptcy proceedings. Proceedings in bankruptcy relate to questions arising between the bankrupt and his creditors. Controversies arising in bankruptcy proceedings are distinct and separable issues raised between intervening parties and involving substantial rights. *In re Prudential Lithograph Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 469.

When a bankruptcy court is called on to deal with the disposition of assets not belonging to ordinary creditors there may then arise a "controversy in bankruptcy." *Keith v. Kilmer*, (C. C. A. 1st Cir. 1921) 272 Fed. 643.

Where the controversy involves facts as well as legal questions a party who seeks a review is confined to the remedy by appeal under this provision. *In re Eilers Music House*, (C. C. A. 9th Cir. 1921) 270 Fed. 91a.

Decisions held appealable.—In the following cases decisions were expressly or impliedly held to be appealable to the Circuit Court of Appeals under section 24a:

A decree on a petition by a trustee in bankruptcy directing a sale by him of certain lands of the bankrupt free from all attachment liens obtained by certain creditors more than four months prior to the filing of the bankruptcy petition and overruling a motion by such creditors to dismiss the trustee's petition. *Griffin v. Lenhart*, (C. C. A. 4th Cir. 1920) 266 Fed. 675.

A decree confirming sale of leasehold by trustee where landlord asserts title to the property. *In re Prudential Lithograph Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 469.

A decree in suit to vacate a preference where the matters involved took such shape that it was necessary for the court to pass on the facts. *City Nat. Bank v. Slocum*, (C. C. A. 6th Cir. 1921) 272 Fed. 11.

A decree relating to a claimant's rights to funds. *Petition of National Discount Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 570.

A reclamation by a third party of his own property in the hands of the trustee is a controversy arising in bankruptcy proceedings, and the proper remedy is appeal under section 24a, and not a petition to revise under section 24b of the Bankruptcy Act. *In re Toole*, (C. C. A. 2d Cir. 1920) 270 Fed. 196.

Vol. I, p. 791, sec. 24b. [First ed., 1912 Supp., p. 611.]

Proceedings in bankruptcy.—The Bankruptcy Act distinguishes between an appeal and a petition to revise, and it distinguishes between proceedings in bankruptcy and con-

troversies arising in bankruptcy proceedings. Proceedings in bankruptcy relate to questions arising between the bankrupt and his creditors. Controversies arising in bankruptcy proceedings are distinct and separable issues raised between intervening parties and involving substantial rights. *In re Prudential Lithograph Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 469.

Appeal or petition to revise as exclusive or optional right.—To the same effect as the original annotation, see *In re Craig Lumber Co.*, (C. C. A. 9th Cir. 1920) 266 Fed. 692; *Petition of National Discount Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 570.

Where the remedy is provided by this section appellate jurisdiction under section 25a of this act is excluded. It is now the settled law that the remedy provided by this section and the appeals provided for in section 25a are mutually exclusive. *Henkin v. Fousek*, (C. C. A. 8th Cir. 1920) 267 Fed. 557.

"It has become settled law that one who is entitled, under section 25a of the Bankruptcy Act, to an appeal to the Circuit Court of Appeals, is not also entitled to a review by petition under section 24b." *In re Thompson*, (C. C. A. 9th Cir. 1920) 264 Fed. 913.

Questions and orders reviewable or not reviewable on petition.—*Allowance of counsel fees and expenses.*—A petition to revise is the proper method for reviewing an order allowing fees to the counsel of the trustee in bankruptcy. *Yaryan Rosin, etc., Co. v. Isaac*, (C. C. A. 5th Cir. 1921) 270 Fed. 710.

An order setting aside an adjudication is reviewable by a petition to revise. *In re DeCamp Glass Casket Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 568.

Vacating adjudication in bankruptcy for want of jurisdiction.—A petition to revise in matter of law under the Bankruptcy Act of July 1, 1898, § 24b, is the proper remedy to review an order of an inferior court of bankruptcy, vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction, upon the motion of the bankrupt, after the expiration of the time for appeal, he having neither contested the involuntary petition against him, nor appealed from the adjudication. *Vallely v. Northern F., etc., Ins. Co.*, (1920) 254 U. S. 348, 41 S. Ct. 116, 65 U. S. (L. ed.) —.

An order refusing to set aside an adjudication of bankruptcy made on a voluntary petition is subject to review only by petition to revise. *In re Ann Arbor Mach. Corp.*, (C. C. A. 6th Cir. 1921) 274 Fed. 24.

An order directing that an amended proof of claim be expunged because not signed and filed by both executors of an estate is properly brought up for review by a petition to revise. *In re Schaffner*, (C. C. A. 2d Cir. 1920) 267 Fed. 977.

Order adjudging contempt.—An order adjudging a bankrupt guilty of contempt in failing and refusing to pay over certain funds to the trustee in compliance with an order of

the referee in bankruptcy is reviewable under this section. *Henkin v. Fousek*, (C. C. A. 8th Cir. 1920) 267 Fed. 557.

Order directing trustee to pay money.—An order directing the trustee in bankruptcy to pay a specified sum in accordance with authority for making a settlement given to him on his application to the court is an administrative order in the ordinary course of bankruptcy which is reviewable by a petition to revise. *Petition of Baxter*, (C. C. A. 6th Cir. 1920) 269 Fed. 344.

Discretionary orders can be revised only for abuse of discretion, which is error of law. *In re Margolies*, (C. C. A. 2d Cir. 1920) 266 Fed. 203.

Interlocutory orders.—While the court may refuse to revise an interlocutory order in bankruptcy, yet it may revise such an order where questions of law going to the jurisdiction are involved and it will speed distribution to dispose of the order. *In re Schaffner*, (C. C. A. 2d Cir. 1920) 267 Fed. 977.

Refusal of petition for intervention.—An order refusing permission to file an intervening petition in bankruptcy proceedings to determine the ownership of certain moneys turned over to the court by the petitioner in accordance with the terms of an order, "with reservation as to the ownership of said fund," is reviewable by a petition for review and not by appeal. *In re Consumers' Packing Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 198.

Validity of judicial sale.—The question of the invalidity of a judicial sale is not reviewable on a petition to revise an order reopening the estate of a bankrupt because of an alleged fraudulent concealment of assets. *In re Leigh*, (C. C. A. 7th Cir. 1921) 272 Fed. 678.

Summary order.—Where the merits of an adverse claim are sought to be summarily adjudicated, the order may be reviewed on petition. *Charles H. Brown Paint Co. v. Rockhold*, (C. C. A. 5th Cir. 1920) 269 Fed. 139.

Time for filing petition.—*Rule of court.*—A rule of the Circuit Court of Appeals requiring a petition to revise under this section be filed within twenty days of the entry of the order sought to be revised but authorizing the district judge to enlarge the time for such filing has been construed as not imperatively requiring the extending authority to be exercised within the twenty-day period. *In re De Camp Glass Casket Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 558.

Suspension of.—The pendency of a motion for a rehearing suspends the time for filing a petition to revise. *Yarvan Rosin, etc., Co. v. Isaac*, (C. C. A. 5th Cir. 1921) 270 Fed. 710.

Findings of fact.—Conclusions of fact adopted by the court below must be accepted by the reviewing court where there is substantial evidence to sustain them. *In re Ann Arbor Mach. Corp.*, (C. C. A. 6th Cir. 1921) 274 Fed. 24.

Where the effect of findings was simply to

declare that a claim was proper in form and entitled to be filed, not that it was allowed, and then to declare that the claim was disallowed, the case is not one for revision under section 24b and reasons given in the finding for disallowing it do not change the effect of the order. *In re Thompson*, (C. C. A. 9th Cir. 1920) 264 Fed. 913.

Scope of review.—A petition to revise opens only questions of law, questions of fact being peculiarly within the province of the court below. *Yarvan Rosin, etc., Co. v. Isaac*, (C. C. A. 5th Cir. 1921) 270 Fed. 710.

In a proceeding to revise under this section only questions of law can be determined, and those questions must arise out of the facts found by the court below or admitted by the parties. *In re Ann Arbor Mach. Corp.*, (C. C. A. 6th Cir. 1921) 274 Fed. 24.

On a petition to revise the court is not authorized to substitute its discretion for that of the trustee and the court, who are charged with the administration of the estate, in effecting a compromise. *Petition of Stuart*, (C. C. A. 6th Cir. 1921) 272 Fed. 938. The court said:

"We cannot, as matter of law, say that the trustee and the court have, in adopting this compromise, exceeded the limits of reasonable discretion, taking into account all the considerations to which attention has been called. Setting to one side questions of the legal right of the respective classes of creditors (in the absence of compromise) to participate in the recovery from stockholders, not only may it well be that no compromise was possible unless all creditors share equally, but presumably the trustee and the court regarded such compromise for the best interest, not only of creditors generally, but of each class of creditors. We do not think the action of the District Court can properly be said to amount to a judicial determination of the legal defenses made by the stockholders against their liability."

"Matter of law."—To the same effect as the original annotation, see *In re Barnes Gear Co.*, (C. C. A. 2d Cir. 1920) 265 Fed. 597; *Petition of Stuart*, (C. C. A. 6th Cir. 1921) 272 Fed. 938.

Vol. I, p. 812, sec. 25a. [First ed., 1912 Supp., p. 623.]

"Controversies" and "proceedings."—The Bankruptcy Act distinguishes between an appeal and a petition to revise, and it distinguishes between proceedings in bankruptcy and controversies arising in bankruptcy proceedings. Proceedings in bankruptcy relate to questions arising between the bankrupt and his creditors. Controversies arising in bankruptcy proceedings are distinct and separable issues raised between intervening parties and involving substantial rights. *In re Prudential Lithograph Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 469.

Appeal or petition to revise as exclusive or optional right.—See note under this catchline to sec. 24b, *supra*, p. 366.

Questions considered and determined in general.—A decision involving the right to prove a claim is appealable under this section, being regarded as a "proceeding in bankruptcy." *Keith v. Kilmer*, (C. C. A. 1st Cir. 1921) 272 Fed. 643.

Vol. I, p. 824, sec. 25a (1). [First ed., 1912 Supp., p. 632.]

Order vacating adjudication.—An order vacating an adjudication of bankruptcy is reviewable by a petition to revise and not by appeal. *In re De Camp Glass Casket Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 558.

Refusal to set aside adjudication.—An order of the District Court dismissing a petition to set aside an adjudication in bankruptcy on the ground of fraud is not one that can be reviewed on appeal under the provision of this section. *Elberton Bank v. Swift*, (C. C. A. 5th Cir. 1920) 268 Fed. 305.

Vol. I, p. 826, sec. 25a (2). [First ed., 1912 Supp., p. 633.]

An order granting or denying a discharge is one from which an appeal can be taken under this section and a petition to revise will be dismissed and the case decided on the appeal. *Feder v. Goetz*, (C. C. A. 2d Cir. 1920) 264 Fed. 619.

Vol. I, p. 826, sec. 25a (3). [First ed., 1912 Supp., p. 634.]

Exclusiveness of remedy by appeal.—To the same effect as the original annotation, see *In re Thompson*, (C. C. A. 9th Cir. 1920) 264 Fed. 913.

Judgment "rendered."—Where an order of adjudication is set aside on motion and subsequently a second order of adjudication is made which does not affirm the earlier order nor refer to it but is an independent order made on the pleadings and proof the time for taking an appeal is to be computed from the date of the second order. *Cameron v. National Surety Co.*, (C. C. A. 8th Cir. 1921) 272 Fed. 874.

Effect of proceedings for rehearing.—The pendency of a motion for a rehearing suspends the running of the time for taking an appeal. *Yaryan Rosin, etc., Co. v. Isaac*, (C. C. A. 5th Cir. 1921) 270 Fed. 710.

Petition for rehearing as not reviving right.—Where the time to appeal has expired the right cannot be revived by filing a petition for rehearing where the only apparent purpose of such petition is to procure the entry of a judgment as of a later date so that an appeal can be taken in compliance with the statute. *In re Thompson*, (C. C. A. 9th Cir. 1920) 264 Fed. 913.

Petition to revise.—The Bankruptcy Act contains no express time limit within which a petition to revise must be filed. *Feder v. Goetz*, (C. C. A. 2d Cir. 1920) 264 Fed. 619, holding that in the second circuit the petition must be filed and served within ten days after the entry of the order sought to be revised.

Vol. I, p. 843, sec. 27a. [First ed., 1912 Supp., p. 645.]

Jurisdiction of court.—The provision in General Order in Bankruptcy No. 12 that after a general reference "all proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee" does not take from the judge authority to hear in the first instance an application by the trustee for authority to compromise a claim. *Petition of Baxter*, (C. C. A. 6th Cir. 1920) 269 Fed. 344.

This section does not limit the right of compromise to all controversies in which all the creditors have the same interest. *Petition of Stuart*, (C. C. A. 6th Cir. 1921) 272 Fed. 938.

Application for authority to settle a controversy by agreement with the other party held sufficient under General Order in Bankruptcy No. 33, see *Petition of Baxter*, (C. C. A. 6th Cir. 1920) 269 Fed. 344.

Consideration for compromise.—An attack on a compromise by a trustee on the ground of a lack of consideration cannot be sustained where it appears that he acted in good faith and that the compromise which called for the payment of a comparatively small sum disposed of a controversy which threatened possible loss of a large fund. *Petition of Baxter*, (C. C. A. 6th Cir. 1920) 269 Fed. 344.

In determining the advisability of compromise, the trustee and the court had the right to take into account the uncertainty and cost of litigation, as well as the existence of unsettled questions of liability. *Petition of Stuart*, (C. C. A. 6th Cir. 1921) 272 Fed. 938. The court said:

"The fact (which we assume for the purposes of this opinion) that the stockholders had no effective defense against the claims of petitioners, and others (if any) similarly situated, does not, in our opinion, exclude the exercise of discretion as to compromise. Assuming that the stockholders affirmatively recognized a liability to or on account of petitioners (although that does not clearly appear), to say the least it is not shown that the stockholders were willing to pay over to the trustee the amount to which either petitioners alone, or petitioners and others similarly situated, claimed to be entitled, reserving their defense as to the remaining creditors, nor does it appear which ones of the creditors, other than petitioners, and in what

amounts, were situated similarly to them. The trustee was confronted by a condition; he could not split up the estate's cause of action, and bring separate suit in the interest alone of petitioners, or in the interest only of petitioners and those believed by the trustee to be similarly situated. He must sue, if at all, for the benefit of all creditors, unless those who clearly had no rights. He had no authority to decide for himself, as against claims of other creditors to the contrary, that petitioners and others similarly situated were the only ones entitled to relief. He could not accept, in discharge *pro tanto* of stockholders' liability, even voluntary payments for the benefit of petitioners and those whom he thought were similarly entitled, unless it was clear that the unpaid and enforceable stockholders' subscriptions were sufficient to provide for all creditors entitled. Whether the trustee did so or not, he had the right to take into account the possibility that a recovery merely on account of the claims of petitioners might under the Bankruptcy Law be distributable among all creditors, as well as the fact that no creditors situated similarly to petitioners (if there were any) objected to the compromise, and the further fact that if at the end of the litigation recovery should be had only on account of petitioners' claims and entirely for their benefit, the expenses of litigation might reduce their net recovery to less than reasonably assured under the compromise, which was expected to realize a net aggregate (taking into account prior dividends), without litigation, three-fourths as great as by the proposed assessment, after successful litigation."

Compromise of stockholders' liability.—Where the question whether a certain liability of stockholders for unpaid stock subscriptions is a corporate asset or belongs to the creditors only depends on the laws of a state, and under the laws of that state, as settled by the decision of its Supreme Court, the liability in question belongs to the corporation, it may be enforced by the trustee in bankruptcy for the benefit of general creditors. The bankruptcy court thus has jurisdiction generally, under this section, to authorize a compromise of the stockholders' liability. *Petition of Stuart*, (C. C. A. 6th Cir. 1921) 272 Fed. 938.

Vol. I, p. 844, sec. 29b (1). [First ed., 1912 Supp., p. 646.]

Evidence—Proof of trustee's appointment.—In a prosecution of a bankrupt under this section, the appointment of his trustee may be proved by the trustee's oral testimony at the trial. *Sharfsin v. U. S.*, (C. C. A. 4th Cir. 1920) 265 Fed. 916.

Defenses—Failure of trustee to qualify.—It is no defense to a prosecution of a bankrupt under this section that his trustee has failed to qualify by giving bond within ten

days after his appointment as required by section 50b of the Bankruptcy Act. *Sharfsin v. U. S.*, (C. C. A. 4th Cir. 1920) 265 Fed. 916. The court said:

"It was shown by the evidence presented in support of the motion for a new trial on after-discovered evidence that Warner did not qualify as trustee by giving the bond required by the statute until June 10, 1919. Section 50k of the bankruptcy statute provides:

"If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office."

"Although the trustee did not give bond, and although the statute provides that the office shall be vacant upon his failure to do so within 10 days, he nevertheless remained the *de facto* trustee, charged with all the official duties of the position, and entitled to enforce all the rights of a trustee against the defendant. These rights and duties could only be ended by the judicial declaration of a vacancy. The principle has been too often decided to require discussion."

Vol. I, p. 849, sec. 29b (2). First ed., 1912 Supp., p. 650.]

Evidence.—Advice of counsel.—On a prosecution for false swearing in making an affidavit subsequent to the original proof of claim evidence as to the advice of counsel in making the original proof is not admissible where there is no pretense that the affidavit was made on the advice of counsel. *Lybrand v. U. S.*, (C. C. A. 4th Cir. 1920) 269 Fed. 601.

Vol. I, p. 852, sec. 30a. [First ed., 1912 Supp., p. 652.]

Force and effect of General Order No. 6.—Since General Order No. 6 is subordinate to the provisions of the Bankruptcy Act, and was not designed to effect any change in the law, it can have no bearing upon the question under section 32 as to whether a motion to transfer a case to another district is premature. *In re Okmulgee Producing, etc., Co.*, (D. C. Del. 1920) 265 Fed. 736.

Vol. I, p. 895, sec. 31. [First ed., 1912 Supp., p. 653.]

Fractions of day.—While this section fairly implies that fractions of a day are to be disregarded, yet where one day only is involved, and the rights of litigants depend on priority in time of two occurrences on that day, and the priority can be established, the courts will ascertain and regard the actual priority. There is only a presumption that they occurred at the same time. *In re Ledbetter*, (N. D. Ga. 1920) 267 Fed. 893.

Vol. I, p. 895, sec. 32a. [First ed., 1912 Supp., p. 653.]

Transfer for convenience of parties.—"The 'greatest convenience' depends upon all the circumstances—proximity of creditors of every kind to the court, proximity to the court of bankrupts and witnesses necessary to proper administration, the location of assets, and perhaps numerous other factors that appeal to a court as in the interest of an orderly, economical, and efficient administration of the assets." *In re Devonian Mineral Spring Co.*, (N. D. Ohio 1920) 272 Fed. 527. In this case the court declared:

"It may be conceded in this case that the majority in amount and number of general creditors live in Kentucky, and that the majority of stockholders live there, as do many witnesses necessary to the determination of the two claims heretofore mentioned, and yet it seems to me that all other considerations favor retention of jurisdiction in this district. In this district are practically all of the assets of the company, its official headquarters; its books and records are here, and above all there is pending in the common pleas court of Lorain county, a county in this district, an action to foreclose two mortgages, totaling over \$10,000, which are alleged to be liens upon what apparently is the bulk of the company's assets—its real property, its plant. This action, having been brought prior to any bankruptcy proceeding, must be tried in the state court. The witnesses who live in Kentucky, and who are alleged to have important testimony to give in connection with these claims, will have to come to the Lorain county common pleas court in any event. * * * A transfer of these bankruptcy proceedings to the Kentucky District Court will not result in promoting their convenience."

The words "*parties in interest*" include not only general creditors, but prior and secured creditors as well; also the bankrupt and every other party whose pecuniary interest is affected by the proceedings. *In re Devonian Mineral Spring Co.*, (N. D. Ohio 1920) 272 Fed. 527.

The bankrupt is a "party in interest" within the meaning of this section and may petition the court to have the case transferred to another district. *In re Okmulgee Producing, etc., Co.*, (D. C. Del. 1920) 265 Fed. 736. In discussing this question, the court said:

"This question may be best disposed of by considering the dominant purposes of the act, the nature of a proceeding in bankruptcy, and whether an alleged bankrupt is a party in interest, within the meaning of section 32 of the act. The dominant purposes of the act were pointed out by Sanborn, C. J., speaking for the Circuit Court of Appeals for the Eighth Circuit in *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 3, 54 C. C. A. 387, 389, thus:

"No one can become familiar with the bankrupt law of 1898 without a settled conviction that the two dominant purposes of the framers of that act were: (1) The protection and discharge of the bankrupt; and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors. All the earlier sections of the act are devoted to the security and relief of the bankrupt, and, when the distribution of his property is reached, the provisions relating to it are all drawn from the standpoint of the insolvent, and not from that of his creditors. The rights and privileges of the bankrupt, and the equal distribution of his property, dominate every provision, while the rights, wrongs, benefits, and injuries of his creditors are always incidental, and secondary to these controlling purposes."

"The nature of a bankruptcy proceeding was well defined by Woodruff, C. J., in *In re Boston, H. & E. R. Co.*, Fed. Cas. No. 1,677, where he said:

"At first view, it is natural and agreeable to our ordinary ideas upon this subject, to assume that a petition by an alleged creditor against his debtor, to compel a submission of his estate to the bankruptcy court, is a contest between two parties, with which a third person may not meddle. But this is by no means a complete view of the scope and effect of the proceeding. It is not a mere suit *inter partes*. It rather partakes of the nature of a proceeding *in rem*. * * *

"That the bankrupt is a party in interest in the proceeding for transfer was expressly decided by this court in *In re United Button Co.*, 137 Fed. 668, 672, where Judge Bradford said:

"The Bankruptcy Act does not define or describe 'greatest convenience' or 'parties in interest,' as those phrases are used in section 32 and General Order 6. Both expressions are elastic and largely indefinite. It is manifestly too narrow a construction of the phrase 'parties in interest' to restrict it merely to unsecured creditors in bankruptcy. The bankrupt is not only literally but substantially a party in interest."

"The petitioning creditors cite no authority in support of their contention that the alleged bankrupt is not a competent or proper party to move for a transfer, but say that the alleged bankrupt's position until adjudication is in the nature of that of a defendant, and this proceeding, if allowed, would grant it a change of venue without the law making any provision therefor. But as the result of a transfer would be the same, by whomsoever the application therefor is made, this contention is relevant, not to the question of the right of the alleged bankrupt to apply for a transfer, but only to the power

of the court to order a transfer before adjudication. I am of opinion that the motion for a transfer is not defective by reason of its having been made by the alleged bankrupt only."

Necessity of adjudication.—No adjudication of the bankrupt need be made prior to the filing of a petition under this section for the transfer of the case to another district. *In re Okmulgee Producing, etc., Co.*, (D. C. Del. 1920) 265 Fed. 736, wherein it was said:

"The point, however, upon which the creditors mainly rely in support of their motion to dismiss the application to transfer, is that, no adjudication having been made either here or in Oklahoma, the application to transfer is premature, and that the court is without power to grant it. The transfer of cases is provided for by section 32 of the Bankruptcy Act. This section, in so doing, prescribes the conditions under which or when 'the cases shall be transferred,' how and by whom they 'shall be transferred,' and whether they 'shall be transferred.' In considering whether the application to transfer is premature, we are concerned only with the happening of those events or the existence of those facts which are conditions precedent to the perfection of the right or power to transfer. These conditions are thus specified by the statute:

"In the event petitions are filed against the same person * * * in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred. * * *

"When the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction." *Johnson v. Southern Pac. Co.*, 117 Fed. 462, 465, 54 C. C. A. 508, 511.

"The terms of the foregoing statute are clear and certain, and its meaning is plain. The court is therefore without power, under the guise of construction, to require the existence of an additional event, fact, or condition not prescribed by the statute as a prerequisite to an order of transfer or to make such order in the absence of one that is required. As the statute does not make adjudication a condition precedent to transfer, the courts may not do so."

Sufficiency of petition.—See *In re Okmulgee Producing, etc., Co.*, (D. C. Del. 1920) 265 Fed. 736.

Vol. I, p. 898, sec. 38a. [First ed., 1912 Supp., p. 655.]

Jurisdiction to review order of court.—A referee has no jurisdiction to review an order of a bankruptcy court granting ancillary proceedings against a nonresident partner of a bankrupt partnership. *In re Flaherty*, (N. D. Ia. 1920) 265 Fed. 741. In discussing the referee's jurisdiction in such a case, the court said:

"The referee, instead of requiring obedience to the order of this court authorizing ancillary proceedings in aid of the United States District Court of Montana, decided that this court had no jurisdiction to make such order. In deciding that this court, or the United States District Court of Montana had no jurisdiction to grant ancillary proceedings in this district, the referee exceeded his authority. If he felt that this court had no jurisdiction to grant ancillary proceedings, he should have simply declined to act, and so reported to this court. Neither the referee nor this court will review the judgment of the District Court of Montana adjudicating the copartnership of George L. Flaherty a bankrupt."

Determination on review.—Where the District Court reverses an order of a referee allowing a part of a claim and sends the case back to the referee for a new hearing upon affirmative defenses, the order is not final and on a second appeal to the District Court, the entire case is before it. *In re Franklin Brewing Co.*, (E. D. N. Y. 1920) 265 Fed. 301.

Weight of referee's findings of fact.—To the same effect as the original annotation, see *In re Prentice*, (D. C. Mass. 1920) 267 Fed. 1019; *In re Ponzi*, (D. C. Mass. 1920) 268 Fed. 997.

Where the evidence is not reported the referee's findings must be accepted unless they appear on his report to be clearly wrong. *In re Jaffee*, (D. C. Mass. 1921) 272 Fed. 899.

Where a finding by the referee has been approved by the District Court it will be accepted by the Circuit Court of Appeals unless justice requires a different conclusion. *In re Bradley*, (C. C. A. 2d Cir. 1920) 269 Fed. 784.

Determination on review—Vacating order in replevin proceedings.—Where the proceedings to review the referee's order permitting replevin against a trustee were seasonably taken, the rights of the parties are not affected by the fact that the goods have actually been replevied under the order of the referee as the replevin action will fall with the vacating of the order on which it was based. *In re International Piano Mfg. Co.*, (D. C. Mass. 1920) 268 Fed. 430.

Overruling proofs of assignments to one creditor by others.—Where an interest in their claims has been assigned to one creditor by several others, the assignee agreeing to make a contest to recover assets and pay all costs if unsuccessful and if successful the creditors to pay their *pro rata* share of the costs, an overruling of the proofs of assignment by the referee has been held to be error, a consideration for the assignment being shown and no complaint being made by the assigning creditors. *In re Kenny*, (W. D. Pa. 1920) 269 Fed. 54.

Power to surcharge trustee.—Where no exceptions have been filed to the account of the

trustee or having been filed have been overruled there is said to be no power in the referee to surcharge the trustee. *In re Kenny*, (W. D. Pa. 1920) 269 Fed. 54.

Vol. I, p. 904, sec. 38a (4). [First ed., 1912 Supp., p. 659.]

Summary jurisdiction as to claims.—The property being in possession of the bankrupt, and therefore *in custodia legis*, constructively, if not actually, the referee had the jurisdiction to determine in summary manner the existence or nonexistence of asserted claims to or liens upon such property. At least, no objection anywhere along the line to the jurisdiction of the referee having been made, it would seem that under the provisions of the Bankruptcy Act summary jurisdiction, based upon consent of the parties involved, was proper. *In re Hansen*, (S. D. Cal. 1919) 268 Fed. 904.

Turning property over to trustee—Summary proceedings.—It has been held that a referee has no power to make a summary order directing one claiming property transferred to him more than four months prior to bankruptcy to pay over the value of such property to the trustee. *Charles H. Brown Paint Co. v. Rockhold*, (C. C. A. 5th Cir. 1920) 269 Fed. 139.

Determining status of alleged secured claim.—Where a claimant has filed a verified claim before a referee on a debt claimed to be secured by a chattel mortgage it thereupon becomes the duty of the referee to pass on the question whether or not the claim is secured by a chattel mortgage as asserted. *In re Hansen*, (S. D. Cal. 1919) 268 Fed. 904.

Enjoining suit in state court.—While a referee, under General Order 12, subd. 3 (1 Fed. Stat. Ann. (2d ed.) 855), may not "enjoin any court or officer of the United States or of a state," he may temporarily enjoin a landlord from a suit of ejectment against a bankrupt in a state court. *In re Lombardy Inn Co.*, (D. C. Mass. 1919) 266 Fed. 394. In affirming the order of the referee, the court said:

"At the time when the receiver in bankruptcy was appointed he found the bankrupt still in possession of the premises, claiming to hold under a written lease. The lessor, alleging a breach of condition, had already instituted ejectment proceedings in the state court. The learned referee temporarily enjoined the prosecution of these proceedings to give the receiver time to turn around. The premises are a hotel of some 30 rooms and a restaurant having a substantial business of its own.

"In holding that the receiver should not be immediately turned into the street, but should have an opportunity to look things over and decide whether or not to defend the ejectment case and try to retain the

lease for the benefit of the estate, and in staying the ejectment proceedings for that purpose, it seems to me that the learned referee was right. Under the circumstances a high degree of diligence will be required of the receiver; and after a reasonable time has elapsed the lessor can move to vacate the restraining order."

Vol. I, p. 909, sec. 38a (5). [First ed., 1912 Supp., p. 663.]

Stenographer's fee held not to be unreasonable, see *In re Weissman*, (D. C. Conn. 1920) 267 Fed. 588.

Vol. I, p. 922, sec. 41a (4). [First ed., 1912 Supp., p. 673.]

Evasive testimony as contempt, see *In re Rosenblum*, (W. D. Mo. 1919) 268 Fed. 381, wherein the court declared as follows:

"The judgment of the court will be that the bankrupt is guilty of contempt, and shall be committed to the Jasper county jail for a period of six months from this date. If, after five days of such imprisonment, he wishes to have an opportunity to be again examined, the marshal will be directed to take him before the referee for re-examination, and if, upon such examination, he shall make a full and satisfactory disclosure of all the material facts in the case within his knowledge, an application may be made to the court for a discharge from imprisonment; but if he declines to submit to such examination, or if, having applied for it, he is guilty of the same evasions and duplicity which characterized the ones already had, such imprisonment shall continue for the term already stated."

Vol. I, p. 923, sec. 41b. [First ed., 1912 Supp., p. 674.]

Violation of order against interference with assets.—Interference with the assets of the estate in violation of an order of the court against such interference does not come within the phrase "any of the things forbidden in this section," the bankrupt in such a case being answerable directly to the court in a proceeding for contempt. *Biderman v. Cooper*, (C. C. A. 3d Cir. 1921) 273 Fed. 683, holding in this case that the proceeding was for a civil contempt and that an order imposing imprisonment should be annulled.

Vol. I, p. 926, sec. 44a. [First ed., 1912 Supp., p. 677.]

Referee's powers as to approval of trustee selected.—The referee has power to refuse to approve as trustee a person elected by the creditors because he resides and does business at a place other than where the bankrupt's

place of business is located. And if on any state of facts consistent with his report he has power to disapprove on the ground stated his action must be confirmed. *In re Jaffee*, (D. C. Mass. 1921) 272 Fed. 899, holding that the question whether General Order 12 (89 Fed. vii, 32 C. C. A. xvi) goes beyond the act, and is invalid in so far as it gives the referee power to decide upon the competency of the person elected by the creditors as trustee, can hardly be considered in a court of first instance; it must be decided by the Supreme Court, by which the General Orders were made.

Vol. I, p. 933, sec. 47a (2). [First ed., 1912 Supp., p. 682.]

Construction.—The 1910 amendment to this section, conferring on trustees "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings," does not give to the trustee in bankruptcy any greater or other right in the premises than any creditor of the bankrupt would have had, if bankruptcy had not intervened. This amendment to the Bankruptcy Act changed the rule, previously in force, that a trustee merely stood in the shoes of the bankrupt, and acquired only the title and rights previously vested in the bankrupt; and now, under this amendment, the trustee possesses, in addition to the title and rights of the bankrupt, also the rights, remedies, and powers which belonged, at the time of the filing of the petition in bankruptcy, to creditors of the bankrupt, and might have been exercised by them, if such bankruptcy petition had not been filed. *In re Bonk*, (E. D. Mich. 1920) 268 Fed. 1012, so declaring in the case of chattel mortgages not filed for record.

Rights of trustee exceed those of bankrupt.—"While the trustee is relegated to the forum of the bankrupt estate to enforce collections, he is not necessarily subject to the limitations of the bankrupt corporation, in the form of his action or the nature of the relief sought. Creditors' rights, which are enforceable under state laws, accrue to a trustee in bankruptcy, and he may maintain or defend proceedings and collect assets under circumstances where the bankrupt would not be at liberty to act." *Kelley v. Abbott*, (Cal. 1921) 196 Pac. 39, holding that a trustee may maintain creditors' bill.

Rights of trustee independent of state law.—The right of a trustee to sue to avoid a fraudulent conveyance by the bankrupt arises from this section and in no way depends on state statutes. *Allen v. Hillman*, (Mich. 1921) 183 N. W. 936.

Trustee's right to collect assets.—To the same effect as the second paragraph of the original annotation, see *Ignatius v. Farmers' State Bank*, (C. C. A. 9th Cir. 1921) 272 Fed. 33.

Effect of state law as to possession of property sold.—Where under the law of the state although a purchaser does not take possession of the property at once yet if in the interim of possession no execution creditor of the seller levies and the buyer thereafter takes possession, the sale takes effect as of its date, a trustee in bankruptcy of the seller subsequently appointed acquires no title to property purchased more than four months before bankruptcy of which the buyer took possession within four months before that event, since under the state law the right of the execution to levy was at an end. *Zehner v. Southern Surety Co.*, (C. C. A. 3d Cir. 1921) 272 Fed. 954.

Bankrupt's interest in trust estate.—Under this section a trustee in bankruptcy has the power to subject the bankrupt's interest in a trust estate to the payment of his debts, and his right to sell all of the bankrupt's property does not preclude him from obtaining possession of such interest. *Forbes v. Snow*, (Mass. 1921) 131 N. E. 298.

Chattel mortgage by dealer.—Where a chattel mortgage on merchandise allowed to remain in the possession of the mortgagor for the purposes of sale is void under a state law as against the creditors of the mortgagor it is void as against his trustee in bankruptcy. *General Securities Co. v. Driscoll*, (C. C. A. 5th Cir. 1921) 271 Fed. 295.

Unrecorded shipbuilding contract.—Where an unrecorded shipbuilding contract provides that the title to the hulls, together with all materials purchased or intended for use in the construction of the vessel, shall be vested in and become the property of the purchaser, and the shipbuilding corporation becomes bankrupt, the title to the material not actually on the boats remains the property of the bankrupt and passes to his trustee. *Gielow v. Eastern Shore Shipbuilding Corp.*, (D. C. Md. 1919) 265 Fed. 845.

Title superior to unenrolled judgment.—Where state statutes provide that a judgment or decree of the United States District Court, or of the state Supreme Court or chancery court or any state court of a different county shall not be a lien on defendant's property until enrolled in the office of the clerk of the circuit court of the county, and that a judgment shall not be a lien on any property unless it is enrolled where a judgment rendered in a federal District Court was not enrolled until after the bankruptcy of the defendant, the claim of the trustee was held to be superior under this section to the claim of the unenrolled judgment. *In re Jackson Light, etc., Co.*, (C. C. A. 5th Cir. 1920) 269 Fed. 223.

Right to sue—Necessity of proof of trustee's appointment.—In an action by a bankrupt's trustee against a creditor to recover an alleged preferential payment of money, the trustee must prove his appointment in order to recover the money. *Van Slyke v. Hunt-*

ington, (C. C. A. 8th Cir. 1920) 265 Fed. 86. The court said:

"The defendant denied in his answer every averment of the complaint not expressly admitted, and he did not admit, and there is no evidence or proof in the record, that the plaintiff was ever appointed or elected a trustee in bankruptcy of any of the assets of any of the alleged bankrupts, and the absence of both admission and proof of that alleged fact is fatal to the decree for the recovery of the \$909.09 from the defendant. The plaintiff was entitled to no such recovery, unless he was the trustee of the assets of one or both of the bankrupts, who owned the \$909.09 the defendant received."

Sales of property—Power to order sale without liens.—"The power to sell a bankrupt's property free from liens is not expressly conferred by the statute. But such a sale is often necessary to the due execution of the power and duty to reduce the assets to money and distribute it to creditors. This necessarily implied power of the court of bankruptcy as a court of equity has been asserted in numerous cases." *Gantt v. Jones*, (C. C. A. 4th Cir. 1921) 272 Fed. 117.

Proceeds of property sold free from liens.—The proceeds of sale come into the hands of the bankrupt court for distribution among creditors precisely as if the mortgage had been formally foreclosed. The same incidents attach to the surplus over the lien debts. *Gantt v. Jones*, (C. C. A. 4th Cir. 1921) 272 Fed. 117.

Title of purchaser where property sold without liens.—At a sale of the bankrupt's property without liens in pursuance of an order of court the purchaser takes the same title as if the sale were made in any other court of equity to foreclose the mortgages or to marshal the assets of an insolvent, with all lienholders and other parties in interest before the court. This title is good against the mortgagor, the mortgagees, and all their privies, including the wife of the mortgagor, who has renounced her dower. *Gantt v. Jones*, (C. C. A. 4th Cir. 1921) 272 Fed. 117.

Time as of which trustee takes status of creditor.—To the same effect as the original annotation, see *General Securities Co. v. Driscoll*, (C. C. A. 5th Cir. 1921) 271 Fed. 295.

Vol. I, p. 942, sec. 47a (11). [First ed., 1912 Supp., p. 686.]

The bankruptcy court has no jurisdiction over the exempted property except to make the appraisal and set it apart to the bankrupt. *In re Gunzberger*, (M. D. Pa. 1920) 268 Fed. 673.

Effect of setting apart homestead.—When a bankrupt claims his homestead and has it set apart, it is excluded from the bankruptcy proceedings and the jurisdiction of the bankruptcy court as completely as if it had never

been placed upon the bankrupt's schedules, and thereafter a creditor with a lawful special or general waiver of the exemption, or against whom the exemption does not apply, would have to resort to the state courts for its enforcement. *Schexnaider v. Fontenot*, (1920) 147 La. 467, 85 So. 207.

Mortgage on exempt land.—A discharge in bankruptcy does not destroy a mortgage lien upon the bankrupt's real property subject to exemption, but merely his personal liability. *Schexnaider v. Fontenot*, (1920) 147 La. 467, 85 So. 207.

Vol. I, p. 950, sec. 48d. [First ed., 1912 Supp., p. 690.]

Receiver's fees.—The court is limited by section 72 of this act to an allowance to the receiver not in excess of that permitted by this section. *In re Weissman*, (D. C. Conn. 1920) 267 Fed. 588.

The court has no jurisdiction to confirm a composition which allows a receiver an amount in excess of that specified in this section, although the statutory allowance may be grossly inadequate. *In re Gross*, (S. D. N. Y. 1921) 274 Fed. 741.

Vol. I, p. 956, sec. 51a (2). [First ed., 1912 Supp., p. 695.]

Necessity of paying filing fee.—A bankrupt who on filing his voluntary petition is able to pay his attorney and who is earning money and by proper saving and conduct can accumulate or procure money with which to pay the filing fee will not be permitted to maintain the proceedings without paying such fee. *In re Latham*, (N. D. N. Y. 1921) 271 Fed. 538.

Vol. I, p. 960, sec. 55f. [First ed., 1912 Supp., p. 698.]

Necessity of final meeting.—To same effect as original annotation, see *Levy v. Schorr*, (C. C. A. 3d Cir. 1920) 266 Fed. 207.

Vol. I, p. 962, sec. 57a. [First ed., 1912 Supp., p. 700.]

Necessity and manner of proving claim.—The "statement under oath" referred to in this section "is at once the claimant's pleading and his evidence, and makes for him a *prima facie* case." *In re Welborne*, (S. D. N. Y. 1920) 266 Fed. 385.

Amendment of proofs—Supplementing proofs by oral testimony.—Where the proof of claim required by this section is defective, the referee may permit the claimant to supplement the defects of the claim by oral testimony, and such testimony will be regarded as written into the claim and as constituting part of it. *In re Welborne*, (S. D. N. Y. 1920) 266 Fed. 385.

Who may prove claims—An executor.—One of two executors may sign and verify a claim on behalf of the estate. *In re Schaffner*, (C. C. A. 2d Cir. 1920) 267 Fed. 977. The court said:

"We do not agree with the District Judge that the proof of claim must be signed by both executors. We think that one may sign and verify a claim on behalf of the estate. The whole bankruptcy proceeding constitutes one suit, and a proof of claim is not an action at law or in equity, but is a demand against a fund in possession of the court for distribution, just like a proceeding to limit the liability of a vessel owner or to wind up a corporation in equity. Strict rules of pleading are not necessary or applicable. We can see no objection to one executor signing and filing a proof of claim upon behalf of the estate, just as section 1 of the General Order permits one partner to do for the firm; both having the right to collect or release a debt or dispose of assets of the estate or the firm. *Geyer v. Snyder*, 140 N. Y. 394, 35 N. E. 784. In such exceptional cases as this great mischief might ensue, if the view of the District Judge were enforced. One executor, by refusing to sign, might prevent a proof of claim ever being filed, and important controversies ever determined. It is suggested that by proceedings in the probate court the letters of such an executor might be revoked; but this would be a long proceeding, which might subject the bankruptcy court to the control of the probate court, as, for example, if that court refused to discharge the executor."

Purchaser of bankrupt's stock of goods.—Where a purchaser of the stock of goods of the bankrupt acted in good faith and the sale was annulled solely on the ground that it was made in violation of the Bulk Sales Law of the state, it has been held that the purchaser should be subrogated as a claimant to the rights of those creditors whose debts were paid out of the purchase money by the bankrupt and those of which payment was assumed by the purchaser and the estate released from payment of the same. *In re Fox*, (D. C. Kan. 1920) 266 Fed. 134. The court said:

"Again, the order of the referee, as shown by his certificate, is based in part on the thought the creditors who received payment from the cash paid by claimants to bankrupt, and the creditors of bankrupt whose debts were assumed by claimants, by reason of the transaction obtained payment in full, while those not so satisfied will receive only a portion of their claims. Hence, it is contended, those creditors who obtained payments in full from the bankrupt in this manner received fraudulent and void preferences. If this position be correct, the same, however, might be said of the individual amounts of claimants standing now allowed under the order of the referee.

"But the fact is there is no proof found in the record claimants knew or had reasonable cause to believe the amount they were paying as purchase price to the bankrupt was not sufficient to pay and discharge all of his indebtedness. Without such knowledge or notice on the part of claimants, no fraud inhered in the transaction so far as they were concerned, and, as the sale has now been annulled on another ground, the property of the estate in bankruptcy or its value has been placed in the hands of the trustee for the benefit of creditors, I fail to see on this head any reason for not allowing the claimants to take that place in the case, through subrogation, such creditors would have assumed, had they not been paid and satisfied out of the purchase price paid by claimants."

Effect of proving claims—Effect on other remedies.—Proof of a claim on notes against the estate in bankruptcy of the maker does not operate as an estoppel against an action by the holder of such notes against his attorney, as agent, for the conversion of the holder's funds in the purchase of the notes. *Parkerson v. Borst*, (C. C. A. 5th Cir. 1920) 264 Fed. 761.

Vol. I, p. 967, sec. 57c. [First ed., 1912 Supp., p. 703.]

Power of referee.—A referee has no right to refuse to file a claim on the ground of its informality. *In re Drexel Hill Motor Co.*, (E. D. Pa. 1921) 270 Fed. 673.

Vol. I, p. 967, sec. 57d. [First ed., 1912 Supp., p. 703.]

Allowance of claims—Effect of formal proof.—To the same effect as the original annotation, see *In re Welborne*, (S. D. N. Y. 1920) 266 Fed. 385.

Disallowance with reservation.—In *Keith v. Kilmer*, (C. C. A. 1st Cir. 1921) 272 Fed. 643, it was declared in the case of the disallowance of the claim of a stockholder with reservation:

"The claim should have been disallowed without reservation. If, to avoid possible future doubt, it be desirable to incorporate in the memorandum of decision a statement to the effect that such disallowance is without prejudice to any rights claimant may hereafter, by proper proceedings, seek to establish against any of the stockholders of the bankrupt corporation, or against any assets of such corporation not distributed by the trustee in bankruptcy to the creditors in the bankruptcy proceedings, there could be no objection to such limiting and guarding statement."

Claims for debts of third persons.—Where a bankrupt is defrauded of a stock of goods, and the person perpetrating the fraud conducts a business in his own name with such goods and incurs debts, the bankrupt's estate

is not liable therefor. *Van Slyke v. Huntington*, (C. C. A. 8th Cir. 1920) 265 Fed. 86.

Vol. I, p. 972, sec. 57g. [First ed., 1912 Supp., p. 706.]

Surrender essential.—When a creditor voluntarily surrenders a preference, he may prove his claim, whether or not he was deliberately attempting to obtain a preference; also, when he is compelled to surrender his preference, he may prove his debt, without reference to whether or not he had knowledge of just what he was doing when the preference was created. *In re Franklin Brewing Co.*, (E. D. N. Y. 1920) 265 Fed. 301.

Independent transactions.—It is in general the rule that a creditor holding two debts at the same time, on one of which he has received a preference, may not prove on the other without surrendering the preference on the one. *In re Dix*, (N. D. N. Y. 1920) 267 Fed. 1016, wherein the court further said:

"If a bankrupt gives a voidable preference of the single debt which he owes to a creditor, and actually extinguishes it, he need not surrender the preference as a condition of proving a debt subsequently arising; but if the preference leave the old debt in part surviving, so that upon incurring the new debt he is still indebted upon the old, he must surrender his preference upon the old in order to prove upon the new. In short, it is only when the debt on which he seeks to prove came into existence after the extinction of the debt on which the bankrupt has made a preferential payment that he may prove without surrendering his preference on the other debt."

Laches.—A bankrupt's trustee is not barred by laches because of the fact that he does not file his petition under this section to have a creditor's claim expunged until four and one-half months after the creditor has filed his claim. *In re Star Spring Bed Co.*, (C. C. A. 3d Cir. 1920) 265 Fed. 133.

Vol. I, p. 976, sec. 57h. [First ed., 1912 Supp., p. 709.]

Determination of value of securities by referee.—In *Dodge Sales, etc., Co. v. Pittston First Nat. Bank*, (C. C. A. 3d Cir. 1920) 266 Fed. 364, the Circuit Court of Appeals affirmed the findings of the District Court confirming the report of a referee as to the value of second mortgage bonds of the bankrupt company held as collateral security by certain creditors.

Vol. I, p. 982, sec. 57n. [First ed., 1912 Supp., p. 712.]

Time for proving claims—Extension of time for filing claims.—In *In re Malkan*, (S. D. N. Y. 1920) 265 Fed. 867, an involuntary petition in bankruptcy was filed

against the debtor on December 24, 1918, and on January 7, 1919, he was adjudicated a bankrupt. Thereafter, upon the written consent of the majority of creditors, and after due notice to all other creditors, an application was made for an order vacating the adjudication and the order appointing the receiver and dismissing the petition in bankruptcy. Only one creditor made objection, and an order was granted April 3, 1919, vacating the adjudication and dismissing the bankruptcy proceedings.

Upon appeal to the Circuit Court of Appeals the order of April 3, 1919, was vacated, and on November 29, 1919, an order was filed in the District Court, pursuant to the mandate of the Circuit Court of Appeals vacating the order of April 3, 1919, and reinstating the receiver, and reinstating the order of the appointment of the receiver, and reinstating the order of adjudication in bankruptcy of January 7, 1919. On December 24, 1919, the District Court granted an order allowing creditors to file their claims within a period of one year from November 29, 1919. One of the creditors then moved to vacate the order of December 24, 1919, on the ground "that the said order was improvidently granted, and that the court was without power and jurisdiction to grant the relief purporting to be granted by the said order." In denying the motion to vacate such order, the court said:

"Briefly stated, the point is this: That the year provided under section 57n of the Bankruptcy Act expired before the order sought to be vacated was made, and hence the court was without power to make the order. Section 57n reads as follows:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, and then within sixty days after the rendition of such judgment."

"Subdivision 2 of section 1 reads as follows:

"'Adjudication' shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed."

"The meaning of the word 'confirmed,' as distinguished from 'affirmed,' is discussed in *Black on Bankruptcy*, p. 1129; *Re Lee*, (D. C.) 171 Fed. 266.

"In the case at bar the decree of adjudication was not directly appealed, but a proceeding was had which in every practical sense was equivalent to an appeal. By virtue of the order made April 3, 1919, the adjudication was vacated. From April 3, 1919, to November 29, 1919, there was no officer with whom a creditor could file his claim. See General Orders XX and XXI; *J. B. Orcutt*

Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. ed. 390. See, also, *Collier on Bankruptcy*, p. 818 *et seq.* There was neither a referee, a receiver, nor a trustee; thus there was a period of nearly eight months when all proceedings in bankruptcy and the consequent administration of this estate were not 'suspended,' but were in an absolutely blank state. There was nothing before the District Court, not an estate, not a referee, not a receiver, not a trustee, not a creditor—indeed, nothing.

"Section 57n was enacted for purely administrative purposes, to the end that estates should be promptly administered; but it contemplated that creditors should have a full year within which to file their claims. If the mandate of the Circuit Court of Appeals had not come down until after January 7, 1920, we might have had the situation of no claims whatever having been filed, in which event, if the moving creditor herein is right, the bankrupt would have escaped without his estate being subject to the payment of any of his debts—*reductio ad absurdum*. Here, if the motion is granted, this creditor may receive 100 cents on the dollar, and laymen creditors, relying on the court proceedings, will be barred from participating in the dividends on claims. No such result will be tolerated, if it can possibly be avoided.

"Applying the fundamental principle of gathering the intent of a statute, when all its relevant provisions are read, I am satisfied that the year, under section 57n, will not expire until a year from November 29, 1919. If the situation is one of *casus omissus*, then surely a court of bankruptcy (which in many respects is a court of equity) will hold that the year began November 29, 1919, or, in any event, that the time from April 3, 1919, to November 29, 1919, should be deducted. From April 3, 1919, until November 29, 1919, was 241 days; 241 days after January 7, 1920 (as I figure it), will be September 4, 1920. By way of extra caution it would be well to notify creditors that they must file their claims by that date.

"There is another point, not raised by counsel, which may be worth considering. This creditor stood idly by until March 31, 1920 (the date of his motion papers), long after January 7, 1920. He thereby lulled the receiver and the creditors into reliance upon the order of December 24, 1919. Had he moved seasonably, the claims could have been filed before January 7, 1920. He should now be estopped, and not allowed to advance the contention that the order was void. I am fully aware of the proposition that a void order cannot be made valid, however hard the circumstances; but, if no one attacks the order, it will stand. I conclude, therefore, as an additional ground, that the creditor, because of his delay beyond January 7, 1920, will not be heard to attack the order. On the other hand, it may be said that the

order of December 24, 1919, was superfluous. If by operation of law the time will not expire until a year from November 29, 1919, or, in any event, until September 4, 1920, an order extending the time is not necessary. If, by operation of law, the time expired January 7, 1920, the order cannot extend it. In order, however, to allow the question to be reviewed promptly, if desired, the order will stand."

Amendment after one year period.—An objection that an amended proof of claim was allowed to be filed more than a year after adjudication has been declared to be without merit. *In re Schaffner*, (C. C. A. 2d Cir. 1920) 267 Fed. 977.

Where the paper presented contained the substance of the formal proof of a claim it is sufficient to constitute the basis of an amended claim after the expiration of the year. *In re Drexel Hill Motor Co.*, (E. D. Pa. 1921) 270 Fed. 673.

Right to participate in composition fund.—This section, denying to unproven claims participation in the distribution of a bankruptcy estate fund, does not deny to any creditor the right to participate in a composition fund being distributed under section 12. *In re Englander's* (E. D. Pa. 1920) 267 Fed. 1012.

Vol. I, p. 987, sec. 58a (7). [First ed., 1912 Supp., p. 716.]

Necessity of notice.—Although it is said that it is not quite clear whether the provision in this section or in General Order in Bankruptcy No. 28, as to notice applies to a summary order giving authority to a trustee to compromise a claim, yet it has been held that even if it does, such an order is not subject to attack for want of notice where all steps were taken in good faith by the parties, without fraud on their parts, that counsel for the trustee had full knowledge of the facts relating to the transaction and that the complaining creditors in person or by counsel had actual knowledge of it and made no objection until several years after. *Petition of Baxter*, (C. C. A. 6th Cir. 1920) 269 Fed. 344.

Vol. I, p. 987, sec. 58a (9). [First ed., 1912 Supp., p. 717.]

Notice essential.—"A discharge is a benefit conferred by the statute on an insolvent debtor. One of the conditions precedent to the enjoyment of this benefit, prescribed by section 58 of the statute, is that creditors should have 30 days' notice, so that they may have an opportunity to present objections to the discharge. If this condition is not complied with, the order of discharge is invalid, and must be so declared. The rights of creditors were involved in the hearing on the petition for discharge, and they cannot be bound without an oppor-

tunity to be heard. . . . It is, we think, elementary that one who claims the benefit of a statute must see that the conditions precedent to awarding the benefit have been complied with. As between the bankrupt and his creditors, it is the duty of the bankrupt, and not of his creditors, to see that they have notice of the application for discharge." *Ellison v. Weintrob*, (C. C. A. 4th Cir. 1921) 272 Fed. 466.

Waiver of right to notice.—After the order of discharge is made the creditors may waive their rights by laches or be estopped from asserting them. *Ellison v. Weintrob*, (C. C. A. 4th Cir. 1921) 272 Fed. 466.

Vol. I, p. 988, sec. 59a. [First ed., 1912 Supp., p. 717.]

Opposing petition.—In *Regal Cleaners, etc., v. Merlis*, (C. C. A. 2d Cir. 1921) 274 Fed. 915, it was said as to the right of the president of a corporation to oppose a petition in bankruptcy filed by its directors:

"If there exists a defense to this petition, while ordinarily it is beyond the authority conferred upon a president of a corporation to interpose an answer, still circumstances may exist which, in equity, would require his filing an answer, although he has not the authority of a resolution of the board of directors of his corporation. If the company is solvent, for the president not to prevent such a result might cause irreparable injury, or perhaps total failure of justice to the stockholders. Under these circumstances, we think the president should, in the due performance of the duties of his office, verify and file an answer as such officer. Ordinarily he must make an earnest effort with the managing body of the corporation, the directors, to induce remedial action on their part, and this must be made apparent to the court. If he fails with the directors, he may then proceed. If he does not make request of the directors, he may show that a request would be futile. Such appears from the facts here. There is no showing that the directors have been requested and have refused, but it does expressly appear that two of the four directors are in favor of the adjudication in bankruptcy. Thus the vote is a tie. Under these circumstances, to apply to the directors for instructions would be futile. We think that the answer should be permitted to stand, and the issues as to the questions involved tried."

A voluntary petition for adjudication of a corporation—*Directors of corporation.*—The board of directors of a corporation may authorize voluntary bankruptcy proceedings. *In re Ann Arbor Mach. Corp.*, (C. C. A. 6th Cir. 1921) 274 Fed. 24.

The directors of a corporation may vote to admit its insolvency, even though they be creditors of the corporation, if they do so in

good faith. *Regal Cleaners, etc., v. Merlis*, (C. C. A. 2d Cir. 1921) 274 Fed. 915.

A petition may be filed by a director who is the retained attorney for the corporation where his action is ratified by a majority of the stockholders and by the only directors who are entitled to vote on the question. *In re People's Warehouse Co.*, (S. D. Miss. 1921) 273 Fed. 611.

"Whether the directors of a corporation, without authority from the stockholders, have power to file a petition in voluntary bankruptcy, depends upon the laws of the state in which the corporation was organized, in the absence of restrictive provisions in its charter. . . . According to the trend of authority, in the absence of restrictive provisions in either statute or charter, a board of directors may authorize the filing of a petition in voluntary bankruptcy." *In re De Camp Glass Casket Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 558.

Officer of corporation.—There is no presumption of authority in an officer of a corporation to make and file a voluntary petition in bankruptcy and he may not do so without the consent of the directors. *Regal Cleaners, etc., v. Merlis*, (C. C. A. 2d Cir. 1921) 274 Fed. 915.

Filing of petition as incumbering corporation's property.—Regarding the question as to whether the filing of a voluntary petition in bankruptcy by the directors of a corporation constituted an incumbering of its property within the meaning of a state statute, the court, in *Fitts v. Custer Slide Min., etc., Co.*, (C. C. A. 8th Cir. 1920) 260 Fed. 864, said:

"Counsel for petitioner claims that the laws of Colorado expressly provide that the directors of a corporation have no power without the consent of the stockholders to file a voluntary petition in bankruptcy. Section 865, Rev. Stat. of Colo., as amended by Session Laws of 1915, page 175, is cited in support of this contention. This statute reads as follows:

"The board of directors or trustees of a mining or manufacturing corporation shall not have power to incumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant until the question shall have been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property, without such consent shall be absolutely void."

"In order to make this statute applicable the filing of a voluntary petition in bankruptcy must be an 'incumbering' of the property of the bankrupt. This court in *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599, 121 C. C. A. 627, construed this statute and expressly defined what the words

'incumber' and 'incumbering' used in the statute mean. In the case cited it was said:

"The words 'incumber' and 'incumbering,' when used in reference to property and its title, are words of this character, and the known legal meaning of these words in their popular sense, in the sense that would be attributed to them by conveyancers, lawyers, and judges, the persons most conversant with them, included when this statute was enacted, and still includes, not only mortgages, deeds of trust, and pledges for the payment of money, but every right or interest in the land which may subsist in third persons to the diminution of the value of the land or its title, but consistent with the passing of the fee by the conveyance of the owner."

"And again on page 610 of 203 Fed., on page 636 of 121 C. C. A., in the same opinion, it is said:

"When this statute was enacted, the popular sense, the ordinary significance, and the known legal meaning of the words 'incumber' and 'incumbering,' when used with reference to property or its title, included every right or interest in land which may subsist in third persons to the diminution of the value of the land, or its title, but consistent with the passing of the fee by the conveyance of the owner."

"This language is fully supported by a number of cases cited in the opinion. The statute in question was passed in 1895, and the amendment of 1915 simply added the proviso that a lease for a period of not exceeding five years should not be deemed an incumbering of property. At the time the statute was passed there was no bankruptcy law, so that it cannot be claimed that the Legislature of Colorado had the provisions of that bankruptcy law in mind. We do not believe that the filing of a voluntary petition in bankruptcy can reasonably be held to be an incumbering of property. The voluntary petition of a person or corporation to be adjudged a bankrupt results, of course, in an adjudication in bankruptcy; but this adjudication in and of itself, without any assignment, transfer, or other act of the bankrupt, operates to divest him of all title and to vest it in the trustee of his creditors. *Remington on Bankruptcy*, § 1112; *Robertson v. Howard*, 229 U. S. 254, 33 Sup. 854, 57 L. ed. 1174.

"The words 'incumber' and 'incumbering' in the statute, as this court said, must be construed in accordance with their popular sense, a sense that would be attributed to them by conveyancers, lawyers, and judges, the persons most conversant with them. Given their popular meaning, these words do not apply to an instrument or proceeding which has the effect to convey the whole estate absolutely. Such a conveyance is not an incumbrance."

Beneficiary under will of person living.—The fact that a person files a petition in

bankruptcy in order to prevent his creditors from satisfying their debts out of a legacy which he expects to receive is held to be no reason for denying him the right to avail himself of the benefits of this act. *Elberton Bank v. Swift* (C. C. A. 5th Cir. 1920) 268 Fed. 305. In this case a petition by a creditor to set aside an adjudication of bankruptcy alleged that a note which the creditor held was dated April 16, 1917, and due December 1, 1917; that at the time the bankrupt filed his petition his mother was 98 years old and at the point of death, and that she actually died shortly thereafter; that the bankrupt knew at the time of filing his petition in bankruptcy that by his mother's will he would be left a legacy of about \$20,000; that he knew the will could never be changed, because, after his mother had made it, a guardian of her property had been appointed by the ordinary's court, on the ground of her imbecility from old age; that the bankrupt's debts, other than to the bank, were insignificant; and that according to his schedule of assets the only property he had was a watch and wearing apparel worth less than \$100.

Vol. I, p. 990, sec. 59b. [First ed., 1912 Supp., p. 718.]

- I. Who may file petition in involuntary bankruptcy.
- II. Form, averments and amendments of petition.

I. WHO MAY FILE PETITION IN INVOLUNTARY BANKRUPTCY (p. 990)

Creditors having provable claims.—It has been held that a seller of rings was not a creditor under this section where he sold rings under an agreement to repair any that were broken and rings which were sent back to him for repair were never repaired or returned, notwithstanding repeated requests, and the buyer was obliged to purchase others to replace them in excess of the agreed price of those returned for repair, and the purchaser had paid a sum to the seller in excess of the value of the rings retained. *Cutler v. Nu-Gold Ring Co.* (C. C. A. 8th Cir. 1920) 264 Fed. 836.

Attachment creditor.—A creditor, who in good faith obtains an attachment against a debtor's property within four months of the filing of a petition in bankruptcy, may join in the petition to have the debtor adjudicated an involuntary bankrupt; and this, although the attachment has not been formally released. *In re Automatic Typewriter, etc., Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 1, wherein the court said:

"If an adjudication be had here, the effect would be a dissolution of the attachment obtained, and therefore there would be no preference to the petitioning creditor. It is thus obvious that the fact that an attachment was obtained here, and was not formally va-

cated by an order of the court at the time of the filing of the petition, did not give a preference, and did not incapacitate the petitioner from filing the petition. The advantage, if any were gained by the writ of attachment, cannot avail the petitioner in the bankruptcy court, and it therefore cannot defeat the right of a creditor having a provable claim of the requisite nature and amount to file a petition in involuntary bankruptcy.

"We find nothing in the Bankruptcy Act itself which forbids a creditor filing a petition under similar circumstances. While the attachment obtained by the respondent remains unvacated of record, this respondent could not secure any advantage by that fact. When the order is entered vacating the attachment, it will be effective as of the date of decision of the court below vacating the same. This was a date before the bankruptcy. Furthermore, the preferred creditor who files a claim may surrender his preference at any time before the claim is allowed. This he need not do before the filing of the claim. We think the court below committed no error in refusing to dismiss the petition in bankruptcy because of this."

Three provable claims jurisdictional.—"The law is now settled beyond dispute that the existence of three provable claims held by three petitioners, respectively, of the alleged bankrupt and, if challenged by pleading, plenary proof thereof is jurisdictional and indispensable to the maintenance of an involuntary petition in bankruptcy." *Cutler v. Nu-Gold Ring Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 836.

Secured creditors.—This section refers to the actual value of securities held by creditor. Hence, an involuntary petition which alleges that two of the petitioning creditors hold security in the form of maritime liens on vessels of the bankrupt, which are valueless because the vessels have left the court's jurisdiction, is sufficient on demurrer as to the qualifications of such petitioning creditors under this section. *In re Triangle Steamship Co.*, (S. D. N. Y. 1920) 267 Fed. 300.

II. FORM, AVERMENTS, AND AMENDMENTS OF PETITION (p. 994)

Averment of commission of act of bankruptcy—*Sufficiency of averment*.—A petition which states that the alleged bankrupt, with intent to prefer, paid \$500,000 on "indebtedness" to a certain named creditor and on other indebtedness to other creditors at some time after a specified date, is not sufficiently specific. *In re Triangle Steamship Co.*, (S. D. N. Y. 1920) 267 Fed. 300, wherein it was said:

"The second objection is more serious. *In re Rosenblatt*, 193 Fed. 638, 113 C. C. A. 506, turned upon a petition which simply copied the language of the statute without

specification of any sort whatever. This petition states that the alleged bankrupt, with intent to prefer, paid \$500,000 upon 'indebtedness' to the Foreign Trade Banking Corporation, a creditor, and upon other indebtedness to other creditors. Probably the allegation that part of the sum was paid to 'other creditors' is invalid under the cases, and, if so, it must be accepted that the amount of the payment to the Foreign Trade Banking Corporation is left uncertain. The allegation amounts to this: That the alleged bankrupt, at some time after August 10, 1919, with intent to prefer, paid some part of the sum of \$500,000 to the Foreign Trade Banking Corporation upon its existing indebtedness. As matter of first impression I own that I should have thought this enough. The omissions are only of the exact dates and the exact amounts of the payments made and that I should think could be supplied by a bill of particulars and full justice be done. The allegations as to 'other creditors' might be treated as surplusage. However, I cannot distinguish the case at bar from *In re Mason-Seaman Transportation Co.*, (D. C.) 235 Fed. 974, decided by Judge Manton while District Judge, where the allegations were certainly as specific as those here, or from *In re Blumberg*, (D. C.) 133 Fed. 845, which was an almost exactly similar case. *In re Hallin*, (D. C.) 199 Fed. 807, may be distinguished, as well as *In re Pure Milk Co.*, (D. C.) 154 Fed. 682, and *In re Nelson* (D. C.) 98 Fed. 76. These are like *In re Rosenblatt*, *supra*, and do not in my judgment control. It seems to me a harsh rule that requires petitioning creditors, who in the nature of things cannot usually be well informed of the alleged bankrupt's dealings, to specify with exactness the amounts and the times of any preferential payments they allege, and it is especially harsh if it results in preventing any amendment, as was held in *In re Pure Milk Co.*, *supra*. Through a trifling omission in pleading, which perhaps the pleader had no information to supply, a creditor like the demurrant may be enabled to prevent any inquiry into the good faith of the payment to him.

"However, in the face of *In re Pure Milk Co.*, *supra*, it is at least an open question whether, if an amendment is necessary which shall specify more particularly the acts of bankruptcy, it would not be regarded as setting up new acts of bankruptcy, and if it were so regarded, then it is settled that the period of four months dates from the amendment. If this be the rule in cases of inadequate specification, then if I overrule this demurrer, and my decision is wrong, it will be too late for the petitioning creditors to allege preferences occurring between, say, November 20th and December 11th, when the petition was filed. There may be such, and if I sustain the demurrer the petitioning

creditors may still avail themselves of those preferences.

"Moreover if I am wrong in sustaining the demurrer no harm has been done, because, if there are preferences between November 20th and December 11th, they can now be pleaded. If on the other hand, there are no such preferences, the petitioning creditors may refuse to amend, and may test this order on appeal; or, if they wish, they may amend and show only preferences more than four months before the amendment. Thereupon the question may be raised on demurrer of the validity of the new petition, and on that appeal may be raised the correctness of my order sustaining this demurrer because the amendment cannot be heard without the original petition.

"Under such circumstances I think I ought to follow *In re Mason-Seaman Transportation Co.*, *supra*, and *In re Blumberg*, *supra*, especially as it is not our general custom, except in clear cases, to disregard an earlier decision in the Southern district."

Allegation as to giving preference—*In general*.—It is a rule that the allegation of the commission of an act of bankruptcy should state the specific facts relied on, with time, place and circumstances, so that the alleged bankrupt may be apprised of what he is required to answer, and that, when the act was an alleged preferential payment, the allegation must show that thereby one creditor was enabled "to obtain a greater percentage of his debt than any other of such creditors of the same class." *In re Standard Aero Corp.*, (C. C. A. 3d Cir. 1921) 270 Fed. 779.

Sufficiency.—An allegation of an act of bankruptcy by the making of a preferred payment may be sufficient although the facts stated are meager. *In re Standard Aero Corp.*, (C. C. A. 3d Cir. 1921) 270 Fed. 779, wherein the court declared: "That the petitioner's allegation of the act of bankruptcy stated the circumstances with sufficient particularity to apprise the corporation of what it was called upon to meet, as later proved by the event, and showed that, because of the preference, the petitioner will suffer in the payment of his claim—if his claim is provable in bankruptcy."

Amendment of petition—Effect on four months' period.—To the same effect as the original annotation, see *In re Triangle S. S. Co.*, (S. D. N. Y. 1920) 267 Fed. 303; *In re Triangle S. S. Co.*, (S. D. N. Y. 1920) 267 Fed. 300.

Vol. I, p. 1001, sec. 59f. [First ed., 1912 Supp., p. 727.]

Opposing petition.—Debtors are not entitled to oppose an involuntary petition. *In re Tidewater Coal Exch.*, (S. D. N. Y. 1921) 274 Fed. 1008.

Intervention as discretionary with bankruptcy court—Review on petition to revise.

—The question as to whether a creditor shall be allowed to intervene in a bankruptcy proceeding is not the subject of trial upon the merits but is a matter determinable upon the face of the petition for leave to intervene and is within the discretion of the bankruptcy court. Hence, a petition to revise an order of the bankruptcy court dismissing the petition, in intervention of a creditor, shall be denied where it appears that the court was guilty of no abuse of discretion. *Fitts v. Custer Slide Min., etc., Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 864.

Vol. I, p. 1003, sec. 59g. [First ed., 1912 Supp., p. 729.]

A petition in voluntary bankruptcy.—To the same effect as the original annotation, see *Blackstock v. Blackstock*, (C. C. A. 8th Cir. 1920) 265 Fed. 249.

Vol. I, p. 1004, sec. 60a. [First ed., 1912 Supp., p. 729.]

- I. Creation of preferences.
- II. Constituent elements.

I. CREATION OF PREFERENCES (p. 1005)

Preference created by transfer.—To the same effect as the original annotation, see *In re Dix*, (N. D. N. Y. 1920) 267 Fed. 1016; *In re Puget Sound Engineering Co.*, (W. D. Wash. 1920) 270 Fed. 353; *Gray v. Tantleff*, (E. D. N. Y. 1921) 273 Fed. 524.

The transfer of corporate property, in payment of an antecedent debt, within four months of bankruptcy may be avoided by the trustee where the transferee had reasonable ground to believe that the transfer constituted a preference. *Bronaugh v. Evans*, (1920) 204 Ala. 153, 85 So. 556.

Applicability of state statute.—A statute which does not contemplate the avoidance of a preferential transfer, but an affirmation of it, so as to make it inure to all creditors alike, is inapplicable on the bankruptcy of the debtor since under the Bankruptcy Act the trustee is only empowered to avoid transfers as for fraud or as preferences. *In re Grocers' Baking Co.*, (N. D. Ala. 1920) 266 Fed. 900.

Conditional sale—Bankrupt's own property transferred.—To the same effect as the original annotation, see *In re Bennett*, (W. D. Mo. 1920) 264 Fed. 533, holding that the surrender of the goods sought to be reclaimed would not effect an unlawful preference.

Preference created by payment—Retention of money by joint adventurer.—Where a person engaged in a joint adventure with a bankrupt retains money accruing from a sale of property in which they are jointly interested, such retention does not constitute a preferential payment. *Nestor v. Joseph*, (C. C. A. 7th Cir. 1920) 265 Fed. 246.

Payments made on open accounts and in due course of business.—Payments on a run-

ning account, where new sales succeed payments, and the net result is to increase the value of the estate, do not constitute preferential transfers under this section. *In re Grocers' Baking Co.*, (N. D. Ala. 1920) 266 Fed. 900.

Payments by receiver in proceedings in state court.—Where one of the members of a partnership brought suit in the state court for the dissolution of the partnership on the ground that it was in such financial straits as not to be able to continue in business and a receiver was thereupon appointed the court said on the question of the payment of a dividend in such proceedings being a preference:

"It appears that the bankrupts, R. M. Smith & Co., (1) while insolvent, (2) within four months prior to the adjudication in bankruptcy, (3) in a suit in the state court which they instituted and controlled, (4) procured payment to the other creditors of a dividend of 12½ per cent. out of the partnership assets then in the hands of the receiver, and (5) that the necessary result or such payment was to give to them a percentage of their respective claims which appellant has not received on the claim subsequently established by him. Thus all the elements of a voidable preference are present, and the transaction must be regarded as of that character. The facts are somewhat novel, it is true; but the question presented seems to us not doubtful, either as a matter of first impressions or as viewed in the light of decisions in analogous cases . . .

"On the facts of record, which carry their own comment, it must be held that appellant is entitled to be placed on an equality with creditors who received the 12½ per cent.; and it is therefore the duty of the bankruptcy court, as a court of equity, to direct such payment to him from the funds now held by the trustee, and which are understood to be ample for that purpose, as will equalize the 12½ per cent. paid to them, the remainder to be divided *pro rata* among all the creditors. It appears, however, that those who received the 12½ per cent. credited it on their respective claims, and proved in bankruptcy, if they proved at all, only for the balance. It results that the payments afterwards made to them by the trustee were not 15 per cent. of their original claims, but of only seven-eighths thereof, whereas appellant has had 15 per cent. of the full amount allowed him, and this should be taken into account in equalizing the further dividends. In other words, the funds in hand should be so distributed as to give to the creditors who got the 12½ per cent., and proved the balance in bankruptcy, the same aggregate percentage of their original claims as appellant gets in the aggregate on his claim." *Farnsworth v. Union Trust, etc., Co.*, (C. C. A. 4th Cir. 1921) 272 Fed. 92.

Attorney's fees.—Where an attorney retains as a fee a portion of a fund which he has recovered for the bankrupt, such fee may not be recovered by the bankrupt's trustee as a preference. *Van Slyke v. Huntington*, (C. C. A. 8th Cir. 1920) 265 Fed. 86.

Banking transactions—Preferential payment to bank.—To the same effect as the original annotation, see *In re Cross*, (N. D. N. Y. 1920) 265 Fed. 769.

Where in an action by the trustee of a bankrupt against a bank it appeared that the defendant complained to the bankrupt of the practice of depositing checks and drawing against them before they were collected, thus practically compelling the defendant to use its cash reserves to make its payments to the clearing house, thereby requiring it to keep a larger reserve, and subjecting it to annoyance, trouble, and risk, and the bankrupt thereupon agreed to compensate the defendant by paying it sums of money based upon the advances made and the time during which it was out the use of the moneys advanced, it was held that the payments so made were not preferences. *Snipes v. Mutual Trust Co.*, (E. D. Pa. 1921) 270 Fed. 318.

The part payment of a note before maturity and within four months prior to the filing of a petition in bankruptcy against the maker, does not constitute a preference where it appears that the bank had no knowledge of his affairs nor of any facts giving it reasonable cause to believe that the payment would effect a preference. *Cregg v. Puritan Trust Co.*, (Mass. 1921) 129 N. E. 428. The court said:

"The note upon which a partial payment was made by the bankrupt had been running from November 26, 1910. It was originally for \$10,000, and had been renewed every six months, the last renewal being on November 29, 1915. The debt of the original note reduced by successive payments was \$6,500 on November 29, 1915, and the renewal note of that date called for the payment of that sum. April 16, 1916, the bankrupt made the payment in question at the note window of the defendant bank. He made no explanation to the defendant whatever of the payment on account before the maturity of the note, did not know whom he saw at the window, and did not make any statement when the rest of the note would be paid.

"The bankrupt lived and carried on business in Lawrence while the defendant bank was located and carried on its business in Boston. There was evidence that a fire had occurred in the bankrupt's place of business on February 28, 1916; that on April 11, 1916, he was behind in his bills, was receiving demands from creditors for payments which were not made; that drafts of considerable size had been made on him through his bank, the Merchants' Trust Company at Lawrence, Mass.; that they were unpaid; that his ac-

count at the Merchants' Trust Company had been transferred to the name of his father as his agent; that his assets before the payment on the note to the defendant on April 11, 1916, were worth in stock and trade \$750 and \$5,000 in cash; and that his liabilities were \$11,000. There was no evidence that the defendant had knowledge of the fire, of the assets and liabilities of the bankrupt or of any of the foregoing facts other than attendant upon the receipt of the payment. It also was in evidence that the payment to the defendant was made with a check signed by the agent of the bankrupt drawn on the Merchants' Trust Company.

"The fact that the note was partially paid before it was due, the fact that the payment on account was larger than the sum of all other previous partial payments, and the fact that the payment was made with a check of an agent, taken together might reasonably have aroused suspicion of the motive which influenced the bankrupt to make the payment, but in the opinion of the court falls short of their probative weight in evidence which would warrant a finding that the defendant had reasonable cause to believe the bankrupt was insolvent when the payment on the note was made."

II. CONSTITUENT ELEMENTS (p. 1014)

Preference must be given to creditor.—To the same effect as the original annotation, see *Benjamin v. Buell*, (C. C. A. 7th Cir. 1920) 268 Fed. 792.

Greater percentage.—To the same effect as the original annotation, see *In re Star Spring Bed Co.*, (C. C. A. 3d Cir. 1920) 265 Fed. 133, holding an assignment of accounts which had such effect to be preferential.

Necessity of diminishing estate.—To the same effect as the original annotation, see *In re Star Spring Bed Co.*, (C. C. A. 3d Cir. 1920) 265 Fed. 133; *In re Grocers' Baking Co.*, (N. D. Ala. 1920) 266 Fed. 900.

Transfer for present consideration.—If a note or money is turned over as a present consideration for goods then purchased and delivered, or if future credit is secured by reason of that payment, there would be no unlawful preference, unless good faith was lacking on the part of the creditor, even though he had reason to know that the bankrupt was in perilous financial condition. *Gray v. Tantleff*, (E. D. N. Y. 1921) 273 Fed. 524.

Where a bankrupt paid for stocks and bonds delivered to him a few hours before the filing of his petition it was in fact a cash transaction in return for an adequate consideration, and did not constitute a preference within the meaning of this section. *In re Perpall*, (C. C. A. 2d Cir. 1921) 271 Fed. 466, wherein it was said:

"The Bankruptcy Act does not provide that any and all transfers made by the bankrupt subsequent to the filing of the petition

and prior to the adjudication are absolutely void. The act provides that transfers may be voided by the trustee if they constitute a preference, and a preference is described by the act. It is only preferential transfers which are voidable. Preference implies paying or securing a pre-existing debt of a person preferred. *Dean v. Davis*, 242 U. S. 438, 37 S. Ct. 130, 61 L. ed. 419. Where one gives an insolvent person value for a transfer of property, where he makes an exchange of property, there is no preference. *Ernst v. Bank*, 201 Fed. 664, 120 C. C. A. 92.

"Payment by the bankrupt on the day of the filing of the petition was, in effect, a cash transaction, and was in return for an adequate consideration received by the bankrupt at the time. The delivery of the stock and the receipt of the check on the same day should be regarded as one transaction. The fact that a few hours transpired, and they could not be said to be literally contemporaneously made, was because of the nature of the business transacted and the practice that prevailed as the custom of this business."

Vol. I, p. 1026, sec. 60b. [First ed., 1912 Supp., p. 739.]

I. Elements of voidability.

II. Recovery of voidable preferences.

I. ELEMENTS OF VOIDABILITY (p. 1026)

Reasonable cause to believe transaction would effect preference.—Where the transaction is an ordinary one, under the circumstances as they appear and without the attendance of features that excite suspicion it has been held that a trustee cannot recover a payment as a preferential one under this section, the creditor not having reasonable cause to believe that the payment would effect a preference. *Lake Benton First Nat. Bank v. Galbraith*, (C. C. A. 8th Cir. 1921) 271 Fed. 687.

Where a creditor who knows the debtor to be for the moment insolvent in the sense of the statute, yet honestly supposes that some of his assets, worthless for the moment, will, if he be allowed to continue, realize enough to pay his debts in full, takes security from the debtor, such act does not effect a preference within the meaning of this section. *Kennard v. Behrer*, (S. D. N. Y. 1920) 270 Fed. 661.

As including debtor's insolvency.—To the same effect as the original annotation, see *Wrenn v. Citizens' Nat. Bank*, (Conn. 1921) 114 Atl. 120.

Effect of master's report.—As to the effect of a master's report on knowledge or reasonable cause to believe it is said that although a "master's report under an ordinary reference has not the binding force of a jury's verdict, is simply advisory to the chancellor, and is only presumptively correct, yet when the chancellor after a full hearing on ex-

ceptions has confirmed the report, and on appeal we are asked to base error on the chancellor's refusal to accept appellant's testimony on a matter of fact as against testimony of appellee's witnesses to the contrary, we find appellant in no better position than if he were assailing a jury's verdict. Neither the chancellor nor ourselves saw the witnesses; the master did; and the master's report involved a finding on credibility of witnesses personally appearing before him and nowhere else." *In re Fred D. Jones Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 818.

Reason to suspect insufficient.—"When the present Bankruptcy Law was enacted, the phrase 'reasonable cause to believe,' in this very connection, had been judicially defined to mean, not mere suspicion, but 'such knowledge of the facts as to induce a reasonable belief,' 'cause for well-grounded belief.' That definition follows the phrase into this act; and it has been so construed and applied." *City Nat. Bank v. Slocum*, (C. C. A. 6th Cir. 1921) 272 Fed. 11.

The statute requires belief that a preference will result and it is not sufficient to create a preference that the circumstances in connection with the taking of security only show that the creditor had cause to believe that a preference might result. It is said that the difference is only one of degree but that the statute establishes it nevertheless. *Sumner v. Parr*, (S. D. N. Y. 1919) 270 Fed. 675. The court said:

"There were no immediate suspicious circumstances. Nothing had just happened which should have caused him to suppose that the bankrupt was any nearer insolvency than she had been for some time past. Finding his debtor unable to make ready payments, and knowing that she had substantial property, he became suspicious, and dissatisfied with the delays, and took security. If this charges him with knowledge that the security will create a preference, then so is every creditor who takes security because he has become doubtful and suspicious of the eventual insolvency of his debtor."

"It is obvious, therefore, that, as a foundation for reasonable cause to believe that the transfer will effect a preference, the creditor at the time of the payment must have notice or knowledge of the debtor's insolvency." *People's Bank v. McAleer*, (1920) 204 Ala. 101, 85 So. 413.

Positive knowledge unnecessary.—To the same effect as the original annotation, see *In re Star Spring Bed Co.*, (C. C. A. 3d Cir. 1920) 265 Fed. 133.

Subsequent knowledge of the creditor is not material. *Wrenn v. Citizens' Nat. Bank*, (Conn. 1921) 114 Atl. 120.

Instances of reasonable cause to believe.—In *Benjamin v. Buell*, (C. C. A. 7th Cir. 1920) 268 Fed. 792, the court said:

"Whether appellant knew, or had cause to believe, that the bankrupt was then in-

solvent, and that the payment would constitute a preference, is dependent upon conflicting evidence, and facts and circumstances which the evidence disclosed. From appellant's long course of dealings with the bankrupt, and his financial interest in him through being so long his creditor, coupled with his frequent presence at bankrupt's place of business, and conversations concerning his affairs, and opportunity for intimate knowledge of them, we cannot say that the chancellor, who heard and saw the witnesses, was not justified in the conclusion he must of necessity have reached, to support the decree, that at and before time of the payment appellant was aware of the bankrupt's insolvency, and of his very desperate financial straits, and of the large excess of liabilities over assets which the undisputed evidence seems to establish."

Instances of lack of reasonable cause of belief.—It was held in the following case decided subsequent to the amendment of 1910, that the facts in evidence were insufficient to show that the creditor had reasonable cause to believe that the transfer would effect a preference. *Wrenn v. Citizens' Nat. Bank*, (Conn. 1921) 114 Atl. 120; *Mantz v. Capital City State Bank*, (Ia. 1921) 181 N. W. 2.

"Required" recordation.—Recordation is to be deemed "required," within the meaning of this section, "when, through delay of it, a position superior to the challenged transfer has been gained during the period that the mortgage was unrecorded by some creditor whom the trustee represents, or whose place he is entitled to take." *Bradley v. Robie*, (C. C. A. 8th Cir. 1920) 266 Fed. 884.

II. RECOVERY OF VOIDABLE PREFERENCES (p. 1038)

Recovery of voidable preferences.—To the same effect as the original annotation, see *Lowell v. Ashton*, (D. C. Mass. 1921) 272 Fed. 536.

Mortgage given before but not recorded until within four months of filing of petition.—A trustee cannot assail an unrecorded mortgage as a preference as of the date of its recordation under this section, if he represents no lien on the property other than the lien mentioned in section 47a arising subsequently to the recordation. *Bradley v. Robie* (C. C. A. 8th Cir. 1920) 266 Fed. 884.

A bona fide purchaser for value may get a good title from a person in possession of title by a preferential transfer. *Gray v. Breslof*, (E. D. N. Y. 1921) 273 Fed. 526.

Recovery of proceeds of sale.—Where a person in possession of title by a preferential transfer sells the property to a bona fide purchaser the trustee may recover from the bankrupt and his preferential transferee the proceeds received from the sale. *Gray v. Breslof*, (E. D. N. Y. 1921) 273 Fed. 526.

Evidence.—*The burden of proof is on the trustee to show reasonable cause to believe that the transaction would effect a preference. This rule was not changed by the amendment of 1910 to the Bankruptcy Act though the fact to be proved was affected.* *City Nat. Bank v. Slocum*, (C. C. A. 6th Cir. 1921) 272 Fed. 11.

Vol. I, p. 1055, sec. 63a (1). [First ed., 1912 Supp., p. 753.]

Bondholders—where bonds held void.—Where a mortgage was executed to cover the claim of a creditor and the bonds secured by such mortgage were delivered to the creditor and accepted in full settlement and subsequently the mortgage was declared void as a preference by an insolvent corporation under the state law and was set aside and the bonds declared void, it was held that even if there had been an accord and satisfaction when the mortgage was executed and the bonds delivered the creditor was thrown back to his original rights when the mortgage and bonds were declared void. *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 828.

The interest due.—See to the same effect as the original annotation, *Ferguson v. Lyle*, (C. C. A. 5th Cir. 1920) 267 Fed. 817.

Fraud—*Bankrupt's fraud.*—Where fraud was practiced by the bankrupt in the transaction out of which a creditor's claim arises, if the creditor could have waived the fraud and sued the bankrupt in assumpsit it is said that he has a provable claim but otherwise not. *In re Schenderlein*, (D. C. Mass. 1920) 268 Fed. 1018.

Vol. I, p. 1064, sec. 63a (3). [First ed., 1912 Supp., p. 760.]

The words "before the filing" in this section do not mean the day before the filing but refer to the very instant of filing if ascertainable. *In re Ledbetter*, (N. D. Ga. 1920) 267 Fed. 893.

The court costs are expressly controlled by this section and section 63a (5), *infra*. *In re Ledbetter*, (N. D. Ga. 1920) 267 Fed. 893.

Costs in general.—Where a debt sued on was a provable debt, costs which were incurred in good faith before the filing of the petition in bankruptcy are a provable debt against the bankrupt's estate. But if, after the filing of the petition in bankruptcy, the creditor elects to pursue to judgment his remedy in the state court, instead of relying on that afforded by the bankrupt court, costs subsequently arising are not provable and will be disallowed. *In re Ledbetter*, (N. D. Ga. 1920) 267 Fed. 893.

Attorney's fees incurred in good faith in a suit on a provable debt before the filing of the petition are said to stand on a similar footing to costs. Of such a claim it has been said:

"It thus has many of the incidents of an item of costs, and it is not improbable that Congress intended attorney's fees so circumstanced to be dealt with as taxable costs for bankruptcy purposes, as well as those the amount of which is fixed by law as an item of costs." *In re Ledbetter*, (N. D. Ga. 1920) 267 Fed. 893.

Vol. I, p. 1065, sec. 63a (4). [First ed., 1912 Supp., p. 760.]

Contracts and open accounts—*Money advanced for purchase of stock exchange seat.*—Where a father advanced money to his son, who was a member of a firm of stockbrokers, to purchase a seat on the stock exchange and executed and delivered to the son a release of all claims and demands by reason of the advance made, as required by the rules of the exchange, it was held, on the adjudication of the firm as a bankrupt, that the father was precluded by such release from asserting a claim for such advance as against the creditors of the firm, and the fact that interest was paid to the father on the advance thus made was held to be immaterial. *In re Atwater*, (C. C. A. 2d Cir. 1920) 266 Fed. 278.

Renting contracts.—*An action for waste based on the covenants of a lease arises from a contract of demise and the claim being contractual in its nature, the Bankruptcy Act takes cognizance of it and it may be proved and used as the basis of a petition in bankruptcy.* *In re Standard Aero Corp.*, (C. C. A. 3d Cir. 1921) 270 Fed. 779.

Breach of contract.—To the same effect as the original contract, see *Heyward v. Goldsmith*, (C. C. A. 3d Cir. 1921) 269 Fed. 946.

Breach occasioned by bankruptcy.—To the same effect as the original annotation, see *Heyward v. Goldsmith*, (C. C. A. 3d Cir. 1921) 269 Fed. 946.

Claims arising out of street cleaning contract.—Where the bankrupts, who were under contract to dispose of the ashes and refuse collected by the street cleaning department of New York city, had chartered several scows, which were loaded at the time of bankruptcy, and the city notified the bankrupts that it had taken possession of the scows and final disposition of the ashes and refuse, and ordered the owners of the scows to discharge the loads on the scows at some other place than at the plants of the bankrupts, it was held that the city having ordered delivery of its property on the scows at a new and different destination must pay for the expense of doing so, which cost it could not recover from the bankrupts' estates. *Connett v. New York*, (C. C. A. 2d Cir. 1920) 270 Fed. 197.

Claim for embezzlement, larceny or conversion—*Implied contract.*—"It is an established rule in the national courts that if a bankrupt has become unjustly enriched by

his embezzlement, larceny, or conversion of the goods of another, the owner may, if he chooses to do so, waive any action of tort that he might have against the bankrupt for such acts, and prove a claim against the bankrupt's estate for the value of the goods, because the law implies a contractual obligation by the bankrupt to pay the owner therefor. . . . But it is also established that a claim for unliquidated damages is not a provable debt, when it arises out of a pure tort, and when there is no breach of an express contract, nor such enrichment of the wrongdoer as may form a basis for an implied contract." *Stalick v. Slack*, (C. C. A. 8th Cir. 1920) 269 Fed. 123.

Vol. I, p. 1073, sec. 63a (5). [First ed., 1912 Supp., p. 764.]

The court costs are expressly controlled by this section and section 63a (3), *supra*. *In re Ledbetter*, (N. D. Ga. 1920) 267 Fed. 893.

Vol. I, p. 1076, sec. 64a. [First ed., 1912 Supp., p. 766.]

Power of court to determine amount or legality of tax.—In *In re General Film Corp.*, (C. C. A. 2d Cir. 1921) 274 Fed. 903, the court said:

"We regard this section as binding upon the government because it is named therein and, while conferring priority, as giving the bankruptcy court the power to hear and determine any question that arises as to the amount or legality of a tax assessed by it. The provision applies to taxes of all the persons mentioned, and we could not differentiate the government from the other persons in the absence of language justifying it." It was also held that R. S. sec. 3226 could under no circumstances apply to the case under consideration because the trustee was not seeking to maintain a suit for the recovery of internal revenue taxes illegally assessed.

Where it is claimed that the bankrupt owes income taxes to the United States and proof of such claim is filed against his estate, the bankruptcy court has jurisdiction to ascertain the correct amount due thereon, rather than to order the trustee to pay the claim and remit him to the remedy of a suit against the United States to determine whether the payment should be refunded. *In re W. P. Williams Oil Corp.*, (W. D. Ky. 1920) 265 Fed. 401, wherein the court said:

"It was the intention of the Bankruptcy Act that estates should be promptly wound up. To require the sort of procedure suggested here would make it impossible to say when there could be a winding up of a bankruptcy proceeding and a distribution of the assets. The trustee, in paying out the bank-

rupt's estate, must always act under the order of the referee or the court, and without such order could not pay the taxes now involved out of the bankrupt's assets. The contention on behalf of the government would require, first, an order of that character; second, a payment in full of the taxes claimed out of those assets; third, an application to the Commissioner of Internal Revenue under section 1316a of the Revenue Act, approved February 24, 1919, for the refunding of the amount so paid; fourth, a delay almost certainly of six months for the Commissioner to act on the application; and, fifth, a suit at law for the recovery of the amount, if the refunding is refused—all while the bankruptcy proceeding stood practically still.

"In this case, if the United States has any priority, it can easily be ascertained in this proceeding, and it was never intended, in a case like this, that there should be any such delay as that indicated. This is demonstrated by the express provision of section 64a of the Bankruptcy Act, which reads as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

"As is obvious, this statute embraces taxes due the United States, as well as those due states and municipalities, and it is expressly provided that all questions raised upon such claims shall be determined in the bankruptcy court. This situation would seem to leave no doubt about what course should be pursued at this stage. As we have said, many authorities were cited; but they seem to us to have no bearing on the real questions involved here, with one exception, namely, the case of *In re Fisher*, (D. C.) 229 Fed. 313, cited for the trustee. . . . It seems

to the court to be entirely obvious that it was the purpose of section 64a to have such matters as are therein referred to settled promptly in the bankruptcy proceeding itself. Here the claim of the United States was filed voluntarily and properly. Its appearance was thereby entered in the bankruptcy case. Its claim was allowed, but the trustee, as he had a perfect right to do, has asked for its re-examination, so that the justness of the claim of the United States may be examined into under the provisions of the section. The referee concluded that the bankruptcy court had no jurisdiction to do this. We think this conclusion of the referee was erroneous, and the order sought to be reviewed will therefore be reversed, with directions to re-examine the claim on behalf

of the United States, and ascertain the correct amount due thereon."

Internal revenue regulations as nullifying section.—This section is not nullified by any regulations regarding the collection of taxes made by the Commissioner of Internal Revenue. *In re W. P. Williams Oil Corp.*, (W. D. Ky. 1920) 265 Fed. 401. The court said:

"Insistence is made in behalf of the United States that certain regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, should nullify the provisions of section 64a of the Bankruptcy Act. It is altogether true that the Revenue Act does, and properly does, authorize generally the making of regulations by the Commissioner; but the Commissioner is not given authority by a regulation to nullify or in any way to interfere with statutory provisions respecting other matters, such as section 64a. Any construction that would give the Commissioner's regulations any broader significance or force than is authorized by the Revenue Act would be inadmissible."

Vol. I, p. 1083, sec. 64b (2). [First ed., 1912 Supp., p. 771.]

A creditor who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses out of the fund. Where the money has been paid to the attorney of the party who recovered it he has a lien on it for his fees and the payment to the estate of the balance is all that can lawfully be demanded of him. *In re Kenny*, (W. D. Pa. 1920) 269 Fed. 54.

Vol. I, p. 1083, sec. 64b (3). [First ed., 1912 Supp., p. 772.]

Services rendered to bankrupt—In involuntary cases.—Where there is nothing to show but what the employment was necessary, nor is there anything to show but what the services were rendered in good faith and for the real purpose of administering the act as to accomplish its purposes; if it be urged, or claimed even, that the employment was to protect the bankrupt from imputations of wrong, such service, if made in good faith, is necessary, and for it reasonable compensation should be allowed. *In re Weissman*, (D. C. Conn. 1920) 267 Fed. 588.

Allowance confined to one fee.—It is said to be clear that the phrase "one reasonable attorney's fees," "does not mean that only one attorney may be paid out of the funds of the estate, but it is very clear that the allowance to be made to the attorneys for the bankrupt, just as to the attorneys for the petitioning creditors, shall be paid and can be only one fee." *In re Weissman*, (D. C. Conn. 1920) 267 Fed. 588.

Discretion as to attorney's fees.—The amount to be allowed to attorneys for the creditors is not wholly a matter of discretion but must be reasonably determined on

evidence of the services performed and of the value of such services. *In re Weissman*, (D. C. Conn. 1920) 267 Fed. 588.

Vol. I, p. 1090, sec. 64b. Fourth.
[First ed., 1912 Supp., p. 774.]

Who may claim wages—General manager of business.—A manager of a store has been held not to be included in the term "workmen, clerks, traveling or city salesmen, or servants." *In re Bonk*, (E. D. Mich. 1920) 270 Fed. 657. The court said:

"From the testimony on the hearing before the referee, transcript of which, returned by the referee with his opinion, has been carefully examined by this court, it appeared that the claimant, pursuant to his contract with the bankrupt just quoted, took charge of the drug store and managed it for the bankrupt, purchasing the merchandise for the store and paying the rent and the other expenses in connection with the operation of such store, including the salary of a pharmacist, who was employed there while claimant was in charge, and who, in addition to his other duties, had charge of the cash register and kept all of the records showing the receipts and expenditures of the business. It does not appear that claimant rendered services in any other capacity than as manager of the store, operating the same for the owner, but exercising his own discretion in the performance of his duties. His claim for wages is based, not on a quantum meruit for work and labor performed, but on the contract under which he had agreed 'to manage and operate' the store on the terms and conditions specified in the contract. Under such circumstances, it is clear that the claimant is not included in the class of 'workmen, clerks, traveling or city salesmen, or servants' within the meaning of section 64b, subd. 4, of the Bankruptcy Act; the language there used not being intended to apply to the manager of a business."

Vol. I, p. 1100, sec. 64b (5). [First ed., 1912 Supp., p. 777.]

Priority of creditors contributing to expense of litigation by trustee.—Creditors contributing to and guaranteeing the expenses of a trustee in bringing and conducting a suit to recover money belonging to the bankrupt's estate are not entitled to have the amount recovered treated as a special fund and devoted first to the payment of their claims. *In re Butcher*, (D. C. Mass. 1920) 266 Fed. 239, wherein it was said: "The present proceedings raise no question as to the allowance of expenses of litigation from the amount recovered; it being taken for granted, apparently, by all parties concerned, that they are allowable. The prayer of the petition is that the amount recov-

ered 'should be treated as a special fund and should be first devoted to the payment of the claims of those creditors who contributed to and guaranteed the expense of the trustee in bringing and carrying forward said litigation . . . in proportion to the amount of their contribution thereto.'

"The amount recovered is now part of the estate in bankruptcy, the distribution of which is governed by the Bankruptcy Act. As said in *In re Morris*, 204 Fed. 770, 123 C. C. A. 220, the act contemplates equality of treatment among creditors of the same class. It is at least doubtful whether the court has power to make a different distribution of assets from that provided in the act. To award preferences among creditors for supposedly meritorious or helpful service by them in the administration of the estate would introduce a wide, and I think unwise, element of discretion. It certainly ought not to be done unless the effect of a refusal to contribute to the fund required for litigation by the estate was squarely put to creditors at the time when they were asked to contribute, as it was in *Cornell v. Nichols*, 201 Fed. 320, 119 C. C. A. 558."

A debt due United States Shipping Board Emergency Fleet Corporation is not in law a debt due to the United States. *In re Eastern Shore Shipbuilding Corp.*, (C. C. A. 2d Cir. 1921) 274 Fed. 893, so holding but not deciding that the United States under the Bankruptcy Act is entitled to prior payment of ordinary debts due to it as against the general creditors of the bankrupt.

Unpaid freight charges.—A claim for unpaid freight charges due from a bankrupt to a railroad while it was operated under federal control was held to be a debt due the United States and entitled to priority. *In re E. J. Hibner Oil Co.*, (C. C. A. 7th Cir. 1920) 264 Fed. 687, 14 A. L. R. 629.

Vol. I, p. 1109, sec. 66a. [First ed., 1912 Supp., p. 783.]

Constitutionality.—This section is not unconstitutional on the ground that the moneys deposited in court which remain unclaimed for a certain period are, under the provisions of the Revised Statutes, paid over to the United States, and that such funds really belong to the state as property which has escheated. *In re Orona Mfg. Co.*, (D. C. Mass. 1921) 260 Fed. 855. The court said:

"The dividends in question are not being dealt with in a final way. The referee has merely ordered that they be paid into court, where they can still be claimed by the creditors entitled to them, and, if not claimed, will, according to the usual practice, be eventually divided among other creditors of the estate, unless too small in amount to justify the expense and trouble of so doing. This method of disposing of such funds

seems to me reasonable, and to be unobjectionable on constitutional grounds. It serves a very useful purpose in enabling trustees to close out estates completely and finally, and concentrates unclaimed funds in the hands of the court, instead of scattering them among many trustees. The power to direct the disposition of small residues in bankruptcy cases is incident to the general power over bankruptcy conferred upon Congress by the Constitution. If the Commonwealth of Massachusetts desires to claim such funds, it should do so in its own name, and in connection with the proceeding to turn them over to the Treasurer of the United States."

Vol. I, p. 1109, sec. 67a. [First ed., 1912 Supp., p. 783.]

Conditional sale.—Although a conditional sale contract is void under the law of Louisiana, yet it is held that the seller under such a contract has a lien for the unpaid purchase price on the proceeds of the sale of the property as a part of the bankrupt's assets where it was separately sold, and the amount is certain and can be separated from the other assets. *In re Bentz*, (E. D. La. 1920) 267 Fed. 606.

Vol. I, p. 1115, sec. 67d. [First ed., 1912 Supp., p. 786.]

Existing rights preserved.—It was the purpose of Congress in enacting a national insolvency law to preserve, rather than destroy, any of the rights or advantages enjoyed by creditors under the laws of the states, save to the extent that they are repugnant to or inconsistent with the specific provision of the Bankruptcy Law, in view of Bankruptcy Act, 1898, § 67d. *Schenck v. Fontenot*, (1920) 147 La. 467, 85 So. 207.

Chattel mortgages.—The validity as original creditors of a chattel mortgage given by the bankrupt for a present consideration and in good faith prior to the filing of the petition or the adjudication in bankruptcy depends on the construction to be given by the statutes of the state at the date of the execution and registration of the mortgage. *In re Saunders*, (E. D. N. C. 1921) 272 Fed. 1003.

Equitable liens.—An equitable lien arising out of a contract will be protected. *Walton Land, etc., Co. v. Runyan*, (C. C. A. 5th Cir. 1920) 269 Fed. 128.

Vol. I, p. 1122, sec. 67e. [First ed., 1912 Supp., p. 787.]

A general assignment for the benefit of creditors.—To the same effect as the original annotation, see *In re Dutz*, (D. C. Ind. 1921) 272 Fed. 348.

Chattel mortgages.—Where by the state law immediate recordation of a chattel mortgage is essential to its validity as against creditors' delay in recording it may defeat the right of the mortgagee as against the trustee in bankruptcy. *In re Hansen*, (S. D. Cal. 1919) 268 Fed. 904.

A chattel mortgage given in good faith for a present consideration and valid under the laws of the state will be held valid against the trustee. *In re Mitchell Motor, etc., Co.*, (W. D. Wash. 1921) 274 Fed. 402.

Where, although a large amount of the bankrupt's property is included in a mortgage to one of its creditors, the transaction is in good faith, with a view of preserving the estate and enabling it to continue as a going concern and to meet its indebtedness, the mortgages are valid under this section. *In re Grocers' Baking Co.*, (N. D. Ala. 1920) 266 Fed. 900.

Designation of property previously pledged.—Where an order to secure a creditor was given to and accepted by a storage company to set aside fifty car loads of lumber but no designation of the cars was made at the time, it has been held that the fact that a designation was not made until more than two years after the date of the order, and also within less than one month before the filing of the petition in bankruptcy, would not render the pledge invalid as against the trustees, because, in a transaction untainted with fraud, and where the rights of third parties are not affected, such designation would relate back to the date of the order. *Atherton v. Beaman*, (C. C. A. 1st Cir. 1920) 264 Fed. 878.

Vol. I, p. 1130, sec. 67f. [First ed., 1912 Supp., p. 797.]

III. Judgment liens.

IV. Attachment and garnishment liens.

III. JUDGMENT LIENS (p. 1134)

Restraining sale.—Under this section it has been held that the court has power to enjoin a sale under an execution issued on a judgment rendered within the four months period. *Wagner v. Mt. Carmel Iron Works*, (C. C. A. 3d Cir. 1921) 270 Fed. 80.

IV. ATTACHMENT AND GARNISHMENT LIENS (p. 1136)

Construction.—The mere adjudication and appointment of a trustee do not of themselves operate to preserve an attachment: there must be affirmative action to effect that result. *In re Prentice*, (D. C. Mass. 1920) 267 Fed. 1019.

Attachment and garnishment liens.—To the same effect as the original annotation, see *In re Wirth*, (D. C. Mass. 1920) 266 Fed. 141, holding that an attachment of funds of the bankrupt made within four months prior to the filing of the petition

against him, should be preserved for the benefit of the bankrupt estate.

Lien obtained prior to four months period.—To the same effect as the original annotation, see *Griffin v. Lenhart*, (C. C. A. 4th Cir. 1920) 266 Fed. 671, wherein the court said:

"In brief, the case is this: Under attachment liens acquired in the state court on the land more than four months before the filing of the petition in bankruptcy, the state court, in equitable proceedings instituted by creditors to enforce the attachments more than four months before the filing of the petition, had adjudged the amounts due and was proceeding to enforce the attachment liens by sale of the land. The question is whether the court of bankruptcy should by the order appealed from take the control of the attached property from the state court.

"Doubtless it might have been held with strong reason that the court of bankruptcy upon adjudication drew to itself for the purpose of administration all the assets and liabilities of the bankrupt of every form, giving, however, full effect to all liens lawfully acquired more than four months before the filing of the petition. But the Supreme Court, considering the reasons stronger for a different view, laid down the general rule that, where a state court has obtained complete jurisdiction by proceedings, either legal or equitable, instituted by creditors for the enforcement of their demands, and under which they have acquired liens upon the property more than four months before the filing of the petition, the state courts should proceed with the enforcement of the liens and a final disposition of the property and of the cause without interference from the bankruptcy court. *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; *Pickens v. Dent*, 106 Fed. 653, 45 C. C. A. 522 (4th Circuit); *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. ed. 122; *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. ed. 128."

Discharge of bond given for release of property.—Where a statutory bond given for the release of attached property is construed by the decisions of a state as being a substitute for the property, the bankruptcy of the principal within four months after the attachment destroys the obligation of the bond and relieves a surety thereto from all liability under it. *Republic Rubber Co. v. Foster*, (1920) 95 Conn. 551, 111 Atl. 839.

Vol. I, p. 1141, sec. 68a. [First ed., 1912 Supp., p. 805.]

The word "debt."—To the same effect as the original annotation, see *Wrenn v. Citizens' Nat. Bank*, (Conn. 1921) 114 Atl. 120.

Claims not due at institution of proceedings.—"At any time before the commencement of bankruptcy proceedings mutual dealers may adjust their obligations and con-

sider the unmatured as well as the matured." *Wrenn v. Citizens' Nat. Bank*, (Conn. 1921) 114 Atl. 120.

Set-off between bank and depositor.—To the same effect as the original annotation, see *Wrenn v. Citizens' Nat. Bank*, (Conn. 1921) 114 Atl. 120, wherein it was held that whether notes were charged against the maker's deposit in the bank or paid by his checks drawn on that deposit, this was only "a book entry equivalent to the voluntary exercise by the parties of the right of set-off."

"The cases are in accord in holding that where a bank receives deposits in the regular course of business, which are subject to withdrawals by check, and there is no collusion or fraud, and where notes have been discounted by the depositor at the bank, it has the right, when notes are due, to set off the amount due to the bank on the notes against the amount due from it on the deposit account. This right exists, even though the depositor is insolvent when the notes become due, and such insolvency is known to the bank. . . . And where the set-off exists, and the parties themselves have not voluntarily made such set-off or adjustment before bankruptcy, the trustee must do so." *In re Cross*, (C. C. A. 2d Cir. 1921) 273 Fed. 39.

Set-off of deposit not preference.—Although a depositor may be proved to have been insolvent at the time a set-off was made by the bank against his account, such set-off is not preferential in the absence of proof that the bank had reasonable cause to believe that it would effect a preference. *Wrenn v. Citizens' Nat. Bank*, (Conn. 1921) 114 Atl. 120.

Vol. I, p. 1150, sec. 70a. [First ed., 1912 Supp., p. 811.]

- I. What constitutes property.
- II. Nature of trustee's title.
- III. Time when title passes.
- IV. Condition of title after petition filed but before appointment of trustee.
- VI. Exempt property.
- VII. Reclamation proceedings.

I. WHAT CONSTITUTES PROPERTY (p. 1150)

Only vested interests are considered property within the meaning of the act. Clearly if property which the bankrupt actually acquires after the filing of his petition is not subject to his debts property which he only hopes or expects to acquire cannot be reached by creditors. *Elberton Bank v. Swift*, (C. C. A. 5th Cir. 1920) 268 Fed. 305.

Book accounts and "receivables" constitute property which passes to the trustee. *In re Garden City Parlor Furniture Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 318.

II. NATURE OF TRUSTEE'S TITLE (p. 1151)

Section 70 is to be construed with section 47a (2).—To the same effect as the original

annotation, see *Ignatius v. Farmers' State Bank*, (C. C. A. 9th Cir. 1921) 272 Fed. 33.

Trustee takes bankrupt's title.—To same effect as original annotation, see *Boise v. Talcott*, (C. C. A. 2d Cir. 1920) 264 Fed. 61.

Title subject to existing equities.—To same effect as original annotation, see *Greif Bros. Cooperage Co. v. Mullinix*, (C. C. A. 8th Cir. 1920) 264 Fed. 391; *Boise v. Talcott*, (C. C. A. 2d Cir. 1920) 264 Fed. 61; *In re Barnhardt Coal, etc., Co.*, (N. D. Ohio 1919) 265 Fed. 385. The case last cited held that the trustee in bankruptcy of a lessee could accept the lease and keep the property only by making the payments which the bankrupt was required to make to prevent a forfeiture, but held further that a forfeiture not being favored by a court of equity the trustee would be relieved from any forfeiture arising from default in payment of rent, on making the overdue payments with interest.

Valid lien and incumbrances.—To the same effect as the original annotation, see *In re Plantations Co.*, (E. D. Pa. 1921) 270 Fed. 273; *Petition of National Discount Co.* (C. C. C. 6th Cir. 1921) 272 Fed. 570; *Lewin v. Tellwide Iron Works Co.*, (C. C. A. 8th Cir. 1921) 272 Fed. 590.

"The courts have uniformly held that the title to the property of the bankrupt vested, by operation of law, in the trustee, subject to all liens which had, prior to the date of filing the petition, attached thereto. The right of the creditors to attack such liens for fraud or other invalidating element vested in the trustee." *In re Saunders*, (E. D. N. C. 1921) 272 Fed. 1003.

It has been held in a case in Oregon that a chattel mortgage given on lumber to be sawed is valid as against the trustee in bankruptcy of the mortgagor where it is duly recorded and the lumber thereafter sawed is placed in the lumber yards of the mortgagor, each pile being marked with the name of the mortgagee, although the lumber so sawed and piled was never in the actual manual possession of the mortgagee. *In re Pine Tree Lumber Co.*, (C. C. A. 9th Cir. 1920) 269 Fed. 515.

Proceeds of sale.—On a sale by the trustee of property which is subject to a valid lien, the lien is transferred to the funds in the hands of the trustee. *In re Plantations Co.*, (E. D. Pa. 1921) 270 Fed. 273. The court further said:

"The trustee knew of the facts upon which the Centrosa Company's equitable lien was based, and therefore is chargeable with knowledge of the lien. The general assets of the estate against which the costs of administration are primarily chargeable cannot be relieved of those charges by the fact that the trustee, knowing the facts, used first the funds chargeable with the lien for their payment in ease of general creditors. Knowing the facts, he should not have used the funds chargeable with the lien in relief of liabili-

ties chargeable against the general funds of the estate, and, following the maxim that equity will look upon that as done which ought to have been done, a court of equity will follow the proceeds into the mass of the estate.

"Confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor."

Right under contracts of bankrupt.—When the trustee in bankruptcy, by order of the referee or of the court, elects to ratify, confirm, and adopt the executory contract of the bankrupt, he thereby assumes the liabilities of the bankrupt thereunder, and takes the contract in the same plight in which the bankrupt held it. *Greif Bros. Cooperage Co. v. Mullinix*, (C. C. A. 8th Cir. 1920) 264 Fed. 391.

Equitable lien of purchaser.—Where a manufacturer agrees to make and deliver to a purchaser staves or other articles for specified prices and on fixed terms, one of which is that the purchaser will make specific advances in payment of the purchase price to enable the manufacturer to pay for necessary materials and labor, and at the time of the adjudication in bankruptcy of the latter there is a quantity of the manufactured product which the purchaser's advances have paid for, in the possession of the bankrupt, the equitable right of the purchaser thereto is superior to that of the trustee in bankruptcy or of the unsecured creditors he represents. *Greif Bros. Cooperage Co. v. Mullinix*, (C. C. A. 8th Cir. 1920) 264 Fed. 391.

Mining lease.—Where a mining lease held by a bankrupt purports to sell, transfer, and convey to him all the coal and limestone in, under, or upon the premises therein described, and provides for forfeiture only in the event that the lessee fails to enter upon the premises and make exploration thereon for coal and limestone within ninety days after the execution of the lease, which condition was fulfilled by the bankrupt, the lease is an asset of the estate and may be sold by the bankrupt's trustee. *In re Barnhardt Coal, etc., Co.*, (N. D. Ohio 1919) 265 Fed. 385, wherein the court said:

"The referee finds that there is no proof of a failure to enter on the premises and make explorations within 90 days, but that, on the contrary, such entry and exploration was made, and the existence of coal and limestone was thereby determined, and that the bankrupt and its several assignors had no intention at any time of abandoning the premises and terminating the lease because the mining of coal or limestone was or had become unprofitable. No coal or limestone was in point of fact mined, and the \$500 minimum royalty, which should have been paid not later than October 1, 1918, was not paid, nor have any payments been made since, either by the receiver or trustee in

bankruptcy. The provisions of this lease are similar to those considered by the Supreme Court of Ohio in the following cases: *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502; *Gas Co. v. Eckhart*, 70 Ohio St. 127, 71 N. E. 281; *Oil Co. v. Robinson*, 71 Ohio St. 302, 73 N. E. 222, 104 Am. St. Rep. 773, 2 Ann. Cas. 444. The interest granted by this lease is not merely a license, but an estate in the premises. The right to enjoy that estate is not dependent on any condition precedent, except the requirement that entry and explorations should be made within 90 days, which was done. No forfeiture or termination is provided for, except in the event of a failure to make such entry and exploration. No right to forfeit or terminate is given for failure to pay the minimum royalty of \$500 a year. Any implied covenant or obligation to exercise reasonable diligence in mining limestone and coal is merged in the covenant to pay \$500 a year in the event of failure to operate. The lease becomes, as was said in *Gas Co. v. Eckhart*, *supra*, a lease from year to year upon an annual rental of \$500. The cases cited by counsel for petitioner, in which mining leases have been canceled by courts of equity for failure to keep an implied obligation to exercise reasonable diligence, are not in point.

"The only question then is: What is the effect under these conditions of a failure to pay the \$500? The referee, in my opinion, reached the correct conclusion, namely, that no forfeiture or right to terminate has resulted therefrom, and that the lease may be sold as an asset of the bankrupt's estate. The payments which have accrued during bankruptcy may be treated and provided for as an expense of administration, or an expenditure necessary for the preservation of the estate; but the failure of the referee to make provision therefor in the order of sale does not require a reversal of his finding and judgment. No request was made of him so to do. One may still be made, with the right to have his rulings reviewed here, in the event parties are dissatisfied with his action."

III. TIME WHEN TITLE PASSES (p. 1154)

Effect of commencement of proceedings.—*Generally.*—The trustee takes title as the debtor had it at the time of the petition. *Boise v. Talcott*, (C. C. A. 2d Cir. 1920) 264 Fed. 61.

In *In re Garden City Parlor Furniture Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 318, the court said:

"Upon the filing of the petition and the appointment of the receiver, all property rights of the bankrupt passed under the jurisdiction of the court; and when the trustee was appointed the title and right to possession vested in him, and it was at all times after the appointment of the receiver in the possession of the court. This extended to book accounts and receivables."

Property in custodia legis.—To same effect as original annotation, see *In re Lombardy Inn Co.*, (D. C. Mass. 1919) 266 Fed. 394.

IV. CONDITION OF TITLE AFTER PETITION FILED BUT BEFORE APPOINTMENT OF TRUSTEE (p. 1158)

Defeasible title in bankrupt.—Until adjudication in bankruptcy, the title of the bankrupt's property remains in the bankrupt. *In re Perpall*, (C. C. A. 2d Cir. 1921) 271 Fed. 466.

VI. EXEMPT PROPERTY (p. 1162)

Title remains in bankrupt.—To the same effect as the original annotation, see *Stratton v. Ermis*, (C. C. A. 5th Cir. 1920) 268 Fed. 533.

Homesteads—Generally.—A trustee takes title to land claimed as a homestead as of the date of the filing of a voluntary petition in bankruptcy where there has been a failure to claim the homestead as required by the laws of the state. *Edgington v. Taylor*, (C. C. A. 8th Cir. 1920) 270 Fed. 48, holding that negligence of counsel in this respect would be imputed to the client.

VII. RECLAMATION PROCEEDINGS (p. 1165)

Right to reclaim.—To the same effect as the original annotation, see *In re John H. Parker Co.*, (N. D. Ohio 1920) 268 Fed. 868; *In re Solomon*, (C. C. A. 2d Cir. 1920) 268 Fed. 108.

Proceeds of check.—Where a check which was given by mistake in a stock transaction and was without consideration was collected by the receiver in bankruptcy of the payee, it was held that the maker of the check was entitled to reclaim the proceeds in the hands of the trustee. *In re Toole*, (C. C. A. 2d Cir. 1920) 270 Fed. 195.

Stock in possession of stock broker.—Where a person purchased stock through a stock broker who became bankrupt before making an actual delivery, and stock of the same kind is found by the receiver when he takes possession of the bankrupt's property, the purchaser may reclaim such stock where no one else is claiming it, although it is not certain that it is the identical stock which was purchased for the claimant. *In re Solomon*, (C. C. A. 2d Cir. 1920) 268 Fed. 108.

Securities pledged with broker.—Where the evidence shows that a customer who had pledged securities with a broker as collateral to secure margin transactions was indebted to the broker for a balance due on his account, though to an amount less than the value of the securities, a right to reclaim the securities has been denied, there having been no tender, before bankruptcy, of the indebtedness. *In re Toole*, (C. C. A. 2d Cir. 1921) 274 Fed. 337.

Securities repledged by broker.—Where securities pledged on marginal transactions

by a customer with his brokers have been lawfully repledged by them with a third party together with securities of other customers, part of which securities are, after the bankruptcy of the broker, sold by such third party to satisfy his debt, the others being returned to the bankrupt's estate, there has been held to be a right of contribution in favor of those whose securities were sold from those whose securities were returned, and the right of the latter owners to reclaim such securities has been denied. *In re Toole*, (C. C. A. 2d Cir. 1921) 274 Fed. 337. The court said:

"We think that, when customers authorize their broker to pledge their securities for the payment of the broker's debts, each becomes to the extent of his pledge a surety for the payment of such indebtedness. As between themselves they become co-sureties. All the collateral lawfully so pledged is subject to the same obligation and lien. The owners of the collateral, being in effect co-sureties, must be entitled to contribution from each other for any loss sustained if the stock of one is sold to pay the debt for which the stock of the other was equally liable. This right of contribution does not arise from the contract, as already said, but rests upon principles of equity and natural justice. The principle is that where all are equally liable for the payment of a debt all are bound equally to contribute to that purpose. So that if the stock of A, B, and C is lawfully pledged for the payment of the debt of X, the stock of each is under the common burden, and if X sells the stock of A and B, and leaves unsold the stock of C, the latter must contribute to A and B the excess they have paid above their share. But if, on the other hand, the stock of A is lawfully pledged, while that of B and C is unlawfully pledged, there is no obligation on the part of B and C to contribute, for there is no common burden as between A on the one side, and B and C on the other. The principle applies only in cases where the situations of the parties are equal, as equality among persons whose situations are not equal is not equitable. The situations are equal when the parties are under a common burden."

Delivery of goods on consignment.—Goods which were delivered on consignment to the bankrupt in pursuance of an agreement made in good faith to the effect that all future deliveries should be of that character and not a sale, may be retaken by the consignor. *Healey v. Boston Batavia Rubber Co.*, (D. C. Mass. 1920) 268 Fed. 75.

Unrecorded chattel mortgage.—A mortgage given by a bankrupt to the seller but which is not recorded as required by the state law is void as to creditors and the seller cannot reclaim. *In re Robinson Mach. Co.*, (E. D. Mich. 1920) 268 Fed. 165.

Stoppage in transitu.—Goods purchased by a bankrupt company and in the posses-

sion of its forwarding agent while en route to their final destination, may be stopped in transit and reclaimed by the seller from the bankrupt's trustee. *In re Stork*, (S. D. N. Y. 1920) 265 Fed. 864.

Vol. I, p. 1171, sec. 70a (5). [First ed., 1912 Supp., p.823.]

- I. In general.
- II. Interests in real property.
- III. Pledges.
- IV. Conditional sales.
- V. Trust funds and deposits.
- IX. Contractual interests and obligations.

I. IN GENERAL (p. 1171)

Generally—Life interest.—A life estate of substantial value can be mortgaged and will pass to the trustee in bankruptcy of the life tenant. *City Nat. Bank v. Slocum*, (C. C. A. 6th Cir. 1921) 272 Fed. 11.

Property retained in possession of seller.—Under the law in Pennsylvania that delivery of possession is indispensable to transfer a title by the act of the owner which shall be valid against creditors, it has been held that a sale by a resident of Pennsylvania of an automobile to a resident of New York to whom the seller gives a bill of sale and storage receipt, but makes no delivery of the car, which he retains in his possession, is invalid as against the trustee. *In re Irwin*, (W. D. Pa. 1920) 268 Fed. 162.

Transfers and incumbrances ineffective as to creditors.—Where there was neither an "immediate delivery" followed by "actual and continued change of possession" nor a filing of the mortgage as required by statute, the mortgage will be held void as to creditors. *In re Bonk*, (E. D. Mich. 1920) 270 Fed. 657.

II. INTERESTS IN REAL PROPERTY (p. 1174)

Tenant's interest in leasehold—Forfeiture enforced.—Where a lease provides that it shall terminate on the bankruptcy or insolvency of the lessee, and on his insolvency it is assigned to a third person with the consent of the lessor, the condition binds the assignee and on his subsequent insolvency the bankruptcy court will enforce the forfeiture and deliver possession of the premises to the lessor as against the assignee's trustee in bankruptcy. *Empress Theatre Co. v. Horton*, (C. C. A. 8th Cir. 1920) 266 Fed. 657. The court said:

"A court of equity may enjoin the performance of and set aside contracts, conditions, and covenants obtained by the fraud, deceit, or wrong of the respondent, but neither the Empress Theatre Company nor its predecessor in interest was guilty of fraud, wrong, or deceit. It may sometimes avoid conditions and covenants for mistake or accident, but there was neither in this case. The condition and covenants of the lease were natural, reasonable, and just. It

clearly shows that when it was made the lessor and the lessee contemplated the possible, perhaps the probable, insolvency and bankruptcy of the lessee and of some of its successors in interest during the long 15 years then to come, discussed, carefully considered, and finally contracted and wrote into their lease their agreement what the effect of such insolvency and bankruptcy should be, to wit, the end of the term of the lease, its forfeiture, and the return to the lessor of the leased premises at its election. The basement leased was a valuable property. The purpose the lessor had in making the lease, to secure the operation in this basement of a high-class café with special amusement features, made the solvency of the lessee and hence its continuous operation of the café essential to the accomplishment of this purpose. Its insolvency or bankruptcy, placing the basement in the hands of a trustee for a long time during bankruptcy proceedings, and then sending it to an unknown purchaser, would undoubtedly to a large extent defeat the object of the lessor in making the lease, produce the vacancy or inadequate operation of the proposed café, and result in immeasurable damage to the leased premises and to the value of their use. It was to prevent this contemplated possibility that these parties wrote into their lease the condition and covenant that in case of the insolvency or bankruptcy of the lessee, at the election of the lessor, the term of the lease should end and the leased premises should be returned to the lessor free from the lease.

"Nor was this an unconscionable or inequitable agreement. The lessor received and the lessee gave for this lease \$42,000 of the corporate stock of the latter. The lessee received and the lessor gave the use of the basement for the term of 15 years on condition that the lessee or its successor in interest, approved by the lessor, remained solvent for 15 years, but that it should be terminable at the option of the lessor at any time within the 15 years when the lessee became insolvent or bankrupt. When the lease was made, the effect of the condition and covenants which the parties undoubtedly then contemplated was that, in case the lessee became insolvent or bankrupt, its \$42,000 of stock which the lessor received would be worthless, and it would actually receive nothing for the lessee's use of the premises, the lessee's operation of the café would be so financially disastrous that it would, at its insolvency, have exhausted the lessee's means and rendered it incapable of operating or using the premises as a café, and the lessor would have the right then to end the term of the lease and take back the leased premises. And such was the actual effect of the condition and covenants of the lease in about a year from the commencement of the lessee's operation under it, when it became insolvent and bankrupt. So it was

that each party at the making of the lease foresaw the possibility, perhaps the probability, of the insolvency and bankruptcy of the lessee, agreed that the effect of such insolvency and bankruptcy should be to vest in the lessor the right at its election then to end the term of the lease and take back the premises, and then took its chance of such insolvency and bankruptcy and signed the lease. And, as the condition and covenants under consideration were in the lease, every one who has succeeded to any interest in or lien upon any interest in the lease has taken that interest or lien under and subject to that condition and those covenants, and has taken its or his chance of the insolvency or bankruptcy of the original or successor lessee thereunder.

"Nor was there anything in the condition and covenants of this lease evil in itself, or prohibited by law, or contrary to the public policy of state or nation. The condition and covenants were not novel, but common provisions in leases. Conditions and covenants in leases of the same character have been repeatedly considered, and generally, nay almost universally, sustained and enforced, both by courts of equity and courts of law."

Effect of provision against assignment.—A provision in a lease prohibiting assignment and subletting by the lessee, does not prevent its transfer by operation of law, on his bankruptcy, to his trustee, and the latter may sell it as an asset of the estate. *In re Prudential Lithograph Co.*, (S. D. N. Y. 1920) 265 Fed. 869.

III. PLEDGES (p. 1178)

Money deposited as security.—Where the bankrupt deposited money with his landlord as security for the payment of the rent such money was not forfeited to the landlord on the bankruptcy of the tenant but remained the property of the bankrupt subject to proper deductions under the terms of the agreement between the parties, and the receiver or trustee in bankruptcy is entitled to a return of the amount deposited less such deductions. *In re Tamory*, (N. D. N. Y. 1921) 270 Fed. 872.

IV. CONDITIONAL SALES (p. 1181)

Contract invalid as to lien creditors.—See to the same effect as the original annotation, *Groner v. Babcock Printing Press Mfg. Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 822.

Where by the law of the state conditional sales, though valid between the parties, are not valid as against those creditors of the conditional vendee who have issued execution and seized the property, the receiver of a bankrupt conditional vendee is entitled to property thus sold to the bankrupt and it cannot be reclaimed by the vendor. *In re Mina*, (W. D. Pa. 1914) 270 Fed. 969.

Contract invalid as to general creditors.—A contract of conditional sale is held to be invalid as to general creditors whose rights accrued between the giving of the conditional sale and the date of recordation. *In re Bennett*, (W. D. Mo. 1920) 264 Fed. 533.

If the sale is valid and binding.—To the same effect as the original annotation, see *In re Robinson Mach. Co.*, (E. D. Mich. 1920) 268 Fed. 165.

V. TRUST FUNDS AND DEPOSITS (p. 1185)

Where bankrupt is trustee—Dividends declared and set aside.—"Where a dividend has been declared, and following such declaration, in order to carry the declaration into effect, the corporation deposits a fund out of which the dividends are to be paid, that fund becomes a trust fund, and the corporation becomes the trustee of the fund. In other words, the debtor and creditor relation is transformed into a trust relation." *In re Interborough Consol. Corp.* (S. D. N. Y. 1920) 267 Fed. 914.

Property devised in trust.—One to whom property is devised "in trust for the heirs of his body" acquires no title to the property which he can mortgage or convey to any one or which will pass to his trustee in bankruptcy. *City Nat. Bank v. Slocum*, (C. C. A. 6th Cir. 1921) 272 Fed. 11.

IX. CONTRACTUAL INTERESTS AND OBLIGATIONS (p. 1191)

Fire insurance policy.—Where the buyers of a sawmill plant were obligated under their contract to take out fire insurance on the plant and the sellers agreed to accept a certain sum as settlement under the policies in case of loss, it has been held that on the destruction of the property the buyer was entitled to any excess over the sum agreed on and that on the subsequent bankruptcy of the buyers the trustee in bankruptcy was entitled to such excess. *Walton Land, etc., Co. v. Runyan*, (C. C. A. 5th Cir. 1920) 269 Fed. 130.

Right to exchange stock for stock of consolidated corporation.—Where on the consolidation of corporations stockholders in the old corporations are entitled to exchange their shares for stock in the new corporation it has been held that the right to do so is not affected by the bankruptcy of the newly created corporation, it being said that the trustee stands, in respect to such rights, in exactly the same position as the bankrupt corporation stood prior to the bankruptcy. *In re Interborough Consol. Corp.*, (S. D. N. Y. 1920) 267 Fed. 914.

Vol. I, p. 1196, sec. 70a (5).
[Policy of insurance.] [First ed., 1912 Supp., p. 835.]

Effect of right to change beneficiary.—To the same effect as the first paragraph of the

original annotation, see *In re Jens*, (S. D. Ia. 1921) 273 Fed. 606.

Where the right to change the beneficiary is reserved to the insured it is said that whether, under the terms of the policies, the consent of the present beneficiary is necessary to the surrender of the policies for their present value, it is unnecessary to decide. If such consent is required, it is merely for the protection of the company against possible controversy or dispute, because, so far as present value is concerned as a property right, it belongs absolutely to the insured, and not to the beneficiary. *In re Jens*, (S. D. Ia. 1921) 273 Fed. 606.

Refusal of company to change beneficiary.—Where an insurance policy contains a provision empowering the insured to change the beneficiary, a trustee in bankruptcy may exercise the power conferred on the bankrupt, and in such case if the insurance company refuses to make the change and pay the cash surrender value to the trustee the court will compel it to do so. *In re Greenberg*, (C. C. A. 2d Cir. 1921) 271 Fed. 258, wherein it was said:

"There is a flat refusal to perform on the part of the insurer, for reasons having no relation to its own security, or indeed to its own business. It is avowed at bar that the company prefers to pay the bankrupt's wife the whole of the policy rather than pay the trustee the surrender value thereof.

"Bankruptcy is equity, and just as it will presume on occasion that that has been done which ought to be done, so on other occasions it will compel that to be done which ought to be done."

Exempt policies do not pass.—In *In re Jens*, (S. D. Ia. 1921) 273 Fed. 606, where the insured reserved the right to change the beneficiary the court, reversing a decision by the referee that the policy was exempt under the state law, said:

"It is quite apparent that the trustee is entitled to the surrender value of the policy, unless such surrender value is expressly exempted by section 1805, Code of Iowa 1897, which is as follows:

"Sec. 1805. *Policy Exempt from Execution.* A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors. The proceeds of an endowment policy payable to the assured on attaining a certain age shall be exempt from liability for any of his debts. Any benefit or indemnity paid under an accident policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured, from his debts. The avails of all policies of life or accident insurance payable to the surviving widow shall be exempt from liability for all debts of such beneficiary contracted prior to the death of

the assured, but the amount thus exempted shall not exceed five thousand dollars."

"In construing such a statute, the whole of the enactment must be considered together. Carefully reading the language of the Legislature it is quite apparent that we can find no words which cover the contention in the case at bar. The first sentence does not use the word 'exemption.' It states that 'a policy of insurance . . . shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors.' How can a policy of insurance 'inure to the separate use of the husband or wife and children' under the circumstances of this case? The wife and children are making no claim and could make none. The person making the claim is not the 'husband'; he is the insured. He is demanding that a property interest belonging absolutely to him shall be held exempt, not to his wife or children, but to himself. The section cannot bear such construction. It is quite apparent that, when the Legislature used the words 'policy of insurance,' it meant 'proceeds' of a policy of insurance. This follows clearly from the latter words, 'inure to the separate use of the husband or wife and children.' It means that upon the death of the husband the proceeds shall inure to the benefit of the wife, and in case the policy be upon the wife it shall upon her death inure to the benefit of the husband, and in each case that the children shall become vested with an interest therein.

"This conclusion is required by further language of the section, which exempts specifically the proceeds of an endowment policy, which, if the previous language meant the policy itself, would be entirely unnecessary, because the language 'policy of insurance' includes all forms of policies.

"From the foregoing it follows that the ruling by the referee must be reversed. The conclusion reached herein is not inconsistent with the opinion of Justice White in *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. ed. 1018, when due consideration is given to differences in the terms of the policies, and to the distinction between the statutes involved."

Payment of proceeds of policy to beneficiary on death of bankrupt without notice of bankruptcy.—After the death of the insured pending bankruptcy, and payment of the stipulated amount to the beneficiary named in the policy, in strict conformity to its terms, without notice of the bankruptcy or claim made by the trustee, there is no liability on the part of the insurance company to pay to the trustee the surrender value that, on complying with the terms of the policy as to change of beneficiary, he might have demanded. *Frederick v. Fidelity Mut. L. Ins. Co.*, (1921) 256 U. S. —, 65 U. S. (L. ed.) —, (affirming (1920) 75 Pa. Super. Ct. 77) wherein the court said:

"It is not enough to sustain the trustee's claim to say that the filing of the petition in bankruptcy was a caveat to all the world, and in effect an attachment and injunction, and that, on adjudication, title to the bankrupt's property became vested in the trustee. *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269. The asserted right of property arose out of a contract under which the insurance company had rights as well as the insured. The company's contract was to pay the stipulated amount to the beneficiary first named on receiving proof of death of the insured, unless the latter should have surrendered the policy, and, with the written approval of the head officer of the company, have changed the beneficiary. The requirement of such surrender and approval was for the protection of the company, so purposed that at least it should have notice before its liability under the policy was modified. Section 70a of the Bankruptcy Act cannot be construed to give to the trustee in bankruptcy a right as against the company to demand that the surrender value be made assets of the estate, as by a change in beneficiary, without timely notice to the company of a demand for such a change; for the section in its very words contemplates that the cash surrender value shall have been 'ascertained and stated to the trustee by the company issuing the policy.'

"In the present case, the company, having in good faith performed the contract according to its terms, without the notice that the contract called for as a condition of changing the terms, cannot be called upon to make the further payment demanded by the trustee. *Frederick v. Metropolitan L. Ins. Co.*, 152 C. C. A. 167, 239 Fed. 125."

Vol. I, p. 1204, sec. 70b. [First ed., 1912 Supp., p. 839.]

Sales of assets free from incumbrances—Discretion of court.—An order directing that the property of a bankrupt be sold free of the lien of a mortgage is within the discretion of the court. *In re Leslie-Judge Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 886.

Setting aside sales—Discretion of court to reopen estate.—A district court has power in its discretion to reopen an estate on a petition by a creditor to seek the cancellation of a judicial sale on the ground that the bankrupt had fraudulently concealed property from the trustee and in consequence of this and other material facts the price obtained at the sale was shockingly inadequate. *In re Leigh*, (C. C. A. 7th Cir. 1921) 272 Fed. 678.

Pleading and proof.—In an action to set aside a sale by the trustee as fraudulent where all the charges of fraud, collusion, concealment, misappropriation, and the like, are met with sworn denials which are positive, unqualified, and responsive to the alle-

gations of the petitions in that regard and no evidence is offered to support the allegations of fraud and the like, the charges fall for want of supporting proof unless they are supported by admissions in the answer. *Bray v. U. S. Fidelity, etc., Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 533.

Tender of sum paid.—Where a deed is void because given to secure a usurious debt it will not be set aside under the Georgia law in a suit by the trustee unless there has been a tender of the debt secured with lawful interest thereon. *Lanham v. State Bank*, (C. C. A. 5th Cir. 1920) 268 Fed. 458.

In a suit to set aside a trustee's sale it has been held that the failure of the plaintiff to offer to pay the sums bid at such sale is a sufficient ground for dismissing the bill. *Lanham v. State Bank*, (C. C. A. 5th Cir. 1920) 268 Fed. 458.

Confirmation of sale—Discretion of court.—The court is warranted in refusing to confirm a sale for only 41½ per cent of the appraised value of the property under the discretion given it in such matters as well as because the property did not bring 75 per centum of the appraised value. *Bryant v. Charles L. Stockhausen*, (C. C. A. 4th Cir. 1921) 271 Fed. 921, wherein it was said:

"The court below was merely exercising a proper discretion in such matters, and this court will not disturb the exercise of that discretion, because it seems to have been wisely and properly exercised in this case. The petitioner cannot complain because he was not confirmed as the purchaser. He did not buy the land at the auction sale. He only offered to buy it, and that offer was only an unaccepted offer until it should be confirmed by the court, and this confirmation was refused by the court below."

Vol. I, p. 1212, sec. 70e. [First ed., 1912 Supp., p. 846.]

Power conferred on trustee.—To the same effect as the original annotation, see *Osley v. Adams*, (C. C. A. 5th Cir. 1920) 268 Fed. 114; *Ignatius v. Farmers' State Bank* (C. C. A. 9th Cir. 1921) 272 Fed. 33; *Minott v. Johnson*, (Me. 1921) 113 Atl. 464.

The right of creditors to attack, on the ground of fraud, liens filed prior to the date of filing in bankruptcy is by this section vested in the trustee. *In re Saunders*, (E. D. N. C. 1921) 272 Fed. 1003.

Trustee vested with rights of creditor—Limitation of actions.—An action under this section brought by a trustee to recover property alleged to have been fraudulently transferred by the bankrupt is governed by the state statute of limitation. *Davis v. Willey*, (C. C. A. 9th Cir. 1921) 273 Fed. 397.

Void assignment of book accounts.—In the case of an assignment of book accounts as collateral for a loan, which transactions was ultra vires the assignee and void, the

assignee cannot as against the trustee in bankruptcy of the borrower retain money collected on such accounts. *In re Garden City Parlor Furniture Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 318.

Receivership for dummy corporation.—Where it appears that a corporation is and has always been a mere dummy or substitute corporation and nothing more than an agent of the bankrupt; that its property and assets are and always have been legally, or at least equitably, the property of the bankrupt; and that such property is in danger of being dissipated and fraudulently made away with, to the injury and depletion of the bankrupt's estate and to the detriment of its creditors, the trustee has power to maintain a bill to appoint a receiver for that corporation. *Hardy v. Oregon Eilers Music House*, (1921) 99 Ore. 340, 195 Pac. 563.

Creditor estopped.—Where the creditor by dealing with the grantee has estopped himself to assail a transfer as fraudulent the trustee who stands in his shoes cannot avoid it. *Durrett v. Harris*, (1921) 148 Ark. 4, 228 S. W. 386.

Question for jury.—The question whether a mortgage was made with intent to delay or defraud creditors has been held under the state law to be one for the jury. *Ignatius v. Farmers' State Bank*, (C. C. A. 9th Cir. 1921) 272 Fed. 33.

Vol. I, p. 1216, sec. 70e. [*Jurisdiction.*] [First ed., 1912 Supp., p. 846.]

Jurisdiction of bankruptcy court.—Consent of defendant as unnecessary to a suit

by the trustee under this section, see *In re Eilers Music House*, (C. C. A. 9th Cir. 1921) 274 Fed. 330.

Effect of prior suit in state court.—An objection that a prior suit is pending in the state court is waived where the pendency of the former suit was not presented by plea or answer in the federal court, nor was objection at any time made in that court that a prior suit in a state court involved the same matters in controversy. *In re Eilers Music House*, (C. C. A. 9th Cir. 1921) 274 Fed. 330.

Vol. I, p. 1220, sec. 72.

Bar to extra allowance.—*In re Weissman*, (D. C. Conn. 1920) 267 Fed. 588. In a case where no objection was made by the attorneys representing nearly all the creditors to an allowance to the receiver in excess of the statutory commissions, because of the fact that the receiver was in constant attendance at the hearings before the commissioner, the court nevertheless declared that in view of the express limitation in this section it was unable to allow more to the receiver even by way of special compensation.

Vol. I, p. 1222, sec. 72b.

Corporation in hands of state court receiver.—Where a corporation has been placed in the hands of a receiver in proceedings in a state court the federal court will not deprive the state court of its jurisdiction by allowing the corporation to file a petition in voluntary bankruptcy. *In re Associated Oil Co.*, (E. D. La. 1921) 271 Fed. 788.

BILLS OF LADING

1918 Supp., p. 73, sec. 1.

Purpose and effect of Act.—"The primary purpose of this law is to enlarge and enhance the negotiability features of 'order' bills of lading and by definitely fixing the law with respect to negotiability, and the imposition of greater responsibility upon carriers, to afford greater protection to those who in the course of commercial transaction handle and deal in such bills." *Matter of Bills of Lading*, (1919) 52 I. C. C. 671.

But in *Commercial Nat. Bank v. Seaboard Air Line R. Co.*, (1918) 175 N. C. 415, 95 S. E. 777, the court said:

"There is doubt if the law does or was intended to make bills of lading negotiable in the full sense of the term, that is, to the extent that ordinary commercial paper is so."

This act was said in *Pioneer Trust Co. v. Nashville, etc., R. Co.*, (1920) 204 Mo. App. 328, 224 S. W. 109, to alleviate to a

great extent the hardship of the rule that a bill of lading which involved any violation of the interstate commerce law was void as to a bona fide purchaser. The act was, however, held to be inapplicable to a bill issued before its enactment.

Liability of carrier as warehouseman.—"The bills of lading act contains no provision respecting transition from liability of a common carrier to that of a warehouseman. Questions of this nature arising in connection with interstate shipments moving under bills of lading issued pursuant to the act to regulate commerce are necessarily federal questions and the question as to responsibility under the bill of lading is none the less a federal one because it must be resolved by the application of general principles of the common law." *Matter of Bills of Lading*, (1919) 52 I. C. C. 671.

Form or bill.—See generally *Matter of Bills of Lading*, (1919) 52 I. C. C. 671.

The four months' limitation formerly contained in a domestic bill of lading, with respect of the time within which claim for loss, damage, or damages could be filed, was held not unreasonable as applied to shipments involved in the case of *Blackburn & Co. v. Ann Arbor R. Co.*, (1920) 56 I. C. C. 439, wherein Wooley, Commissioner, said:

"On June 1, 1916, the defendants extended the time for filing claims from four to six months. The complainants argue that this is a recognition of the unreasonableness of the limitation attacked, and that the extension should be made retroactive. Such alteration in a tariff of course is not proof that the original provision was unreasonable; nor is the six months' limitation provided in the uniform bill of lading as prescribed by us in Bills of Lading, 52 I. C. C. 671, of itself proof of that fact. This provision was not specifically prescribed by us, but was arrived at by agreement, during the pendency of that case."

1918 Supp., p. 74, sec. 8.

Turning car over to another carrier for further transportation as delivery by carrier.—The terminal carrier, by surrendering a car at destination to another carrier for further transportation, at the request of an employee of the latter, makes a disposal of such car in assumed termination and discharge of its obligations which, whether justified or not, is, in legal contemplation, a delivery, although in forwarding the car it used the original waybill, striking out the original destination and substituting a new one on the line of the new carrier's road. *Pere Marquette R. Co. v. French*, (1921) 254 U. S. 538, 41 S. Ct. 195, 65 U. S. (L. ed.) —, reversing (1919) 204 Mich. 578, 171 N. W. 491.

Requiring surrender of bill of lading.—A delivery by a carrier in good faith to a person in possession of an order bill of lading properly indorsed, thus satisfying the provision of sec. 9 does not exonerate the carrier from liability to the shipper as for a conversion where it failed to require the surrender of the bill of lading, as provided in that instrument, if loss to the shipper or a subsequent purchaser of the bill results from such failure, but where the loss suffered is not the result of the failure to take up the bill, the mere failure to take it up does not defeat the exoneration. *Pere Marquette R. Co. v. French*, (1921) 254 U. S. 538, 41 S. Ct. 195, 65 U. S. (L. ed.) —, (reversing (1919) 204 Mich. 578, 171 N. W. 491), wherein the court said: "There is nothing in the act which imposes upon the carrier a specific duty to the shipper to take up the bill of lading. Under § 8 the carrier is not obliged to make delivery except upon production and surrender of the bill of lading; but it is not prohibited from doing so. If, instead of insisting upon the

production and surrender of the bill, it chooses to deliver in reliance upon the assurance that the deliverer has it, so far as the duty to the shipper is concerned, the only risk it runs is that the person who says that he has the bill may not have it. If such proves to be the case, the carrier is liable for conversion, and must, of course, indemnify the shipper for any loss which results. Such liability arises not from the statute, but from the obligation which the carrier assumes under the bill of lading."

1918 Supp., p. 74, sec. 9.

Physical "possession" of order bill.—It is the physical possession of the bill of lading which is made a justification for delivery by the provision of this section that a carrier is justified in delivering goods to one who is in possession of an order bill of lading indorsed in blank. It does not matter in what capacity the person holds possession of the bill of lading, whether as agent or on his own account, nor whether he holds it lawfully or unlawfully, so long as the carrier has no notice of any infirmity of title.

If the physical possession of a bill of lading were deemed legally the principals' possession, the physical delivery of the shipment to such agent at his request, later ratified by his principals, would likewise be deemed legally a delivery to them. *Pere Marquette R. Co. v. French*, (1921) 254 U. S. 538, 41 S. Ct. 195, 65 U. S. (L. ed.) —, (reversing (1919) 204 Mich. 578, 171 N. W. 491), wherein the court said: "Was the delivery at Bindner's order one which the carrier was justified in making under the provisions of § 9 of the Federal Uniform Bills of Lading Act? Prior to the enactment of the Federal Uniform Bills of Lading Act, or of other applicable legislation, a carrier was not ordinarily relieved from liability to the consignor or owner for delivery of goods to a person not legally entitled to receive them, although such person was in possession of an order bill of lading, duly indorsed in blank, and surrendered it to the carrier at the time of delivery. Delivery was held not to be a justification, because the bill of lading, despite insertion therein of words of negotiability, did not become a negotiable instrument. Independently of statute (and, indeed, also under earlier state statutes) the insertion of words of negotiability had merely the effect of enabling title to the goods to be transferred by transfer of the document. See *Berkley v. Watling*, 7 Ad. & El. 29, 112 Eng. Reprint, 382, 2 Nev. & P. 178, 6 L. J. K. B. N. S. 195. But one who did not have a valid title to the goods could not, by transfer of the bill of lading, give a good title to a bona fide holder. *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 557, 25 L. ed. 892. When, in the interests of commerce, the Federal Uniform

Bills of Lading Act extended to bills of lading certain characteristics of negotiable paper in order to protect a bona fide purchaser of such bills, it was deemed proper to afford also certain protection to the carrier. This was done, in part, by providing in § 9 that the carrier would be justified in making delivery to any person in possession of an order bill of lading, duly indorsed, with certain exceptions to be noted below. . . .

"The only exception to the rule justifying the carrier in making delivery to one in possession of an order bill of lading indorsed in blank, which is urged as applicable here, is where the carrier has information that the person in possession of the bill is not lawfully entitled to the goods."

Right to deliver to true owner without bill.

—Reading together sections 9, 18 and 19 "it becomes quite clear that Congress intended to confer upon carriers transporting goods in interstate commerce the right to deliver the goods to the true owner and to make such delivery a complete defense to an action by a shipper who holds an order bill of lading and who sues to recover damages for a failure to deliver the goods to him." *Banik v. Chicago, etc., R. Co.*, (1920) 147 Minn. 175, 179 N. W. 899.

1918 Supp., p. 75, sec. 11.

Shipper a bona fide purchaser.—Shippers who took back a draft and attached bill of lading, with full knowledge that the terminal carrier had made delivery to another carrier without requiring a surrender of the bill of lading, as provided in that instrument, and that the drawee had refused to accept the shipment or honor the draft, cannot claim the protection of this section. *Pere Marquette R. Co. v. French*, (1921) 254 U. S. 538, 41 S. Ct. 195, 65 U. S. (L. ed.) —, reversing (1919) 204 Mich. 578, 171 N. W. 491.

1918 Supp., p. 75, sec. 13.

Waiver of terms of bill.—In *Decker & Sons v. Director General*, (1919) 55 I. C. C. 453, it was contended that section 10 of the uniform bill of lading providing that "any alteration, addition, or erasure in this bill of lading, which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor," permitted a waiver of any of the terms or conditions of the bill of lading. In overruling this contention, the Interstate Commerce Commission said: "It obviously refers only to those provisions which are peculiar to a given bill of lading and which are subject to alteration, addition, or erasure, such as the description of the property, routing, etc., and does not authorize a waiver of those uniform provisions

which are incorporated in the carrier's published tariffs and are presumed to be a part of the transportation contract, and, as such, binding upon both carrier and shipper."

1918 Supp., p. 76, sec. 18.

Right to deliver to true owner without bill.—See annotation under sec. 9.

1918 Supp., p. 76, sec. 19.

Right to deliver to true owner without bill.—See annotation under sec. 9.

1918 Supp., p. 76, sec. 20.

Unnecessary enlargement of description in bill.—This section makes it the duty of the carrier in loading package freight to count the packages, but lays no duty on him to ascertain the kind, quantity, or weight. In loading bulk freight he must ascertain the kind and quantity. The fair implication is that he must state in the bill the number of packages so counted, and the kind and quantity of bulk freight so ascertained. If the description in the bill be enlarged by stating the nature of the contents of the packages, or the weight of them, it is voluntary and gratuitous, and the statement may be guarded and qualified as the carrier sees fit. *Ellis v. Payne*, (N. D. Ga. 1921) 274 Fed. 443, so holding in the case of cotton in permanent bales which is declared to be package freight.

1918 Supp., p. 77, sec. 21.

Discrepancies in elevator weights.—In *Matter of Bills of Lading*, (1919) 52 I. C. C. 671, certain shippers proposed the elimination from the uniform bill of lading of a provision that carriers should not be liable for "differences in the weights of grain seed or other commodities caused by . . . discrepancies in elevator weights." Regarding the advisability of such an elimination, the Interstate Commerce Commission said: "Under section 21 of the bills of lading act above referred to, where a shipper of bulk freight has installed and maintains adequate weighing facilities, the carrier must, upon written request, and after reasonable opportunity so to do, ascertain the kind and quantity of grain. This gives the carrier the opportunity of weighing the grain when it is shipped. The arrangement, however, does not provide a like opportunity at destination where, for instance, grain is delivered into an elevator and weighed by the elevator of consignee. The carrier is liable, both at common law and under the federal statute, for any actual loss of goods caused by it while in transit. If a difference in weights results from actual loss of the goods so caused by it, the carrier must pay the claim for such loss. Under the law it is the carrier's duty to collect,

and the shipper's duty to pay, freight charges based upon correct, not estimated, weights. The claimed loss presents a question of fact. Whether or not a 'discrepancy' in elevator weights results from actual loss of the commodity or an error, human or mechanical, in the weighing operations, is a question of fact to be determined from all the evidence. The burden of proof to show what is the correct weight should depend, in a measure at least, upon which of the parties, carrier or shipper, is responsible for the accuracy of the weights. It would appear, therefore, that the disputed provision relative to 'discrepancies in elevator weights' is of no real effect in limiting the liability of the carrier and is mere surplusage."

1918 Supp., p. 77, sec. 22.

Fraud by agent in giving straight bill instead of order bill.—A carrier is liable for the fraudulent act of his agent in giving to

a shipper a straight bill of lading when the shipper in effect requested an order bill. That the fraud was not willful is not important. *Duholm v. Chicago, etc., R. Co.*, (1920) 146 Minn. 1, 177 N. W. 772.

1918 Supp., p. 81, sec. 41.

Intent and presumption as to intent.—On a trial for forging and negotiating bills of lading an instruction has been held proper which defined the offense charged as always including the element of intent to defraud as an essential ingredient, and laid down the proposition that, if the accused received the bills of lading without the signature of the railway agent, and negotiated them to secure money, then the presumption would be he intended to cheat and defraud, and that unless he rebutted the presumption, or there was a reasonable doubt of his intent, he should be convicted. *Jackson v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 770.

CENSUS

Vol. II, p. 35, sec. 11. [First ed., vol. I, p. 738.]

This section was not repealed by the act of 1919. (Fed. St. Ann. 1919 Supp. p. 15) *Holcomb v. Spikes*, (Tex. 1921) 232 S. W. 891.

Bulletin as evidence.—A bulletin issued under this act will be judicially noticed and considered in evidence, despite a certificate of the director of census that the count was subject to correction. *Holcomb v. Spikes*, (Tex. 1921) 232 S. W. 891, wherein the court said:

"It is insisted that the Director of Census gave a certificate to the effect that the count for the census was subject to correction. If this certificate was authorized by the act, we do not believe it should be held that this evidenced that the census was not complete under the terms of the law when the Director had officially published and distributed bulletins that the population was over 10,000. It is not a certificate that the official count was incomplete or was not correct. In fact, his subsequent certificate shows it was correct, and that his bulletin had been properly issued. The bulletin, we believe, officially announced the population as shown by the list forwarded by the enu-

merators of Lubbock county and supervisors of the district, and that as filed in the archives of the census office it was open to the public. The statute authorized, if there was an incomplete or erroneous enumeration, that it could be amended or taken anew. The bulletin does not indicate that it was incomplete or negligently done, but rather indicates it may be subject to correction. It does not carry the idea that it was incomplete, but that it was complete. We think, when the bulletin was given to the public, officials who were required to act with reference thereto may take official notice that the enumeration had been made and was then in the archives of that office, subject to the inspection of the public in which the population of Lubbock county had been determined. The fact that it may be corrected does not indicate that the census was not complete and then a public document under the law."

1919 Supp., p. 27, sec. 34.

Prior act not repealed.—The act authorizing the public printer to print bulletins, etc. (2 Fed. St. Ann. p. 36, § 11) was not repealed by this act. (*Holcomb v. Spikes*, (Tex. 1921) 232 S. W. 891.

CHINESE EXCLUSION

Vol. II, p. 67, sec. 1. [First ed., vol. I, p. 774.]

Chinese person born in the United States — Estoppel.—There is said to be no principle of estoppel in favor of an applicant from the fact that his father and his two brothers were admitted to the United States as citizens thereof. *White v. Chan Wy Sheung*, (C. C. A. 9th Cir. 1921) 270 Fed. 764.

Burden of proof.—A son of a Chinese person who seeks admission as the son of a native born citizen of the United States has the burden to show that his father was born in the United States. *White v. Chan Wy Sheung*, (C. C. A. 9th Cir. 1921) 270 Fed. 764.

Hearing.—A denial of a fair hearing cannot be established by showing that the decision of the immigration officials was against the weight of testimony. *White v. Chan Wy Sheung*, (C. C. A. 9th Cir. 1921) 270 Fed. 764.

Vol. II, p. 71, sec. 6. [First ed., vol. I, p. 778.]

Wives and minor children of Chinese laborers.—A Chinese person, first permitted to enter the United States in 1901 as a resident merchant's minor son, but who subsequently acquired the status of laborer, and as such is entitled to remain in the United States, may not properly demand that his wife and minor children, who were born in China, and have never resided elsewhere, be permitted to come into this country and reside with him. The Federal statutes exclude all Chinese persons belonging to the class defined as laborers except those specifically and definitely exempted, and there is no such exemption of a resident laborer's wife and minor children. *Yee Won v. White*, (1921) 256 U. S. —, 41 S. Ct. 504, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1919) 258 Fed. 792, 170 C. C. A. 86.

Vol. II, p. 76, sec. 11. [First ed., vol. I, p. 782.]

Prosecution under Immigration Act.—A person bringing Chinese laborers into the United States, who, because of failure actually to land the aliens in the United States, did not proceed far enough to violate this section, may be prosecuted under the Immigration Act of February 5, 1917, § 8, (see 1918 Supp. p. 220) the latter section being broader and more comprehensive in its terms. *U. S. v. Butt*, (1920) 254 U. S. 38, 41 S. Ct. 37, 65 U. S. (L. ed.) —.

Indictment.—In *Kaphan v. U. S.*, (C. C.

A. 9th Cir. 1920) 264 Fed. 323, there were two indictments against the defendant. In one it was charged that he and others conspired to bring into the United States, and to cause to be brought into and to aid and abet the bringing into and landing in the United States, through the port of San Francisco, Chinese persons who were not lawfully entitled to enter or remain in the United States; in the other he, with others, was charged with having conspired to willfully and unlawfully conceal, remove, mutilate, obliterate, and destroy records, papers, and other documents filed and deposited in a public office, to wit, the immigration office at Angel Island, Cal. In determining the sufficiency of the latter indictment, the court said:

"It is said that the indictment is defective, in that there is no allegation as to what Kaphan did with the records which he would use in bringing and causing to be brought into the United States Chinese persons not entitled to enter or remain in the United States. The point is not well taken. The indictment, after alleging that Kaphan with others conspired to do the things charged as heretofore stated, averred that in furtherance of the conspiracy and to effect the object thereof one of the defendants, Yow, delivered to another defendant, Akers, certain letters addressed to Chinese applicants for admission to the United States awaiting examination to enter the United States at the immigration station at Angel Island, Cal., and that the letters contained questions and answers to be used by the applicants as a means of gaining admission to the United States. The indictment was drawn under section 37 of the Penal Code, and section 11 of the Chinese Immigration Act (section 11, Act May 6, 1882, as amended by Act July 5, 1884). Section 11 provides that any person who shall knowingly bring into or cause to be brought into the United States, or aid or abet the landing in the United States, from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor. Inasmuch as the charge was for conspiring to violate the section just referred to, it was unnecessary to allege in detail what Kaphan did with the records which were delivered, and which contained questions to be used by the applicants as a means of gaining admission to the United States."

Vol. II, p. 77, sec. 12. [First ed., vol. I, p. 782.]

Temporary admission under bond.—Where a Chinaman has been permitted to come into this country temporarily on giving a

bond to appear for any hearing or hearings to finally determine the question of his right to enter or remain, his rights must be determined as of the date of his application for entry. He cannot by engaging in a mercantile enterprise acquire a residential status. *Ex p. Wu Kao*, (W. D. Wash. 1920) 270 Fed. 351.

Vol. II, p. 82, sec. 7. [First ed., vol. I, p. 770.]

The purpose of readmission certificates is to avoid detention and to facilitate the readmission of Chinese aliens who are entitled to return to the United States under the Chinese Exclusion Laws. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

Status acquired by domicile.—A Chinese merchant once lawfully domiciled in the United States does not thereby acquire a status which entitles him to readmission. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

Return certificate as determining right of re-entry.—Such certificates have no binding effect as adjudications of the right to return. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

Vol. II, p. 86, sec. 13. [First ed., vol. I, p. 772.]

Repeal of section.—The right to a judicial hearing given by this section is taken away by the Immigration Act of Feb. 5, 1917 (1918 Supp. Fed. Stat. Ann. p. 211 *et seq.*) in the case of deportation proceeding against a Chinese woman for prostitution, though her entry into the United States was prior to the passage of that act. *Chin Shee v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 801.

Vol. II, p. 94, sec. 3. [First ed., vol. I, p. 762.]

Sufficiency.—Evidence held insufficient to entitle defendant to remain in the United States, see *Doo Fook v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 860.

Burden and measure of proof.—“The burden of the attack is upon the government;

but that does not mean that the government must in any event introduce proof to show that the defendant is not a citizen of the United States. The attack may be made upon the evidence produced on behalf of the defendant upon the hearing, and if that evidence is contradictory, or insufficient to show that the defendant was born in the United States, the court would be justified in so holding, notwithstanding the previous action of the Executive Department of the government in giving him a landing. In other words, the burden of proof placed on the defendant by the statute in a deportation case is not shifted until that proof establishes to the satisfaction of the court his lawful right to be and remain in the United States.” *Doo Fook v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 860.

Vol. II, p. 104, sec. 2. [First ed., vol. I, p. 760.]

Chinese merchants.—*In general.*—A merchant is a person engaged in buying and selling merchandise, who during the time does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. The words “laborer or laborers” include both skilled and unskilled manual laborers; the statute instancing certain lines of work which may be considered as illustrative. A merchant may therefore do certain labor without losing his status as a merchant, but that labor must be done in and about the conduct of his business, and be necessary thereto. If he goes beyond this, and engages in manual labor not connected with his business as a merchant, he is to be classed as a laborer; his status being manifested by the kind of work he does. *Chan Gai Jan v. White*, (C. C. A. 9th Cir. 1920) 266 Fed. 869.

Conclusiveness of finding.—The determination of the Department of Labor as to whether a Chinaman is a merchant or a laborer within the intentment of the Chinese exclusion legislation is final and conclusive where there is competent evidence of a persuasive character to sustain it. *Chan Gai Jan v. White*, (C. C. A. 9th Cir. 1920) 266 Fed. 869.

CITIZENSHIP

Vol. II, p. 119, sec. 1996. [First ed., vol. I, p. 788.]

A person will be denied admission to citizenship where the evidence discloses that he enlisted in the United States army; that he later deserted therefrom; that he was subsequently taken into custody, tried by a general

court-martial upon the charge of desertion, in violation of the forty-seventh Article of War, found guilty of such charge, and sentenced, among other punishments, to be dishonorably discharged from the service and to be confined at hard labor for one year. *In re Gnadt*, (E. D. Mo. 1920) 269 Fed. 189.

Vol. II, p. 123, sec. 3. [First ed., 1909 Supp., p. 69.]

American woman married to resident foreigner.—To same effect as original annotation, see *Techt v. Hughes*, (1920) 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166.

Alien wife of alien husband.—The alien wife of an alien husband cannot become a naturalized citizen of the United States. *In re Guary*, (S. D. N. Y. 1921) 271 Fed. 968.

CIVIL RIGHTS

Vol. II, p. 143, sec. 4. [First ed., vol. IV, p. 740.]

Exclusion as reversible error.—A conviction of a negro will be reversed where negroes

were excluded from the jury solely on account of their color, the violation of this act rendering void the action of the jury commissioners in selecting the panel. *Ware v. State*, (1920) 146 Ark. 321, 225 S. W. 626.

CLAIMS

Vol. II, p. 179, sec. 3477. [First ed., vol. II, p. 7.]

Railway company succeeding to claims of another by consolidation.—The prohibition of this section, against the transfer or assignment of claims against the United States, does not preclude a recovery by a railway company against the United States for charges for transportation services originally payable to another railway company to whose rights the former company has succeeded through merger or consolidation sanctioned by state laws. *Seaboard Air Line Ry. v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 611, 65 U. S. (L. ed.) —, *reversing* (1918) 53 Ct. Cl. 107.

Vol. II, p. 216, sec. 3466. [First ed., vol. II, p. 45.]

Rights of sureties paying claims.—See annotation under R. S. sec. 3468, *infra*, this page.

R. S. sec. 3468 contrasted.—“Section 3468, applying an established rule of the law of subrogation (*Lidderdale v. Robinson*, 12 Wheat. 594, 596, 6 L. ed. 740, 741), declares that when a surety pays to the United States the money due upon . . . [a] bond, such surety . . . shall have the like priority for the recovery . . . of the moneys . . . as is secured to the United States. Section 3466, embodying the common-law rule by which the sovereign has priority over other creditors of an insolvent (*United States v. State Bank*, 6 Pet. 29, 35, 8 L. ed. 308, 310), declares that the debts due to the United States shall first be satisfied. There is no conflict between the two sections, which are substantially a re-enactment and extension of the provisions of § 65 of the Act of March 2, 1799, chap. 22, 1 Stat. at L. 627, 676.” *U. S. v. National Surety Co.*, (1920)

254 U. S. 73, 41 S. Ct. 29, 65 U. S. (L. ed.) —.

Income tax.—It is said that in a certain sense an income tax is due as soon as there is an income but that the tax is “*solvendum in futuro*” and becomes payable only when the solution or assessment is accomplished. *Pennsylvania Cement Co. v. Bradley Contracting Co.*, (S. D. N. Y. 1920) 274 Fed. 1003.

Receivers.—While receivers are not mentioned by name or title in this and the following section, yet they are within the purview of the act. *Pennsylvania Cement Co. v. Bradley Contracting Co.*, (S. D. N. Y. 1920) 274 Fed. 1003.

Vol. II, p. 222, sec. 3467. [First ed., vol. II, p. 49.]

Receiver.—It seems that a receiver of a corporation who hastened distribution of the estate before the due date of an income tax and then declared that he had had nothing to pay it with would be personally responsible. And it is further declared that any court which facilitates such a distribution would be chargeable with judicial wrongdoing. *Pennsylvania Cement Co. v. Bradley Contracting Co.*, (S. D. N. Y. 1920) 274 Fed. 1003.

Vol. II, p. 223, sec. 3468. [First ed., vol. II, p. 50.]

Rights of sureties paying claims.—The United States, having been given by R. S. § 3466, (see vol. 2, p. 216) priority over other creditors of an insolvent debtor, is entitled to such priority, as against a surety on the debtor's bond to the government, for the amount of its claim remaining unpaid after the surety has paid the full amount

of the liability on the bond, although by this section, when a surety pays to the United States the money due upon a bond, such surety is given like priority for the recovery of the money as is secured to the United States. While the priority given the surety by such statute attaches as soon as

the obligation upon the bond is discharged, it cannot ripen into enjoyment unless or until the whole debt due the United States is satisfied. *U. S. v. National Surety Co.*, (1920) 254 U. S. 73, 41 S. Ct. 29, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1919) 262 Fed. 62.

COINAGE, MINTS AND ASSAY OFFICES

Vol. II, p. 365, sec. 3565. [First ed., vol. II, p. 145.]

A judgment on a foreign bill of exchange payable in pounds sterling should be entered

on the basis of the rate of exchange prevailing at the time the judgment is entered. *Liberty Nat. Bank v. Burr*, (E. D. Pa. 1921) 270 Fed. 251.

COLLISIONS

Vol. II, p. 389, art. 16. [First ed., vol. II, p. 160.]

Application of article to sailing vessels.—The rule regarding moderate speed in a fog applies to sailing vessels as well as to steamers, although different considerations enter into the determination of what is moderate speed for a sailing vessel. *Adams v. U. S.*, (D. C. Mass. 1921) 272 Fed. 780.

Vol. II, p. 393, art. 20. [First ed., vol. II, p. 162.]

Presumption as to fault.—Where a steamer and schooner are approaching each other. it is the duty of the schooner to hold her course and of the steamer to keep out of her way, and the fact that the steamer failed to do so raises a presumption of fault on her part. *Crowell v. U. S.*, (D. C. Mass. 1921) 273 Fed. 227.

Vol. II, p. 394, art. 21. [First ed., vol. II, p. 162.]

Privileged vessel to keep course.—"It is the duty of the privileged vessel to keep 'on her course until a departure is necessary to avoid immediate danger,' and the rule as to speed is the same as that regarding the course. The fact that subsequent events show that stopping and backing on the part of the privileged vessel would have avoided collision does not prove negligence." *The Binghamton*, (C. C. A. 2d Cir. 1921) 271 Fed. 69.

Rule applied.—Where a privileged steamer maintained her course and speed up to one minute of the time of the collision prior to which time it was possible for the other to avoid her by porting, she will not be held in fault, at least in the absence of some dis-

tinct indication that the burdened vessel was about to fail in her duty. *The Binghamton*, (C. C. A. 2d Cir. 1921) 271 Fed. 69.

Vol. II, p. 395, art. 23. [First ed., vol. II, p. 162.]

Liability for failure to lessen speed.—It has been held that it is a fault for a vessel to approach at full speed a light the color and significance of which is not clear. *Crowell v. U. S.*, (D. C. Mass. 1921) 273 Fed. 227, holding a steamer to be at fault in thus approaching a sailing vessel.

Vol. II, p. 396, art. 24. [First ed., vol. II, p. 162.]

Overtaking vessel.—In *The Stortind*; (E. D. Va. 1920) 264 Fed. 1013, the evidence was held to show that a vessel was overtaking another.

Vol. II, p. 398, art. 29. [First ed., vol. II, p. 163.]

Failure to maintain lookout.—To the same effect as the original annotation, see *The Brandon*, (C. C. A. 4th Cir. 1921) 273 Fed. 176.

Position of lookout.—In case of a fog a lookout should be posted on the forward deck. *Adams v. U. S.*, (D. C. Mass. 1921) 272 Fed. 780.

Lookouts during fog.—It is negligence for a schooner to carry full sail and maintain unnecessarily a speed of approximately 6 knots through a fog, and to proceed for a period of time which, though short, was vitally important, without a lookout, and without sharply using her fog horn after she had become aware of the presence of the

steamer, and to have no officer on deck in charge of her movements, and authorized to give prompt orders as the vessels approached each other. *Adams v. U. S.*, (D. C. Mass. 1921) 272 Fed. 780. And a steamer proceeding at immoderate speed through a fog without a properly posted lookout is guilty of gross negligence. *Adams v. U. S.*, (D. C. Mass. 1921) 272 Fed. 780, holding a speed of eight or nine knots to be immoderate.

Mutual fault.—In *The Brandon*, (C. C. A. 4th Cir. 1921) 273 Fed. 176, both vessels were held to have been mutually at fault in violating this article and other rules of navigation.

Vol. II, p. 407, Rule 15. [First ed., vol. II, p. 171.]

Evidence.—It has been held that proof tending to show an established and long-continued custom on the part of a steamer never to check merely for fog, no matter how dense, but to continue at full speed, would be distinctly relevant toward determining an otherwise doubtful issue of fact, whether the boat on a particular occasion, while under the same management and the same master, did depart from that custom and for the first time show caution, instead of utter recklessness. *The Choctaw*, (C. C. A. 6th Cir. 1921) 270 Fed. 114.

Vol. II, p. 411, Rule 24. [First ed., vol. II, p. 172.]

Collision in St. Clair Flats.—In the *Perseus*, (C. C. A. 6th Cir. 1921) 272 Fed. 633, which involved the liability for a collision occurring in the St. Clair Flats in consequence of which a tug and scow colliding with a steamer were sunk, the tug was held at fault sufficient to account for the collision, in failing to hear the one-blast response of the *Perseus*; not hearing it, in continuing to navigate thereafter on the assumption that a port to port passing agreement had been made; and also in giving a cross-signal when the boats were but a few hundred feet apart, and executing it without waiting for response from the *Perseus*. The court also declared that the contention that the steamer violated the duty of an unencumbered steamer to keep clear of a craft burdened with a tow was in its opinion, properly answered by the trial court in the statement that the collision did not happen because the tug was encumbered with a tow and could not be maneuvered and handled with the same freedom as a tug thus not encumbered, and the weather was calm, and such wind as was blowing would aid rather than hinder the tug in keeping on her proper course.

Vol. II, p. 414, Rule 28. [First ed., vol. II, p. 173.]

Lookouts.—In the case of a tug having a barge in tow failure to have a lookout stationed forward was held to be negligence in *Mylroie v. British Columbia Mills Tug, etc., Co.*, (C. C. A. 9th Cir. 1920) 268 Fed. 449.

In *The Choctaw*, (C. C. A. 6th Cir. 1921) 270 Fed. 114, a case of a collision in a fog, a vessel was held liable for not maintaining a proper lookout where the lookout was stationed two hundred feet back of the bow.

Vol. II, p. 419, art. 11. [First ed., vol. II, p. 176.]

Duty to avoid collision.—The obligation on the part of free vessels to avoid risk of collision with those incumbered, or at rest, is imperative, and one that the admiralty courts must enforce, having regard to the perils of navigation and the importance of the rule of the road in respect thereto. *The Shinsei Maru*, (E. D. Va. 1920) 266 Fed. 548.

Duty of anchored vessel.—In the case of an anchored vessel it is its duty to hold its place so long as there is any doubt as to what an approaching vessel may do. And such a ship not otherwise in fault is not to be held blameworthy because those in charge of her do not instantly figure out all the possibilities which upon calm reflection might be suggested by the unexpected movements of a vessel approaching them, and that men are not to be held liable for not possessing unusual quickness of apprehension. All that can be required is the exercise of reasonable care and skill. *The Ceylon Maru*, (D. C. Md. 1920) 266 Fed. 396.

Collision not to be anticipated.—An anchored vessel is not required to contemplate the probability of a collision happening in broad daylight, as well as at night, or in a thick fog, and at all times, in calm as well as in stormy weather, and to keep officers and men standing by, ready to pay out chain at a moment's notice. Before it can be required, there must be notice of some conditions out of the ordinary, which makes such a precaution one that an ordinarily skillful and prudent mariner would take. *The Ceylon Maru*, (D. C. Md. 1920) 266 Fed. 396.

Evidence; burden of proof.—In the case of a collision with an anchored vessel it is incumbent on the vessel colliding with it to show, where it claims that its steering gear would not work, what was the cause of the failure of the steering gear to function, or what were all the possible causes, if there were more than one, and then to prove that no precautions reasonably requirable of her would have prevented its or their operation. *The Ceylon Maru*, (D. C. Md. 1920) 266 Fed. 396.

Vol. II, p. 420, art. 12. [First ed., vol. II, p. 177.]

Use of flare up light.—In *The Lafayette*, (C. C. A. 2d Cir. 1920) 269 Fed. 917, a sloop yacht was held not to be guilty of negligence in not using a flare up light. Being a privileged vessel it was declared to be her right and duty to keep her course and speed and a steamship which should have seen her but did not, because it did not have a proper lookout, was held liable for the collision.

Vol. II, p. 420, art. 15. [First ed., vol. II, p. 177.]

Vessels at anchor—In general.—A vessel at anchor is not obliged to blow danger whistles unless there is some reason therefor. Ringing a fog bell and keeping a man on deck is sufficient. *Central Railroad of New Jersey No. 27*, (E. D. N. Y. 1920) 270 Fed. 297.

Vol. II, p. 421, art. 16. [First ed., vol. II, p. 178.]

Source and purpose of rule.—"The rule was made a part of the international code adopted by Act of Congress of August 19, 1890, 26 Stat. 320. It became effective on July 1, 1897, by the President's proclamation. 29 Stat. 885. It was adopted to prevent collisions at sea. But Congress has also made the rule applicable for harbors, rivers, and inland waters by the Act of June 7, 1897, 30 Stat. 99." *The No. 25*, (C. C. A. 2d Cir. 1920) 266 Fed. 331.

Rule mandatory, see *The New London*, (C. C. A. 2d Cir. 1921) 271 Fed. 83.

Moderate speed.—A vessel proceeding in a fog in frequented waters at such speed that she cannot stop within seeing distance of another vessel is going at an immoderate rate of speed and is at fault for collision. *The Albatross*, (D. C. Mass. 1921) 273 Fed. 285.

Mutual fault.—To the same effect as the original annotation, see *The New London*, (C. C. A. 2d Cir. 1921) 271 Fed. 83.

In *the Mexico-Marú*, (W. D. Wash. 1921) 270 Fed. 800, a vessel moving from harbor at night and vessel at anchor with which it collided held mutually at fault, the former for proceeding at excessive speed in view of conditions as to fog and the anchored vessel for failure to ring her fog bell.

Navigation in fog.—Regarding the speed of a vessel while navigating in fog, the court, in *The City of Richmond*, (D. C. Md. 1920) 265 Fed. 722, said:

"The moderate speed to which a vessel under such conditions as those which confronted the *City of Richmond* must limit herself means 'a speed so slow that the vessel can be stopped within the distance

at which another vessel can be seen.' If the fog is so dense as to justify the master in believing that another vessel going at a moderate speed could not be seen at the distance in which he could stop his vessel, and that the two vessels would be in danger of collision, then the master should anchor and give the statutory signals." *The City of Richmond* was going at such a speed in the direction from which fog bells were sounded that, after she had seen the motionless *Texan*, she could not stop in time to avoid a crash. Her fault is clear."

Burden of proof.—In a case involving this rule it is declared that when a vessel disregards a rule of navigation, she has the burden of showing that her disobedience did not contribute to the injury which followed. *The No. 25*, (C. C. A. 2d Cir. 1920) 266 Fed. 331.

Evidence held to show disregard of this rule by steamer colliding with tug in Hudson River. *The No. 25*, (C. C. A. 2d Cir. 1920) 266 Fed. 331.

Vol. II, p. 424, art. 18, Rule 1. [First ed., vol. II, p. 178.]

Mutual fault.—A tug with a tow coming out of a slip when her master knew that another tug was crossing the slip and would necessarily interfere with his exit, and the second tug crossing the slip without a proper lookout were both held to be at fault in *The Progressive*, (C. C. A. 2d Cir. 1921) 271 Fed. 207.

In *The Orange*, (C. C. A. 2d Cir. 1921) 271 Fed. 458, a steamer and a ferry boat collided. Both vessels were held to be at fault, the steamer, which was the burdened vessel, for attempting to cross the bow of a ferry boat instead of under her stern, and the ferry boat in increasing her speed after knowledge that the steamer was disregarding her signals.

A tug passing down the channel of a river with a tow and hawser of unusual length and in violation of the rules and regulations, thereby unduly obstructing the channel, and a steam vessel coming into the channel across anchorage grounds, which were crowded with shipping, at too great a rate of speed to avoid a collision, were both held to be at fault in *The Berkley*, (E. D. Va. 1921) 271 Fed. 35.

Failure to act on signals.—A vessel has been held liable for a collision with a boat being towed where those in charge of the vessel were depending and acting, not upon what the sailing lights disclosed to them was the course of the tow, but upon their assumption of what the course was, and the collision was brought about by their assumption turning out to be wrong. They failed to observe the sailing lights of the tow. *The Senator Penrose*, (E. D. Pa. 1921) 270 Fed. 785.

Vol. II, p. 426, Rule V. [First ed., vol. II, p. 179.]

Rights of ferryboats operating near ships.—Ferryboats "when operating in or close by the entrances to their own slips, have rights somewhat superior to those of other craft in the immediate vicinity. The Breakwater, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. ed. 139. These rights, however, are no greater than those reasonably required for the proper and efficient navigation of the privileged boats. *Carroll v. City of New York*, 249 Fed. 453, 161 C. C. A. 411. They must maintain a sharp lookout for craft passing up and down the stream, and, once safely clear of their racks, are bound to navigate with respect to other craft in accordance with the rules of the road." *The Hazelton*, (C. C. A. 2d Cir. 1921) 273 Fed. 815.

Vol. II, p. 427, Rule VIII. [First ed., vol. II, p. 179.]

Rule to be applied.—In the following case a vessel was held at fault for violation of this rule. *The Plymouth*, (C. C. A. 2d Cir. 1921) 271 Fed. 461.

Vol. II, p. 428, art. 19. [First ed., vol. II, p. 180.]

Change by agreement.—As to the duties and obligations which arise where there is a change by agreement, it has been said:

"On the whole, we are disposed to think that any agreement to change the usual rules should be treated as creating thereafter a position of special circumstances. If so, we think that, although the proposal emanates from the privileged vessel, and should be taken as meaning that she will undertake actively to keep out of the way, it need not absolve the burdened vessel from her similar and original duty also to keep out of the way, nor will it impose on her a rigid duty to hold her course and speed. It is true that that duty is imposed by the rules generally as a correlative to the duty to keep out of the way, but only in cases where no agreement has been reached. Some convention is essential when neither knows the other's purposes, but when both have agreed upon a maneuver by an exchange of signals, their accord should be left for execution by movements adapted to the circumstances. For example, if the angle of crossing is wide, it will usually be best for the originally burdened vessel to hold her course and speed; but, if it be narrow, it is safest for both to starboard and pass at a greater distance. No doubt the proposal involves the proposer in a duty to give a wide enough margin for safety, even though the assenting vessel do not starboard." *The Newburgh*, (C. C. A. 2d Cir. 1921) 273 Fed. 436.

Duty of privileged vessel.—When a burdened vessel decides to "keep out of the way" by crossing the bow of the privileged vessel the duty of the latter is to cooperate and she need not keep her course. *The Newburgh*, (C. C. A. 2d Cir. 1921) 273 Fed. 436.

Risk assumed by burdened vessel.—"It is good law that, when the burdened vessel decides to 'keep out of the way' by crossing the bows of the privileged vessel, though she gets an assent to such a proposal, she assumes the risks involved in choosing that method." *The Newburgh*, (C. C. A. 2d Cir. 1921) 273 Fed. 436.

Vol. II, p. 430, art. 20. [First ed., vol. II, p. 180.]

Presumption of fault.—In case of a collision between a steamship and a sailing vessel a strong case must be made out if the sailing vessel is to be held at fault. *The Lafayette*, (C. C. A. 2d Cir. 1920) 269 Fed. 917.

Rule applied.—Schooner held not to be on course involving risk of collision long enough to apprise an overtaking steamship of the risk, so as to impose the duty upon her to keep out of the way as prescribed by this article. *The Helen Fairlamb*, (E. D. Pa. 1921) 271 Fed. 507.

Vol. II, p. 433, art. 22. [First ed., vol. II, p. 180.]

Rule applied.—In the *Gowanus*, (E. D. N. Y. 1920) 269 Fed. 659, a tug having barge in tow was held liable for attempting to cross bow of ferry boat and the ferry boat was held to be at fault for failure to give whistle signal until it was too close to the tow of the tug to maneuver safely at the speed at which it was going with the tide.

Vol. II, p. 434, art. 24. [First ed., vol. II, p. 180.]

Collision held fault of overtaking vessel.—In *The Hampden*, (S. D. Ga. 1920) 267 Fed. 464, a collision was held to be the fault of the overtaking vessel whether attributable to the movement of the engines of that vessel or to the suction of the overtaken vessel.

Vol. II, p. 436, art. 25. [First ed., vol. II, p. 180.]

When safe and practicable.—In *The Klatawa*, (W. D. Wash. 1920) 266 Fed. 120, the court said regarding the duties of vessels under this article:

"'When safe and practicable' is intended to cover the reasonable necessities of practical navigation. *The Three Brothers*, 170 Fed. 48, 95 C. C. A. 322. A vessel intending to enter a narrow channel should so maneuver

on approaching the entrance as to leave ample room for outcoming vessels to pass port to port, approaching the channel from the side she must keep after entering; and a vessel leaving a narrow channel should pass out, keeping to its starboard side of the channel, until she is well clear of the entrance, and should not change her course to port until she is well clear of vessels passing in." To same effect, see *The Admiral Watson*, (W. D. Wash. 1920) 266 Fed. 122.

Determination of question whether narrow channel.—It is not the mere physical dimensions of a strait or passage of water that determines whether it shall be called a narrow channel or not. It is the kind or character of navigating use to which that water is put. *The Hokendaqua*, (D. C. N. Y. 1919) 270 Fed. 270.

Effect of custom.—A custom of vessels leaving a certain point to pursue a certain course through a narrow channel which custom is one devised for their own convenience, not based on any necessity of navigation, distinctly not tending to safety, and by no means universal, does not excuse a violation of the rule provided in this article. *The Hokendaqua*, (D. C. N. Y. 1919) 270 Fed. 270.

Tug with tow navigating channel.—In *The Pembrokehire*, (D. C. Md. 1920) 269 Fed. 851, a steamship was held at fault for a collision with one of several barges which were being towed.

Upper New York Harbor.—The channel between Throgg's Neck and Willet's Point has been held to be a narrow channel within the Inland Rules. *The Hokendaqua*, (D. C. N. Y. 1919) 270 Fed. 270. The court said:

"I am of opinion that it is, not because it is of any definite width, or measures any particular number of yards across, but because it is a body of water so much used and used in such a manner as to render the application of article 25 both proper and necessary."

Buzzard's Bay.—In *The North America*, (E. D. N. Y. 1921) 273 Fed. 263, tugs in charge of tows were held mutually at fault for collision occurring in a narrow ice channel.

Rule applied.—In *The Klatawa*, (W. D. Wash. 1920) 266 Fed. 120, two power boats which collided in a narrow channel leading from a lake to a bay were held to be mutually at fault, one for not giving a timely signal on approaching the channel and the other for not keeping to that part of the fairway on starboard side of the vessel.

In *The Sif*, (C. C. A. 2d Cir. 1920) 266 Fed. 166, a tug with barges in tow was held to be partially at fault for a collision because it was navigating on the wrong side of a narrow channel in violation of this article.

In *The Admiral Watson*, (W. D. Wash. 1920) 266 Fed. 122, a schooner and steam-

ship were held to be mutually at fault for a collision in a narrow channel, the former on the ground that, although she was the privileged vessel, she maintained her course and speed after it became apparent that a collision was imminent, and the latter because she was not in the fairway in accordance with the provisions of this article, failed to answer the schooner's signals and did not maintain a proper lookout.

In *The Amolco*, (D. C. Mass. 1921) 273 Fed. 614, which was a case of a collision between a steam trawler and a steamship in Lower New York Harbor on a clear day, the trawler was held at fault where it was the duty of the steamer to hold her course and speed and the trawler failed to perform her duty to give way.

Vol. II, p. 440, art. 27. [First ed., vol. II, p. 181.]

Holding course when danger imminent.—In *The Albatross*, (D. C. Mass. 1921) 273 Fed. 285, a vessel leaving her pier was held to be negligent in reversing her engines when another vessel suddenly appeared in a fog headed directly at her, it being the duty of the former vessel to keep her course and of the other vessel to pass under her stern.

Special circumstances.—In the case of a collision between a tug going up a river with a tow and a steam vessel manoeuvring so as to slip in broadside between piers, the situation was held to be one which under this article required each vessel to navigate with prudence so as to avoid immediate danger. *The Coamo*, (C. C. A. 2d Cir. 1920) 267 Fed. 686.

In *The Helen Fairlamb*, (E. D. Pa. 1921) 271 Fed. 507, a schooner in attempting to change her course immediately after crossing an overtaking steamship's bow, and in failing to keep a proper lookout was held guilty of a failure to give due regard to special circumstances as provided by this article and hence to be solely in fault for the resultant collision.

Inevitable accident.—The word "inevitable" must be considered as a relative term, and construed, not absolutely, but reasonably with regard to the circumstances of each particular case. *The Anna C. Minch*, (C. C. A. 2d Cir. 1921) 271 Fed. 192. The court in applying the rule stated held in this case that a collision due to the breaking away of a vessel properly moored to a dock and her drifting against another, which was caused by the breaking of an ice dam during a spring freshet, was an inevitable accident for which she could not be held liable.

Vessel at anchor.—In *The Beaverton*, (S. D. N. Y. 1919) 273 Fed. 539, a vessel at anchor on anchorage ground where she had a right to be was held not to be chargeable with joint fault for collision with a vessel in charge of four tugs, where the latter vessel was not under control which fact,

however, was not discovered until the two vessels were about a length apart.

Burden of proof.—What the law would normally call a tort becomes an accident if its infliction was inevitable in the technical admiralty sense; that is, that it was of such a sort that it would not have been prevented by the use of that degree of reasonable care and attention which the situation demanded. The burden, of course, is heavily upon [the party] asserting such a defense. *The Anna C. Minch*, (C. C. A. 2d Cir. 1921) 271 Fed. 192.

Vol. II, p. 442, art. 29. [First ed., vol. II, p. 181.]

Duty to have lookout was held to be imperative in the *New London*, (C. C. A. 2d Cir. 1921) 271 Fed. 83.

A lookout should be given no other work which interferes with that duty and this is particularly true on congested waters in a fog. *The Albatross*, (D. C. Mass. 1921) 273 Fed. 285.

Vol. II, p. 446, sec. 2. [First ed., 1914 Supp., p. 30.]

Lights on scows.—To same effect as original annotation, see *The Sif*, (C. C. A. 2d Cir. 1920) 266 Fed. 166.

Vol. II, p. 453, sec. 4233, Rule seven. [First ed., vol. II, p. 186.]

Colliding vessels without lights held mutually at fault.—See *The Cushing*, (S. D. N. Y. 1920) 266 Fed. 570.

Vol. II, p. 457, sec. 4233, Rule eighteen. [First ed., vol. II, p. 190.]

Failure to keep to right held to render vessel liable for collision. *The Shinsei Maru*, (E. D. Va. 1920) 266 Fed. 548.

Vol. II, p. 471, sec. 4412. [First ed., vol. II, p. 201.]

Pilot rules held not inconsistent with provision.—See *The John D. Rockefeller*, (C. C. A. 4th Cir. 1921) 272 Fed. 67. The pilot rules referred to in this case were as follows:

"Rule 1. When steamers are approaching each other from opposite directions, the signal for passing shall be one short and distinct blast of the whistle to alter course to starboard so as to pass on the port side of the other, and two short and distinct blasts of the whistle to alter course to port so as to pass on the starboard side of the other.

"When two vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

"When an ascending steamer is approaching a descending steamer, the pilot of the ascending steamer shall give the first signal for passing, which shall be promptly answered by the same signal by the pilot of the descending steamer, if safe to do so, and both shall be governed accordingly; but if the pilot of the descending steamer deem it dangerous to take the side indicated by the ascending steamer, he shall immediately signify the fact by sounding the alarm or danger signal of four or more short and rapid blasts of the whistle, and it shall be the duty of the pilot of the ascending steamer to answer by a signal of four or more short and rapid blasts of the whistle, and the engines of both steamers shall be immediately stopped, and backed if necessary, until the signals for passing are given and answered. After sounding the alarm signal by both steamers, the pilot of the descending steamer shall indicate by his whistle the side on which he desires to pass, and the pilot of the ascending steamer shall govern himself accordingly, the descending steamer being entitled to the right of way.

"Where possible the signals for passing must be made, answered and understood before the steamers have arrived at a distance of half a mile of each other."

Effect of customs of river.—"The customs of the river are, of course, subordinate to the statutory rules and to the pilot rules; but, when not inconsistent with those rules, they should be observed for promoting both dispatch and safety, and the violation of an established custom of this sort is attributed to a vessel as a fault. On the Mississippi river the recognized applicable customs, established, we think, by the weight of the evidence in this case, and recognized in all the cases we have been able to find on the subject, are these: Where the navigation is not materially affected by bends or other special conditions, the descending vessel should keep in the middle of the stream, and the ascending vessel should keep to her right side of the river. But, where there are bends, the ascending vessel has a right to run the points, and the descending vessel to run the bends; that is, the ascending vessel should take the course from the point on one side of the river to the nearest point on the other, to avoid the resistance of the current by keeping in the eddy water near the bank, while the descending vessel should keep the main channel current, following the bends, thus using the force of the current." *The John D. Rockefeller*, (C. C. A. 4th Cir. 1921) 272 Fed. 67, wherein it was said: "As all vessels navigating the Mississippi river should observe these rules and customs, navigators have a right to expect their observance by each other."

Duty where signals misunderstood.—"Where it is evident to a navigator of a vessel that his signals are misunderstood,

he should immediately stop and reverse until his signals are understood, and he will be held at fault for failure to do so." The John D. Rockefeller, (C. C. A. 4th Cir. 1921) 272 Fed. 67.

Duty where other vessels disregarding rules.—"A rule of caution laid down by the courts—to be applied, however, with great

discrimination—is that, when one vessel sees, or should see, that another is disregarding the required precautions against collision, and fails to take reasonable precaution herself, in view of the remissness of the other vessel, both will be held at fault." The John D. Rockefeller, (C. C. A. 4th Cir. 1921) 272 Fed. 67.

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Vol. II, p. 546, sec. 1 (a). [First ed., 1909 Supp., p. 81.]

Title held as trustee.—Where one of several co-authors obtains a copyright in the joint work in his individual name, the legal title thereby vested in him is held in trust for his co-authors. *Maurel v. Smith*, (C. C. A. 2d Cir. 1921) 271 Fed. 211.

Vol. II, p. 548, sec. 1 (e). [First ed., 1909 Supp., p. 81.]

"Manufactured" goods—*Disc records*.—In *Ricordi & Co. v. Columbia Graphophone Co.*, (S. D. N. Y. 1920) 270 Fed. 822, it was held that disc records were "manufactured" within the United States within the meaning of this section where eight of the nine steps in the process of "manufacture" of the commercial records were taken by the defendant in the United States, and that the ninth step, or the step which resulted, speaking in the common vernacular, in putting the "finishing touches" upon the disc, was taken by the defendant at its factory in Toronto, Canada, where the various parts, such as wax blanks, wax masters, wax matrices, mother matrices, stamping shells and backed-up stampers, were shipped after they had been manufactured, as above stated, within the United States. The court said:

"In other words, the 'manufacture,' as I see it, commenced when the song was sung by the artist and recorded upon the wax master record, and every step taken thereafter, up to and including the one described in paragraph '8,' was taken within the territorial limits of the United States.

"In reaching a conclusion in respect of the issue presented, I am frank to confess that in view of the fact that there are practically no judicial 'signboards' hung along the pathway that I have been forced to travel to 'point the way,' I have been much vexed in reaching a conclusion."

Vol. II, p. 553, sec. 5. [First ed., 1909 Supp., p. 83.]

What may be copyrighted—*Book previously published abroad in foreign language*.—In *Italian Book Co. v. Cardilli*, (S. D. N. Y.

1918) 273 Fed. 619, it appeared that an Italian wrote a song in Italy, and another Italian furnished music therefor; both words and music were published in Naples in 1913, and forthwith copyrighted in accordance with the law of Italy. Each copy of said words and music sold, stated in Italian who was the proprietor, that said proprietor owned the rights for all countries, and that all rights were reserved. The song was popular, and four years later the Italian proprietor sold to the plaintiff, an American corporation, the privilege of copyrighting and selling the same in the United States, apparently on a royalty basis. Thereupon the plaintiff did copyright words and music; the registration being of December 10, 1917, and the date of original publication stated as September 1, 1913. The defendant copied words and music and sold the same after this registration date. There were no intervening rights, as that phrase is commonly used in patent litigation. It was held that the publication in Italy did not prevent an American copyright four years later.

A *trade catalogue*.—Cuts used in a catalogue are the subject of copyright. *Campbell v. Wireback*, (C. C. A. 4th Cir. 1920) 269 Fed. 372. The court said:

"It is contended here, first, that the cuts reproduced in defendant's catalogue are not copyrightable matter, but this contention is refuted by abundant authority. It is sufficient to cite *Westermann Co. v. Dispatch Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499, in which the Supreme Court assumes the validity of a copyright of pictorial illustrations of styles in women's apparel, and which therefore seems controlling of the instant case. Among other cases of like import and directly in point are *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 23 S. Ct. 298, 47 L. Ed. 460, which sustains a copyright on circus posters showing groups of performers; *Da Prato Statuary Co. v. Guilian Statuary Co.* (C. C.) 189 Fed. 90, holding that a catalogue of cuts of pieces of statuary was copyrightable; *White Co. v. Shapiro* (D. C.) 227 Fed. 957, sustaining the copyright of a catalogue containing cuts of lighting fixtures; and *Stecher Lithographic Co. v. Dunston Lithographic Co.* (D. C.) 233 Fed. 601, upholding the copyright of chromos or lithographs of certain vegetable products.

Bearing in mind that plaintiffs' cuts are made from drawings which 'were originally designed and prepared by persons of skill and artistic capacity,' as the court below finds, the case in hand comes clearly within the rule which we believe to be stated correctly in *Weil on Copyrights*, p. 226, as follows:

"A mere advertisement of a bare list of articles, prices or facts would seem not to be copyrightable. It would lack the minimum of originality necessary for copyright. On the other hand, catalogues or other advertisements having originality, or *quasi* artistic character, are copyrightable. It requires very little originality indeed to render proposed advertising matter copyrightable."

A *trade-mark directory* of the jewelry trade with the names and addresses of jewelers classified under different heads and arranged alphabetically with illustrations of the trade-marks used by each is the subject of protection under this act. *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, (S. D. N. Y. 1921) 274 Fed. 932.

Vol. II, p. 562, sec. 8. [First ed., 1909 Supp., p. 83.]

A partnership may obtain a copyright in the firm name even if that name indicates a corporation. *Campbell v. Wireback*, (C. C. A. 4th Cir. 1920) 269 Fed. 372.

Aliens—Statement of citizenship.—As to the necessity of a statement of citizenship in an application for a copyright, it has been said in a case in which the question of necessity was raised:

"As to the matter of citizenship, it is enough to say that there is no statutory requirement for the inclusion of a statement of citizenship or domicile in the application for copyright; nor, so far as we are advised, was such a statement required by any rule of the register's office in 1911 when plaintiff's first application was filed. And the rule adopted in 1913 and since in force prescribes merely refusal of registration as the penalty for its nonobservance. We are therefore constrained to hold, without arguing the point, that the acceptance of plaintiff's applications operated as a waiver of the administrative regulation, if in fact it was not strictly observed, and that the action of the register in issuing to them the certificates of registration cannot be collaterally attacked in this proceeding. In short, we are of opinion that plaintiffs have substantially complied with the statute and that the copyrights obtained by them are entitled to full protection." *Campbell v. Wireback*, (C. C. A. 4th Cir. 1920) 269 Fed. 372.

Vol. II, p. 580, sec. 23. [First ed., 1909 Supp., p. 23.]

Persons entitled to renewal.—"No assignment of copyright or of right to copyright,

can anticipate or assign away the right of renewal which is conferred upon the author, widow, children, next of kin, or executor by the statute. In other words, the property right obtained by the filing of a copyright is the power to prevent copying or use of the material during the period provided for by statute. Neither the author nor his assignee possess any rights or powers which can be transferred in such a way as to run beyond that period. When the renewal of the copyright is sought, a new property right is created and a new power to prevent copying given to the persons entitled, not in any way dependent upon the previous bestowal of a similar authority.

"When there are no widow, children, or next of kin, and the right of renewal vests in an executor, the right must become property which is a part of the estate. Upon the happening of the condition subsequent, the estate thus gains the renewal of the copyright, and the person then entitled to receive the estate or that part of it which includes the renewed copyright will receive the benefit at the hands of the executor. No formal transfer by the executor is necessary, as evidently the executor can hold this property right only subject to accounting for and turning over the estate." *Fox Film Corp. v. Knowles*, (E. D. N. Y. 1921) 274 Fed. 731.

Disposition of right by will.—An author who died more than a year previous to the expiration of his copyright has no power to make any disposition by will of the right to renew his copyright. *Fox Film Corp. v. Knowles*, (E. D. N. Y. 1921) 274 Fed. 731.

Notice of copyright after renewal by executor held sufficient in *Fox Film Corp. v. Knowles*, (E. D. N. Y. 1921) 274 Fed. 731.

Vol. II, p. 581, sec. 24. [First ed., 1909 Supp., p. 87.]

Purpose and scope of section.—It is said to be regarded as settled that the proprietor of an existing copyright as such has no right to a renewal, that the statute confers no right of renewal upon administrators, and that the purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty. *Silverman v. Sunrise Pictures Corp.*, (C. C. A. 2d Cir. 1921) 273 Fed. 909.

Right of author to devise.—"It is plain from the language of the act, and from the design and purpose thereof as expressed by congressional committee and recognized by courts, that the author cannot take away the rights of widow, children, etc., before the opening of the last year of original copy-

right. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated—a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right *eo nomine*, which is exactly what the statute was designed to prevent.

“But what may be assigned can ordinarily be devised, and it results that before the statutory year the author cannot devise the renewal right.” *Silverman v. Sunrise Pictures Corp.*, (C. C. A. 2d Cir. 1921) 273 Fed. 909.

Next of kin.—Where an author died in 1909 leaving her surviving neither husband, children, nor any descendants of children deceased, and the executors of her will after having administered her estate were fully and finally discharged in 1911 it was held that her two sisters as next of kin were entitled to apply in 1915 for a renewal of a copyright which expired that year they being authorized so to do for themselves and their fellow owners in common, their act being in law the act of all. *Silverman v. Sunrise Pictures Corp.*, (C. C. A. 2d Cir. 1921) 273 Fed. 909.

Vol. II, p. 581, sec. 25. [First ed., 1909 Supp., p. 87.]

Seizure of copies.—The writ of seizure authorized by the Supreme Court rules as the proper procedure to enforce this section must, of course, be read upon the statute, and no marshal should seize any copies which have been sold to persons not infringers; since that use does not make one an infringer as in the case of a patent. Where the infringing books were not sold but lent to the defendant's customers, the court said:

“Now, it is true that at first blush it might seem (the bailment being determinable at will by the bailor) that the writ of seizure might interrupt the bailee's possession, precisely as it can the bailor's. Yet it appears to me that this would be improper. The statute, which is highly penal, cannot be supposed to go further than it says, and it is expressly limited to infringers; all rights, including the right of possession by others, must be immune from violent interruption, unless there is express warrant for it. And so the possession of innocent bailees should be respected, because it is legal, and should be disturbed only under the terms of the agreement which created it. They are free to enjoy the piratical copies, subject to the reserved rights of the defendant. If so, the plaintiff must work out its right to forfeit through the defendant's right to recall the books, and will be enjoined from its proposed course of seizing these books in the hands of the defendant's customers.

There is an especial ground in equity for this, because, while such violence would be extremely disastrous to the defendant's business, it could not possibly benefit the plaintiff if the defendant recalls the books within a short time.” *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, (S. D. N. Y. 1921) 274 Fed. 932.

Pleading.—Where jurisdiction is undoubted and an objection is made that the plaintiff has failed to allege a cause of action because it has neglected to state specifically that an executor recording a copyright and claiming the copyright as legatee took such action in the absence of any living widow, children, or next of kin of the author, it has been declared that an allegation that action was had by an executor plainly imports a will, thus excluding next of kin under the statute, and that an allegation that the copyright was duly obtained when admitted for the purpose of a motion to dismiss makes it unnecessary to specifically allege the nonexistence of other persons entitled. *Fox Film Corp. v. Knowles*, (E. D. N. Y. 1921) 274 Fed. 731.

Damages as discretionary with judge.—In a case where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge. *Campbell v. Wireback*, (C. C. A. 4th Cir. 1920) 269 Fed. 372.

Vol. II, p. 593, sec. 36. [First ed., 1909 Supp., p. 91.]

II. INJUNCTIONS AND ACCOUNTING (p. 601)

When a play has obtained such popularity that its name has plainly acquired a secondary signification (i. e., one suggestive of that particular play) equity will, under the rules of unfair competition, prevent the use of the same name, or any colorable imitation thereof, as descriptive of another and competing production. *National Picture Theatres v. Foundation Film Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 208.

Where unfair competition is charged “the rights of the parties are to be determined [by principles] similar to those which are well known to govern trade-marks, although the combination of elements is more complex than in devices which commonly go by that name” (per Holmes, J., *New England, etc., Co. v. Marlborough, etc., Co.*, 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377).

“To expand this thought: The plaintiff must have a right in being, an actual property, to protect . . . there must be a real present or prospective competition, that is, an endeavor to get the same trade from the same people at the same time; and that endeavor must on the defendant's part be unfair, that is with a wrongful intent to ‘gain the advantages of that celebrity’ . . . of

which plaintiff is the owner; but such intent, though it must be deemed to exist in fact, may be inferred from the inevitable consequences of the act complained of." *National Picture Theatres v. Foundation Film Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 208.

Right of administrator.—In holding that an administrator is not entitled to maintain a suit for an injunction and accounting for infringement of a copyright, it has been said:

"Under the original Copyright Act of 1790 (1 Stat. 124), the right of renewal was given to an author, his executors, administrators, or assigns. But the Act of 1831 (4 Stat. 436) and all subsequent acts have confined the right of renewal to the author if living 'or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then by the author's executors, or in the absence of a will, his next of kin.' It will be noticed that while an executor is mentioned an administrator is not and therefore has been regarded as excluded. *White-Smith Music Publishing Co. v. Goff*, (C. C.) 180 Fed. 256, 258. The right of renewal does not follow the author's estate but the renewal right is derived directly from the statute." *Danks v. Gordon*, (C. C. A. 2d Cir. 1921) 272 Fed. 821.

Complaint must show title.—In an action for infringement of copyright the plaintiff's bill must show title in the plaintiff to the relief sought. The complainant must show his title not merely by an allegation that he is the proprietor but by setting forth facts which show how he became proprietor and

why he has the right to bring the action. *Danks v. Gordon*, (C. C. A. 2d Cir. 1921) 272 Fed. 821.

Effect of decree in another district.—On an application for an injunction against the production of a play on the ground that it is an infringement of copyright a district court is not bound by a consent decree in another district against other defendants. *Hodgson v. Vroom*, (C. C. A. 2d Cir. 1920) 266 Fed. 267.

Appellate review.—The power of the Circuit Court of Appeals to review a decree refusing an application for an injunction against the production of a play on the ground that it is an infringement of copyright, is not hampered by a consent decree to an injunction against other defendants in a different district court than that from which the appeal in the present case is taken. *Hodgson v. Vroom*, (C. C. A. 2d Cir. 1920) 266 Fed. 267.

Vol. II, p. 609, sec. 42. [First ed., 1909 Supp., p. 91.]

Assignment of motion picture rights.—The owners of a copyright on a book or play own the right to represent on a screen photographs telling the copyrighted story and this right may be assigned. *National Picture Theatres v. Foundation Film Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 208.

Mortgage of copyright.—Copyrights can be mortgaged only under the Federal Copyright Law. *In re Leslie-Judge Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 886.

COSTS

Vol. II, p. 624, sec. 823. [First ed., vol. II, p. 276.]

Apportionment at law.—At law there is no apportionment of costs and the judgment runs in solido against all the defendants. *American Nat. Bank v. Commercial Nat. Bank*, (S. D. Ga. 1920) 268 Fed. 688.

Apportionment in equity.—In equity the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit. This power in the court over costs in equity cases is not arbitrary, and must be exercised with sound discretion. The usual practice in equity, where there are several defendants, all of whom are cast in the suit, is to award the complainant costs in solido against all of them, but the rule may be varied when the losing parties can show that equity and good conscience require a different judgment. *American Nat. Bank v. Commercial Nat. Bank*, (S. D. Ga. 1920) 268 Fed. 688.

Vol. II, p. 628, sec. 824. [First ed., vol. II, p. 278.]

"Final hearing in equity or admiralty"—In general.—"The language of the statute is not 'on the final hearing of the controversy,' but merely 'on the final hearing,' so that the proctor must represent the libellant's claim to a decree on some final hearing which disposes of the case as made in the libel, whether this decree is made on the law, or whether it is made on a disputed state of facts, or whether it is made on an agreed state of facts. If the cause was dismissed by the libellant, or was disposed of in some such manner, there is never such final hearing as entitles the proctor to have his fee taxed; but, on the other hand, there is nothing in the statute which limits the allowance of the fee to cases in which there is a controversy over the law or facts. We should follow the statute, and not try and distort its meaning, but give its words their fair

and ordinary meaning." *The Bluefields*, (S. D. Ala. 1921) 273 Fed. 268.

On payment of money into court.—In *The Bluefields*, (S. D. Ala. 1921) 273 Fed. 268, in which a libel was filed by a sailor for wages due and the vessel paid the amount of the sailor's demand and accrued costs into court, the court said:

"It is conceded in argument that, if no appearance had been made by the vessel or her owner, the libelant could have taken a decree pro confesso, and then on the submission have obtained a final decree, which would have authorized the taxing of his fee. Contention is made, though, that because the money has been paid in court the libelant must dismiss his libel, so that the fee cannot be taxed. I know of no power on the part of the defendant to control the conduct by the libelant of his cause, and it seems to me that, where the money has been paid into the court by the vessel, the libelant has his option either to dismiss the libel and take the money, in which event no fee could be taxed, or to ask, as he here has done, for a final decree because of the confession made by the payment into court of his wages. It seems to me that a decree so rendered would be such a final hearing as was contemplated by section 824, though there is no controversy or dispute over the facts or law as stated in the libel; the only dispute being whether or not the taxed fee shall be allowed. Again, if the proctor is entitled to his fee on a final decree on a decree pro confesso, or on a plea filed confessing his cause, how can claimant contend that, if he does less than expressly confess the demand by merely paying the money into court, the right to the fee is defeated. It is further contended that

this libel was improperly filed, because the libelant was informed before it was filed, and at the time he made his demand for his money, that his wages would be paid on the following day, and that the litigation was vexatious, and no costs should be allowed. In this case I find that the sailor honestly believed that the owner was going to deduct the hospital bill from his wages before payment, and there was no impropriety in his bringing suit when he did.

"The decree will therefore be entered in accordance with this opinion, and the clerk is hereby directed that, when the decree is finally entered, he will tax a fee of \$10 for libelant's proctor."

Vol. II, p. 640, sec. 973. [First ed., vol. II, p. 289.]

Where disclaimer unnecessary.—Failure to file disclaimer before suit is begun affects only the costs in the court below, and has no relation to costs in the Circuit Court of Appeals. So far as substantial relief is concerned disclaimer before suit brought is not essential. *Excelsior Steel Furnace Co. v. Williamson Heater Co.*, (C. C. A. 6th Cir. 1920) 269 Fed. 614.

Vol. II, p. 644, sec. 983. [First ed., vol. II, p. 291.]

The word "law," as used in this section has reference to the law administered in the federal courts; that is, federal law, and also state law, in so far as the latter is not inconsistent with the former. *Morris-Turner Livestock Co. v. Director General*, (D. C. Mont. 1920) 266 Fed. 600.

CRIMINAL LAW

Vol. II, p. 654, sec. 1014. [First ed., vol. II, p. 321.]

Following state practice generally—*Mode of process.*—"Proceedings for holding an accused person to answer a criminal charge are assimilated to those under the laws of the state in which the proceedings take place, and all the regulations and steps incident to the proceeding before a United States commissioner, from its commencement to its close, are guided by the state laws, so far as they may be applicable to the federal courts, if no rule upon the same subject has been prescribed by the federal statutes." *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408; *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

The usual mode of process which the statute requires to be followed clearly applies only to the procedure by which the offender

may "be arrested and imprisoned or bailed," and not the procedure in connection with his indictment. *U. S. v. Powlowski*, (E. D. Pa. 1921) 270 Fed. 285.

Proceeding for arrests, which include seizures under warrants should conform to the practice of the state in which issued. *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

Applicability to Volstead Act.—Section 2 of the National Prohibition Enforcement Act (1919 Supp. Fed. St. Ann. p. 205) makes this section applicable in the enforcement of that act, and the power of state officers to proceed under that act exists only as this section provides. *Lenski v. O'Brien*, (Mo. App. 1921) 232 S. W. 235.

Under this section and section 2 of Title II of the National Prohibition Enforcement Act (1919 Supp. Fed. St. Ann. p. 205) a warrant for the arrest of a violator of the Prohibition Enforcement Act may be issued to a mu-

municipal police officer. *Harris v. Superior Ct.*, (Cal. App. 1921) 196 Pac. 895.

Preliminary examinations—Confession by defendant.—It is said that, while the authorities are not uniform, "a confession, freely and voluntarily made, with full knowledge that the accused is not required to make it, and, if made, it may be used as evidence against him, is sufficient to constitute probable cause, and warrant the commissioner in holding the accused without further evidence of the corpus delicti." *U. S. v. Kallas*, (W. D. Wash. 1921) 272 Fed. 742.

Jurisdiction—"Offense against the United States."—"It must always be kept in mind that federal officers and courts have no power or jurisdiction to arrest, try, or punish a citizen, unless the act with which he is charged violates a federal statute. In that respect their power is subject to limitations not imposed upon state officers and courts having jurisdiction to arrest, to try, and to punish for what are known as 'common-law offenses.'"—*Ex p. Harvell*, (E. D. N. C. 1920) 267 Fed. 997.

Bail.—It is said to be evident from a reading of this section that it was not within the mind of Congress to limit the bail solely to the old common law form and "that in those cases where the penalty of the bond is payable in money, and money to the amount thereof is tendered as security, together with a recognizance, they should be accepted, and it is not within the discretion of the court to reject them." *Rowan v. Randolph*, (C. C. A. 7th Cir. 1920) 268 Fed. 527.

Review by habeas corpus.—In a habeas corpus proceeding the court will assume, in the absence of the evidence taken before the commissioner and approved by the District Judge, that their finding of probable cause was sustained by competent evidence, bearing in mind, also, that on this proceeding the court would not in any event look into the weight of evidence on that question. *Rowe v. Boyle*, (C. C. A. 9th Cir. 1920) 268 Fed. 809.

Even though the government failed to institute removal proceedings and illegally removed a prisoner to another district by mere direction of the attorney general to the warden of the prison where he was confined, he is not entitled for that reason to his discharge on habeas corpus but he having come within the jurisdiction of the court under the rule in the authoritative decisions of the Supreme Court, the government could, as it did, serve the officer in charge of the person of the prisoner with a writ of habeas corpus ad prosequendum to prosecute and place him on trial. *Ex p. Lamar*, (C. C. A. 2d Cir. 1921) 274 Fed. 160.

Validity of bond or recognizance.—"Where an offender has been bailed agreeably to the usual mode of process of the laws of the state where the offense is charged to have been committed, the laws of that state are

to be looked to to determine the sufficiency of the procedure taken." *U. S. v. Davenport*, (W. D. Tex. 1920) 266 Fed. 425.

In *U. S. v. Davenport*, (W. D. Tex. 1920) 266 Fed. 425, it was held that the bond and judgment were sufficient where they set out the offense as embezzlement from a national bank without specifically stating that it was from a Federal Reserve Bank.

Action on the forfeited bond or recognizance—Issues.—In an action on a bail bond of one indicted under section 5209 of the Revised Statutes, it has been said:

"The issues are measured by the terms of the bond and the recitations of the judgment nisi. There seems no reason for a strict or highly technical construction of law in favor of defendants. This action does not involve the guilt or innocence, conviction or acquittal, of any one. It is not a criminal case. The bail bond is a contract between the sureties and the government. Upon the failure of the principal to appear the sureties become debtors." *U. S. v. Davenport*, (W. D. Tex. 1920) 266 Fed. 425.

REMOVAL OF ACCUSED TO TRIAL DISTRICT

Indictment—Sufficiency.—If there is any doubt as to the validity or sufficiency of the indictment, the proper court for the resolution of any such question is that in which the indictment has been returned, and not that where proceedings in removal are instituted. *Rowe v. Boyle*, (C. C. A. 9th Cir. 1920) 268 Fed. 809.

Indictment prima facie.—Where in a proceeding for removal to another jurisdiction the government introduces an indictment and the prisoner admits that he is the person named therein a prima facie case is established. *Rowe v. Boyle*, (C. C. A. 9th Cir. 1920) 268 Fed. 809.

Probable cause.—"The Supreme Court has mapped out with clearness the procedure under section 1014 of the Revised Statutes where it is sought to remove a defendant from the district where arrested to that where the offense is triable. It is distinctly ruled that, while the indictment constitutes prima facie evidence of probable cause, it is not conclusive, and evidence may be offered by the defendant tending to show that no offense triable in the district to which removal is sought has been committed; that in such a proceeding the function of the judge is not ministerial, but judicial; that 'he must look into the indictment, to ascertain whether an offense against the United States is charged, and whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same. The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions.' *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct.

430, 51 L. ed. 689; *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. ed. 882." U. S. v. Yount, (W. D. Pa. 1920) 267 Fed. 861.

Order of removal interlocutory.—An order removing defendants to another district is interlocutory and not appealable. *Murray v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 522.

Vol. II, p. 674, sec. 1. [First ed., vol. II, p. 334.]

Arrest without warrant.—A federal officer on arresting a person without a warrant must take him before a magistrate for a hearing. *Es p. Harvell*, (E. D. N. C. 1920) 267 Fed. 997.

Vol. II, p. 676, sec. 1024. [First ed., vol. II, p. 337.]

Election of counts.—The denial by the court in the exercise of its discretion of a motion for election is not reviewable error. *Corbin v. U. S.*, (C. C. A. 5th Cir. 1920) 264 Fed. 659.

Offenses held to have been properly joined.—Duplicity in an indictment consists in the joinder of two or more distinct defenses in one count, and hence where two forgeries alleged in an indictment are plainly describable as "two or more acts or transactions connected together" the joinder is not duplicitous and is expressly permitted under this section. *Epstein v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 282.

It has been held that an indictment charging the concealment of smoking opium in violation of section 2 of the Act of Feb. 9, 1909, as amended by the Act of Jan. 17, 1914 (3 Fed. Stat. Ann. (2d ed.) p. 725) may be properly consolidated and tried with an indictment charging the manufacture of smoking opium in violation of section 1 of the Act of Dec. 17, 1914, (4 Fed. Stat. Ann. (2d ed.) p. 173). *Toy v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 326.

It is proper to charge in different counts of an indictment a conspiracy to commit an offense against the United States where the offenses charged all belong to the same class of crimes. *Anderson v. U. S.*, (C. C. A. 8th Cir. 1921) 273 Fed. 20.

A court may order separate actions for repeated violations of an injunction to be consolidated for trial and to direct the trial of all the charges against the defendant to a single jury. *Jennings v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 399.

Offenses against the White Slave Act growing out of the same transaction may be so connected as to permit of their joinder in one indictment in separate counts. *Freed v. U. S.*, (App. Cas. D. C. 1920) 266 Fed. 1012.

Counts for misdemeanor and felony may be joined under this section. *Phillips v. U. S.*, (C. C. A. 5th Cir. 1920) 264 Fed. 657.

Indictments held to have been properly consolidated.—An indictment under the Penal Law, section 13 (7 Fed. Stat. Ann. (2d ed.) p. 249, sec. 4898) for providing and preparing a military enterprise against a nation with whom the United States is at peace may be consolidated with an indictment for a conspiracy to commit such offense. *Jacobsen v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 399.

Separate punishment for each offense.—Where counts really charge separate offenses, though connected together and so capable of joinder under this section, sentence may be imposed for both, for such was the legislative intent in creating them separate offenses. *Es p. Farlow*, (N. D. Ga. 1921) 272 Fed. 910.

Vol. II, p. 681, sec. 1025. [First ed., vol. II, p. 340.]

Incorrect date.—The date in an indictment does not necessarily limit the prosecution to proof of the commission of the offense upon that identical date, provided the date proven is prior to the date of the filing of the indictment, and is in such reasonable proximity to the actual date named in the indictment that the defendants could not have been prejudiced or misled thereby. *Billingsley v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 86.

Time of commission of offense.—An indictment which charges that the defendants conspired to violate section 135 of the Penal Code of the United States (7 Fed. Stat. Ann. (2d ed.) 688) between certain specified dates, is sufficient in view of the provisions of this section. *Harrington v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 97.

Immaterial variance.—A variance which does not prejudice should be disregarded. Thus, on a prosecution for introducing liquor into that part of the state of Oklahoma that was formerly Indian Territory the fact that the indictment charged that the liquors were introduced into Washington County while the proof showed that they were introduced in Nowata County was held to be immaterial where the counties were in that part of the state that was formerly Indian Territory. *Flack v. U. S.*, (C. C. A. 8th Cir. 1921) 272 Fed. 680.

Where an indictment charges a sale of intoxicating liquor to a certain named person, giving his Christian name, and the evidence is silent as to his Christian name the variance has been held to be immaterial. *Saucedo v. U. S.*, (C. C. A. 5th Cir. 1920) 268 Fed. 830.

Indictments held sufficient.—Under this section in the case of a prosecution for using the mails with intent to defraud where the substance of the scheme charged was not the mere use of a corporate name similar to the name of an existing association, but to use

it so as to have the credit and reputation of the other company in order to obtain goods not intended for defendant, and for which he would not pay, the failure to allege that the unincorporated partnership or association, then doing business and in actual operation, was duly organized, did not prejudice the defendant, and make the indictment fatally defective. *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14.

1918 Supp., p. 122, sec. 3.

Constitutionality.—The Act is not invalid as unwarrantably extending the constitutional definition of the crime of treason since Congress may punish, under the ordinary rules of prosecution and without trenching upon the constitutional limitation as to treason, acts which are of a seditious nature and tend toward treason, but which are not of the direct character and superdangerous degree which would meet the constitutional test and make them treason; and even more must this be true of words. Likewise, it does not violate the constitutional provision guaranteeing freedom of speech. *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1; *Wimmer v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 11; *Lockhart v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 14.

"It is familiar law that language in a statute which is capable of a very broad or of a narrower construction should receive the latter where the former would or might make it unconstitutional, and where the latter is sufficient to reach the case before the court, and hence it is not very important to point out that 'favor,' 'support,' and 'oppose,' as mere words, may have definition broad enough to cover and include some things which are also within the protection of the First Amendment; the really important question is whether that particular kind and degree of favor, support, or opposition alleged against defendants is within the constitutional immunity." *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1.

Language not protected by constitution.—*Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75.

Construction.—The word "whoever" as used herein has been construed as including corporations and partnership. *American Socialist Soc. v. U. S.*, (C. C. A. 2d Cir. 1920) 268 Fed. 212.

Relation to section 6 of Selective Service Act.—This section and section 6 of the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1159) are in pari materia. *Snitkin v. U. S.*, (C. C. A. 7th Cir. 1920) 265 Fed. 489.

"Military forces" defined.—See *Fairchild v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 584.

"Recruiting" and "enlistment" defined.—See *Fairchild v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 584.

Wilfully obstructing the recruiting or enlistment service.—Rejection of evidence offered by defendant and charge to the jury as to purpose of act held error in *Erhardt v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 326.

Presumptive intent.—The mere fact that an intent is presumptive does not make it insufficient. An inference of intent may be strong enough to overbalance an express declaration. *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1.

Language intended to incite.—A fixed line cannot be drawn between agitation and incitement. There may be incitement in fact which is not so in form. *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 254 Fed. 1.

Offense involves moral turpitude and conviction thereof warrants disbarment of attorney. *In re O'Connell*, (Col. 1920) 194 Pac. 1010. Compare *In re Clifton*, (1921) 33 Idaho 614, 196 Pac. 670, refusing to disbar for acts which while disloyal did not amount to a violation of the act.

Indictment—In general.—In *Stokes v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 18, it was declared that if the text of the letter complained of in the indictment, when considered in the light of the time and circumstances of its publication, was such that it was reasonably calculated to cause the effects charged, if it was such that intelligent and impartial men, in the exercise of a sound judgment, might reasonably deduce from it the conclusion that the publisher thereby intended to attempt to cause insubordination, etc., in the military or naval forces of the United States, or to obstruct its enlistment service, or to make false statements for the purpose of interfering with the operation or success of its military or naval forces, it was sufficient in its terms to sustain the indictment and to require the court below to send the case to a trial by the jury. If, on the other hand, upon its face, in the light of the time and circumstances of its publication, it was not reasonably susceptible to such an inference and judgment the demurrer should have been sustained. In this case it was held that there was no error in overruling the demurrer. See also *Grubl v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 44, wherein the court made a similar declaration but reversed the judgment of the court below and ordered the discharge of the defendant.

Following language of section.—An indictment is sufficient which charges the offense in the words of the statute. *Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75.

Necessity of averment that United States was at war.—To same effect as annotation in 1920 Supp. p. 471, see *Sonnenberg v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 327.

Criminal intent.—As to the necessity of charging a criminal intent it has been said that "it would seem enough to say that the clauses of the statute charged to have been

violated (which were added by the amendment of 1918, for the purpose of broadening the scope of the statute) do not in express terms require a criminal intent, except as the word 'intended' is used in the clause involved in the third count, and which is so charged therein. It is sufficient that the language be disloyal, profane, scurrilous, or abusive, that it be willfully used, and that it relate to the form of government, the Constitution, the military or naval forces, the flag or the uniform of the army and navy of the United States, or that the language is intended to bring any one of them into contempt or disrepute. The words 'willfully and feloniously' prima facie import an unlawful intent." *Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75.

Allegation of facts unnecessary.—In *Stokes v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 18, the three violations, which were charged in three counts in the indictment, were that by causing the publication of this letter on March 20, 1918, while the United States was at war with the Imperial German government, she (1) willfully and knowingly attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States; (2) willfully and knowingly obstructed the enlistment service of the United States, to the injury of that service, and to the injury of the United States; and (3) willfully and knowingly made and conveyed false reports and statements, with the intent to interfere with the operation and success of the military and naval forces of the United States, and with the intent to promote the success of the enemies of the United States. It was held that the indictment was sufficient though it contained no averment of any facts tending to inform the defendant in what way, by what means, or by its effect upon what persons, the publication of the letter either caused, or disclosed an attempt to cause, insubordination, etc., or obstructed the enlistment service, or conveyed false reports, with the intention to interfere with the operation of the military or naval forces, of the United States.

Names of persons to whom language addressed need not be alleged. *Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75.

Insufficient description of offense.—Where a defendant was charged with having willfully caused and attempted to cause disloyalty, insubordination, mutiny and refusal of duty in the military forces of the United States to the injury of the United States by the making of certain statements, it was held that a demurrer to the count should have been sustained, it being declared that it did not appear from the indictment that the statements were susceptible to the inference that the defendant made them with the evil intents charged. *Grubl v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 44.

Attempting to cause insubordination.—*Fairchild v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 584.

Sufficiency.—In the following cases the indictments were held to be sufficient: *Matthey v. U. S.*, (C. C. A. 8th Cir. 1921) 274 Fed. 924; *Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75; *Sykes v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 945; *Martin v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 329; *Sonnenberg v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 327; *Anderson v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 75; *Lockhart v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 14.

Defenses.—In *Mamaux v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 816, an instruction as to the defense that the remarks were made under compulsion or duress of officers of the law was held proper.

Evidence—Other words or acts.—See *Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75; *Boehner v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 562; *Hinkhouse v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 977; *American Socialist Soc. v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 212; *Bold v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 581; *Anderson v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 75; *Grubl v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 44; *Stokes v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 18; *Wimmer v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 11; *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1.

Statements made prior to act.—To same effect as annotation in 1920 Supplement, p. 475, see *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1.

Statements prior to date of offense are inadmissible. *Holzmacher v. U. S.*, (C. C. A. 7th Cir. 1920) 266 Fed. 979.

Notes and reports of dictagraph operators.—Such notes and reports have been received although they were not complete in that they embodied only the talk with reference to the attitude of the defendants towards the war and did not set forth the entire conversation and statements, where the part not taken down had no reference to the subject of the war or defendants' attitude towards it. And such statements are admissible where although the operators testified generally that at the time of the trial they had no independent recollection in detail of the statements made, they further testified that they knew that their notes were correct, and knew that the fuller report at the end of each day was accurate, it being for the jury to determine the credit to be given to them. *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1.

Evidence as to impression made by defendant's speech.—In *Trelase v. U. S.*, (C. C. A. 8th Cir. 1920) 266 Fed. 886, it was held proper to permit a witness to testify as to the impression made on him by the speech of the defendant.

Sufficiency.—In the following cases the evidence was held to be sufficient to sustain a conviction of the defendants for a violation of this section: *Hinkhouse v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 977; *Trelease v. U. S.*, (C. C. A. 8th Cir. 1920) 266 Fed. 886; *Fairchild v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 584; *Bold v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 581; *Anderson v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 75; *Lockhart v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 14; *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1.

In the following cases the evidence was held to be insufficient to sustain a conviction under this section: *Becker v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 195; *Grubl v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 44.

Variance.—See *Bold v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 581.

Instructions.—See *Bold v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 581.

In *Stokes v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 18, the court reversed a conviction on the ground that when the entire charge was considered in the light of the time and circumstances surrounding the trial, of the extended discussion in the charge of the many side issues which crept into the case, and of the other characteristics of the charge to which attention had been called, the court was unable to resist the conclusion that the patriotic zeal of the court below led it to place too heavy a burden upon the defendant in her endeavor to meet the evidence which the government produced against her, and that the cause of the administration of justice would be served by another trial of the case.

In *Schoborg v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 1, it was said:

"It is objected that the court charged that it was sufficient to make out the statutory offense if the words were intended to and were reasonably calculated to some extent to help the cause of the one and injure the cause of the other, without going further and saying that the jury must find in the circumstances of the particular utterance a condition of things which would make the words spoken tend to create a clear and present danger. If the charge as given should have been modified and limited as now claimed, it was the duty of defendants to bring to the attention of the court the limitations which they desired incorporated. They did nothing except to save an exception to this paragraph of the charge as given. When a charge is correct in its general thought and aspect, and is later criticized only because it did not draw sufficiently refined distinctions, a mere general exception to the proposition as given by the court is not sufficient basis for review—lacking reasonably clear inference that the precise limitation was intended to be relied upon and to be put before the court.

"The same is true as to the complaint against the charge because it told the jury that it was possible for one to be guilty of the offense by a declaration that he is on the side of Germany or wants to see Germany win, or that he is against the United States and wants to see the United States lose. It is said that this is entirely too narrow a construction. So it may be, sometimes; yet undoubtedly there might be cases where it would be a perfectly accurate statement. The defendants should have pointed out to the trial judge their particular theory which made it inapplicable to this case. We cannot say that it was either erroneous or prejudicial."

Questions for jury—Knowledge and intent.—To same effect as annotation in 1920 Supplement, p. 477, see *Anderson v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 75.

In a prosecution under this act for publishing a letter in terms condemning the "government" it has been declared that the natural, ordinary, rational meaning of the word "government" in the defendant's letter, written and published at such a time and under such circumstances, and expressly mentioning the government in its war aims, was the body of persons then conducting the war and the activities of the nation, and that as there was nothing in the letter itself, and a search of the record disclosed no substantial evidence, to indicate that the writer used or intended to use it in any other sense, the unavoidable conclusion is that it was error to submit to the jury the issue whether or not the defendant used or intended to use the word "government" in this letter in the sense of the constitutional government of the nation of 1787. *Stokes v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 18.

Tendency of language used.—Whether the language charged to have been used by defendant had a natural tendency to show the commission of the unlawful act charged is ultimately a question for the jury. *Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75.

Acquittal and conviction under separate counts.—An acquittal under a count charging an offense of which intent to interfere with the operation or success of the military service of the United States was an element, was held not to be inconsistent with conviction under another count charging an offense of which such an intent was not an element. *Hinkhouse v. U. S.*, (C. C. A. 9th Cir. 1920) 266 U. S. 977.

1918 Supp., p. 124, sec. 4.

Section 6 of the Penal Code repealed by this provision. *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

Indictment for conspiracy to violate section 3 held sufficient.—See *Anderson v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 65.

1918 Supp., p. 129, sec. 3.

Probable cause.—A search warrant may issue only upon probable cause, supported by oath or affirmation. The question of probable cause must be submitted to the committing magistrate, so that he may exercise his judgment as to the sufficiency of the ground for believing the accused person guilty. *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408.

Affidavit must set forth facts.—The United States commissioner, or other officer with whom an affidavit is filed, may not, simply because such affidavit is presented, issue a warrant. The affidavit must itself be sufficient, must state facts which justify the issuance of a warrant and the commissioner or such other officer is required by law to satisfy himself of the sufficiency of the affidavit and that the circumstances call for the issuance of a warrant. *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408.

1918 Supp., p. 129, sec. 6.

The name of the accused should be set forth in the affidavit and search warrant where it is known. *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408.

Description of place.—"In describing the place to be searched, it is sufficient if the officer to whom the warrant is directed is enabled to locate the same definitely and with certainty. This does not necessarily require the exact legal description to be given, such as ordinarily appears in deeds of record in the county recorder's office. The description may be such as is known to the people and used in the locality in question, and by inquiry the officer may be as clearly guided to the place intended as if the legal record description were used." *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408.

1918 Supp., p. 130, sec. 10.

Searches at night.—Authority.—If a search is to be made at night the authority for so doing should appear in the warrant. *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408.

1918 Supp., p. 132, sec. 1.

Exclusion from mail.—Generally.—Authority to revoke the second-class mail privileges of a newspaper which, contrary to the Espionage Act of June 15, 1917 (1918 Supp. Fed. Stat. Ann. 120), systematically contained false reports and false statements, published with intent to interfere with the success of the military operations of the Federal government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service, was conferred upon the Postmaster General, not merely as to a single issue of such paper, but until a proper

application and showing shall be made for a renewal of such privilege, by the provision of title 12 of that act that any newspaper published in violation of any of its terms shall be "nonmailable," and shall not be "conveyed in the mails or delivered from any postoffice or by any letter carrier," when read in connection with the declaration of *U. S. Rev. Stat. § 396* (8 Fed. Stat. Ann. (2d ed.) 20), that it is the duty of the Postmaster General to superintend regularly all the business of the Postoffice Department, and to execute all laws relating to the postal service, and with the Federal legislation classifying the mails, which deals only with "mailable matter." *U. S. v. Burleson*, (1921) 255 U. S. 407, 41 S. Ct. 352, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282.

Constitutionality.—Federal legislation conferring upon the Postmaster General power to revoke the second-class mail privilege enjoyed by a newspaper which that official finds, after a hearing fairly conducted, systematically to have contained false reports and false statements published with intent to interfere with the success of the military operations of the Federal government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service, in violation of the Espionage Act of June 15, 1917, is not unconstitutional, either as not affording the publisher a trial in a court of competent jurisdiction, or as infringing the constitutional freedom of speech and press, or as taking property without due process of law. *U. S. v. Burleson*, (1921) 255 U. S. 407, 41 S. Ct. 352, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282.

1918 Supp., p. 136, sec. 1.

Section held operative though war actually at end, there being no formal state of peace, see *Ex p. Sichofsky*, (S. D. Cal. 1921) 273 Fed. 694.

Effect of joint resolution of Congress.—The joint resolution, enacted in the last days of the Sixty-sixth Congress, repealing certain war-time acts, carried with it a saving clause to the effect that nothing therein contained should be held "to exempt from prosecution or to relieve from punishment" any offense theretofore committed in violation of the acts therein repealed or referred to, etc. In view of the express and positive provisions of section 13 of the Revised Statutes, this saving clause was hardly necessary. *U. S. v. Reisinger*, 128 U. S. 398, 9 S. Ct. 99, 32 L. Ed. 480. Its insertion, however, makes it clear and indubitable that Congress was intending to make punishment possible for those who had violated the law previous to its repeal. *Ex p. Sichofsky*, (S. D. Cal. 1921) 273 Fed. 694.

CUSTOMS DUTIES

Vol. II, p. 726, par. 1. [First ed., 1914 Supp., p. 59.]

By-product lignum extract.—See note under par. 624.

Nutgall extract.—Where the evidence establishes that commercial extract of nutgalls is a liquid containing 25 or 30 per cent of tannic acid, and that commercial tannic acid is a powder containing about 70 per cent, or even less, of tannic acid, a powder derived from the extract, containing more than 78 per cent of tannic acid, largely used in weighing silk fibers or fabrics, as a mordant in dyeing silk, and in the manufacture of ink, and not commonly used in tanning leather, is classifiable as tannic acid under this paragraph, and not as an extract or decoction of nutgalls under paragraph 30 or tanning material under paragraph 624. *East Asiatic Co. v. U. S.*, (1920) 10 U. S. Cust. App. 207.

Vol. II, p. 726, par. 5. [First ed., 1914 Supp., p. 59.]

By-product lignum extract.—See note under par. 624.

Nitric acid mixed with sulphuric acid.—See note under par. 387.

"Chemical . . . compounds."—"A chemical compound necessarily implies not a mere mingling of components, but a chemical combination of them, resulting in their destruction as distinct entities and in the development by chemical reaction of a new substance possessing properties radically different from those of its constituent elements." Thus, hydrogenated oil, oil whose hydrogen content has been increased chemically, this process resulting in changing the oil from a liquid to a solid at ordinary room temperatures without altering its essential character and qualities, is not a chemical compound within the meaning of that expression in this paragraph. *U. S. v. Rockhill*, (1920) 10 U. S. Cust. App. 112.

"Chemical . . . compounds" and "chemically compounded" distinguished.—The term "chemical . . . compounds," in this paragraph differs from the term "chemically compounded" in paragraph 498; and a given substance although not a chemical compound within this paragraph, may perhaps be chemically compounded within paragraph 498. *U. S. v. Rockhill*, (1920) 10 U. S. Cust. App. 112.

Vol. II, p. 734, par. 30. [First ed., 1914 Supp., p. 61.]

Nutgall extract.—See note under par. 1.

Vol. II, p. 734, par. 34. [First ed., 1914 Supp., p. 62.]

Cleaned and dried fish sounds.—Cleaning and drying, and splitting for the purpose of cleaning or drying, are not processes of manufacture, and do not ordinarily carry merchandise into the category of "prepared," as that term is used in tariff nomenclature generally and in this paragraph. Thus, fish sounds which have been cleaned and dried, after having been split to facilitate the cleaning and drying, imported to make soup, are not dutiable under this paragraph, as "prepared fish sounds," but are admissible free crude, dried, or salted for preservation only of duty under paragraph 419, as "fish sounds, and unmanufactured." *U. S. v. Brown*, (1920) 10 U. S. Cust. App. 47.

Vol. II, p. 734, par. 36. [First ed., 1914 Supp., p. 62.]

Refined and crude chicle.—Not every slight advance in value is sufficient to constitute such an advance as to render merchandise dutiable at the higher rates provided for it by the import revenue laws when advanced in value; and this paragraph, levying a lower rate of duty upon "chicle, crude," and a higher rate upon it "refined or advanced in value by drying, straining, or any other process or treatment whatever beyond that essential to the proper packing," should be construed accordingly. Thus, where chicle is shipped from Mexico into Canada and from Canada into the United States and in Canada is hammered into smaller particles and in part resacked, these processes being related to packing and transportation rather than to manufacture and increasing the value only from 28 to 30 cents per pound, the crushing enhancing the value only, one-half of a cent per pound, and as imported into the United States is intermixed with dirt, bark, sticks, and other foreign substances, it can not be regarded as "chicle . . . refined or advanced in value by drying, straining, or any other process or treatment whatever beyond that essential to the proper packing," under this paragraph, but should be classified hereunder as "chicle, crude." *U. S. v. American Chicle Co.*, (1920) 10 U. S. Cust. App. 98.

Vol. II, p. 735, par. 44. [First ed., 1914 Supp., p. 62.]

"Oils."—Fluidity at ordinary room temperatures is not necessary to the meaning of the word "oils," in this paragraph. *U. S. v. Rockhill*, (1920) 10 U. S. Cust. App. 112.

Hydrogenated fish oil.—Fish oil which has been hardened by chemically increasing its hydrogen content, its essential character-

istics remaining unchanged, is classifiable under this paragraph, as fish oil, and not under paragraph 5 as a chemical compound, or under paragraph 498 as grease, not chemically compounded, such as is commonly used in soap making or in wire drawing or for stuffing or dressing leather. *U. S. v. Rockhill*, (1920) 10 U. S. Cust. App. 112.

Vol. II, p. 744, par. 81. [First ed., 1914 Supp., p. 66.]

Crushed limestone.—See note under par. 93.

Vol. II, p. 749, par. 95. [First ed., 1914 Supp., p. 68.]

"Articles or wares plated with gold or silver."—See note under par. 167.

Vol. II, p. 752, par. 102. [First ed., 1914 Supp., p. 69.]

Ferrosilicon.—Low grade ferrosilicon, originated as a by-product in the manufacture of aluminous abrasives, known commercially as ferrosilicon and chiefly used in the manufacture of ordinary basic steel, is classifiable as "ferrosilicon" under this paragraph, notwithstanding that there is a much higher grade, made to specifications and better adapted to the making of steel. To exclude the merchandise from this paragraph because its silicon content is as low as from 13 to nearly 17 per cent, whereas that of standard ferrosilicon is much higher, would be to ignore the fact that the parent paragraph (184, act of 1909) provided for ferrosilicon containing not more than 15 per cent of silicon as well as for that containing more. The merchandise is not classifiable as "iron ore," "iron in pigs" or "scrap and scrap steel" under paragraph 518; as crude minerals under paragraph 649; as crude metallic mineral substances or metals unwrought under paragraph 154; as waste under paragraph 384; or as nonenumerated unmanufactured articles under paragraph 385. *U. S. v. Tower*, (1920) 10 U. S. Cust. App. 155.

Vol. II, p. 759, par. 135. [First ed., 1914 Supp., p. 73.]

Needlecases.—Leather folders and rolls and leather-covered wooden boxes, fitted with needles, thread, scissors, etc., and known variously as "traveling companions," "necessaries," "sewing kits," or "sewing cases," are correctly classified under this paragraph as "needlecases or needlebooks furnished with assortments of needles or combinations of needles and other articles," rather than under paragraph 360 as manufactures of leather permanently fitted and furnished with traveling and similar sets or manufactures of leather, notwithstanding testimony that some of them were designed to be, and were,

used by travelers. *U. S. v. Cross Co.*, (1920) 10 U. S. Cust. App. 58.

Vol. II, p. 760, par. 144. [First ed., 1914 Supp., p. 73.]

Copper matte.—See note under par. 461.

Vol. II, p. 761, par. 152. [First ed., 1914 Supp., p. 74.]

Copper matte.—See note under par. 461.

Vol. II, p. 762, par. 153. [First ed., 1914 Supp., p. 74.]

Copper matte.—See note under par. 461.

Solder reclaimed from shells.—See note under par. 154.

Vol. II, p. 762, par. 154. [First ed., 1914 Supp., p. 74.]

Ferrosilicon.—See note under par. 102.

Solder reclaimed from shells.—Where solder, reclaimed from spoiled brass shells, and consisting substantially of lead and tin in nearly equal parts, with small percentages of other metals, is imported in the shape of ingots, bars, molds, etc., to be rerun and used for various purposes, the tin content is not classifiable under paragraph 631, as scrap tin; nor is the lead content classifiable under paragraph 153 as scrap lead. The merchandise would seem to be classifiable under this paragraph as "metals unwrought;" but, in the absence of any such claim in the protest, the collector's classification of it under paragraph 167 as articles or wares partly or wholly manufactured of the metals named in the paragraph must, though not approved, be undisturbed. *U. S. v. Jacobson & Sons Co.*, (1920) 10 U. S. Cust. App. 191.

Vol. II, p. 765, par. 167. [First ed., 1914 Supp., p. 76.]

Solder reclaimed from shells.—See note under par. 154.

Boiler parts.—See note under section III, par. J, subsec. 5.

Materials—manufactures distinguished.—See note under section IV, par. J, subsec. 5.
American goods returned.—See note under par. 404.

"Articles or wares plated with gold or silver."—The provision of this paragraph for "Articles or wares plated with gold or silver," embraces only such articles or wares as are wholly or in chief value of metal. Thus, hatpins with large paste heads of a pearly luster and metal gold-plated stems, the paste heads being the chief value, are classifiable under paragraph 95, as manufactures of paste, and not under this paragraph as "Articles or wares plated with gold or silver," or paragraph 356 as "jewelry." *Veith v. U. S.*, (1920) 10 U. S. Cust. App. 201.

Marine surface condensers.—Merchandise known as "marine surface condensers," imported for the purpose of being used in connection with steam engines of American vessels to condense the steam and permit of its reuse, the only thing necessary to their operation being their attachment to one or two pumps and the introduction of the steam, are finished mechanical devices. They are not admissible free of duty under subsection 5, paragraph J, section IV, as materials necessary for the building of the machinery of American vessels, but are dutiable under this paragraph as manufactures of metal. *Todd Shipyard Corp. v. U. S.*, (1921) 10 U. S. Cust. App. 273, *distinguishing U. S. v. Hannevig*, (1920) 10 U. S. Cust. App. 124.

Vol. II, p. 769, par. 170. [First ed., 1914 Supp., p. 76.]

Squared timbers.—See notes under par. 647.

Vol. II, p. 769, par. 173. [First ed., 1914 Supp., p. 77.]

Round reeds in the rough, chiefly used for the making of chairs, are more specifically provided for as chair reeds in this paragraph than as reeds in the rough, in paragraph 648. *Peabody v. U. S.*, (1920) 10 U. S. Cust. App. 220.

Chinese reeds.—In *Peabody v. U. S.*, (1920) 10 U. S. Cust. App. 220, Chinese reeds in the rough, graded as common, selected and extra selected, were classified by the collector as chair reeds under this paragraph, and the importers' protests claiming them to be classifiable as rough reeds under paragraph 648 were overruled by the Board of United States General Appraisers. The evidence established that the common were not chiefly used for making chairs but failed to establish that the other two grades were not so used. The decision of the board was reversed as to the common and affirmed as to the selected and extra selected.

Vol. II, p. 770, par. 175. [First ed., 1914 Supp., p. 77.]

Containers of tea.—See note under par. 627.

Vol. II, p. 770, par. 176. [First ed., 1914 Supp., p. 77.]

Bamboo pipe stems.—See note under par. 381.

Vol. II, p. 775, par. 192. [First ed., 1914 Supp., p. 78.]

Ground oat hulls.—Hulls ground from oats as a by-product in the manufacture, from the kernels, of oat meal, rolled oats, and Quaker oats, are dutiable as "oat hulls" under this

paragraph, and not as nonenumerated manufactures under paragraph 385. *Tower v. U. S.*, (1921) 10 U. S. Cust. App. 259; *Tower v. U. S.*, (1921) 10 U. S. Cust. App. 259; *Central Vermont R. Co. v. U. S.*, (1921) 10 U. S. Cust. App. 262.

Vol. II, p. 787, par. 244. [First ed., 1914 Supp., p. 82.]

Allowance for breakage or leakage.—The proviso of this paragraph, that the collector can "make no constructive or other allowance for breakage or leakage or damage on wines, liquors, cordials, or distilled spirits" can not be taken to modify section 300, act of October 3, 1917 (1918 Supp. Fed. Stat. Ann. 350), taxing liquor in bond at the time of its enactment, so as to make the quantity dutiable under the tariff act the same as that subject to the additional duty imposed by the war revenue act. Section 300 taxes the actual, not the constructive, quantity. *Porges v. U. S.*, (1920) 10 U. S. Cust. App. 244.

Vol. II, p. 791, par. 252. [First ed., 1914 Supp., p. 84.]

Invoice as evidence.—See note under par. 253.

Cotton cloth colored and uncolored.—Cotton cloth, to be dutiable under this paragraph, as "cotton cloth . . . colored," must have colored yarns or threads, which form a necessary and substantial part of the article. Unbleached cotton duck or canvas, having a single blue warp thread equally visible on both surfaces and running lengthwise of the fabric about an inch from each edge, the blue thread serving only for a marginal guide in making up the fabric and not affecting the cloth either as to price, strength, or embellishment, is to be classified under this paragraph as not colored. *U. S. v. Bryant*, (1920) 10 U. S. Cust. App. 79.

Vol. II, p. 792, par. 253. [First ed., 1914 Supp., p. 84.]

Invoice as evidence.—It cannot be said that the invoice has no value whatever as evidence. Not only is it *prima facie* evidence of what it declares, but it is the evidence which determines the collector's action as to all imported merchandise which has not been examined. Hence, where there is nothing except the invoice to show the yarn count of cotton cloths under this paragraph and paragraph 252, and the invoice is impeached, the Board of United States General Appraisers may correctly presume that the yarn count is shown by the invoice, and their decision sustaining the protest and directing reliquidation in accordance with the yarn count stated in the invoice should be affirmed. *U. S. v. Bloomingdale*, (1920) 10 U. S. Cust. App. 149.

Vol. II, p. 801, par. 284. [First ed., 1914 Supp., p. 88.]

Hemp chenille.—See note under par. 335.

Vol. II, p. 801, par. 288. [First ed., 1914 Supp., p. 88.]

Worn-out pulp felts.—See note under par. 651.

Manufactures of wool.—In *U. S. v. Field*, (1920) 10 U. S. Cust. App. 183, the merchandise consisted of woven flax canvases and colored woolen yarns, the canvases having been stitched by hand with the yarns sufficiently to indicate a preconceived ornamental design and color scheme and the nature of the needlework, and enough of the yarns being imported with the canvases to complete the work. When finished, they were to be used on the seats or backs of pieces of furniture, and the canvases substantially, if not entirely, covered by the ornamental designs. It was held that the importations were not finished articles, but materials, the component material of chief value being wool, and should be classified under this paragraph as manufactures of wool, and not under paragraph 358 as embroideries or embroidered articles.

Vol. II, p. 805, par. 293. [First ed., 1914 Supp., p. 89.]

Chenille carpets and rugs.—A review of the history of rug making shows that originally and now the term "chenille" used in this paragraph was and is commonly and properly used to distinguish that kind of carpet or rug from all other kinds. No contrary commercial designation appears at the time of the enactment of the tariff act of 1913. It is therefore concluded that the act of 1913 differentiates between chenille and Axminster carpets and rugs. And as chenille rugs are made from portions of chenille carpets or carpeting, and are not enumerated in paragraph 300, they are dutiable under this paragraph, by virtue of paragraph 303. *U. S. v. Trorlicht, etc., Carpet Co.*, (1921) 10 U. S. Cust. App. 254.

Machine-made chenille wool rugs of the importations, not "woven whole for rooms," are dutiable by virtue of paragraph 303, at the rate imposed on chenille carpets by this paragraph. *U. S. v. Trorlicht, etc., Carpet Co.*, (1921) 10 U. S. Cust. App. 254.

Vol. II, p. 805, par. 300. [First ed., 1914 Supp., p. 89.]

Chenille carpets and rugs.—See note under par. 293.

Handmade rugs.—Certain handmade rugs known as "Idaho," "Kerbela," "Beirut" and "Calcutta" and certain rugs shown to be carpets woven whole for rooms from speci-

fications are dutiable under this paragraph. *U. S. v. Trorlicht, etc., Carpet Co.*, (1921) 10 U. S. Cust. App. 254.

Vol. II, p. 805, par. 303. [First ed., 1914 Supp., p. 89.]

Chenille carpets and rugs.—See note under par. 293.

Rugs for floors.—The expression "rugs for floors . . . and other portions of carpets or carpeting . . ." in this paragraph includes long rolls of carpeting intended to be cut at places indicated in the weave, each piece, after being cut, to be bound and fringed into a finished rug. *U. S. v. Trorlicht, etc., Carpet Co.*, (1921) 10 U. S. Cust. App. 254.

Vol. II, p. 808, par. 318. [First ed., 1914 Supp., p. 90.]

Applied articles.—See note under par. 358.

Vol. II, p. 810, par. 320. [First ed., 1914 Supp., p. 90.]

Mechanically ground wood pulp, in sheet form, imported in rolls, the sheet being of a width and thickness especially suitable for the manufacture of a particular kind of pulpboard does not, by reason of its form, become "pulpboard" within the meaning of that term in this paragraph, but remains "mechanically ground wood pulp" within the meaning of that expression in paragraph 649. *Beaver Co. v. U. S.*, (1920) 10 U. S. Cust. App. 22.

Vol. II, p. 814, par. 329. [First ed., 1914 Supp., p. 92.]

Professional journals.—See note under par. 426.

Everyman's Library not textbooks.—To same effect as original annotation, see *Wakem v. U. S.*, (1920) 10 U. S. Cust. App. 24.

Vol. II, p. 815, par. 332. [First ed., 1914 Supp., p. 92.]

Fashion plates.—Cards containing pictures of women wearing fashionable clothes, surrounded by samples of actual dress goods fabrics and other similar cards representing the interiors of rooms exhibiting designs of drapery, pictures of wall paper and linoleum designs, bolts of dress or upholstery fabrics, a couch with figured covering, and similar articles are not classifiable as "original drawings" under paragraph 652; neither are they "works of art" under paragraph 376. They should be classified as manufacturers of paper under this paragraph.

MacLoughlin v. U. S., (1920) 10 U. S. Cust. App. 37.

Vol. II, p. 816, par. 333. [First ed., 1914 Supp., p. 93.]

Jewelry—*Imitation pearl necklaces*.—See note under par. 356.

Vol. II, p. 818, par. 335. [First ed., 1914 Supp., p. 93.]

Hemp chenille.—There seems to be little, if any, difference in meaning between the word "braids" and the word "plaits" in this paragraph. Two threads twisted together cannot be regarded as a braid or plait. Thus, merchandise known as hemp chenille, made on a machine by braiding one hemp and two cotton threads and contemporaneously cutting the hemp thread so that the finished product is two tightly twisted cotton threads with pieces of hemp thread sticking through the twists, is not classifiable under this paragraph as "braids" or "plaits," but should be classified as a manufacture of hemp under paragraph 284. *Ringk v. U. S.*, (1920) 10 U. S. Cust. App. 107.

Vol. II, p. 822, par. 347. [First ed., 1914 Supp., p. 94.]

Artificial and ornamental fruits, etc.—To be classifiable as "artificial and ornamental fruits, grains, leaves, flowers, and stems, or parts thereof," under this paragraph, it is not necessary that articles should truly represent fruits, grains, leaves, flowers, or stems. It is sufficient if they simulate natural fruits, grains, leaves, flowers, and stems in physical characteristics and appearance closely enough to cause them in common understanding to be regarded as leaves, stems, flowers, or fruits, produced, not by nature but by the hand of man, and, at the same time, are appropriate and suitable to be used for those purposes of ornamentation to which the natural products may be temporarily devoted. *Cochran Co. v. U. S.*, (1920) 10 U. S. Cust. App. 62. To same effect, see *Johnson & Co. v. U. S.*, (1920) 10 U. S. Cust. App. 54.

Articles made of straw and chip in natural colors, too fragile and crude to be used as millinery ornaments, but imported as raw material for making them, not resembling fruits, grains, leaves, flowers, and stems, or parts thereof, are not to be classified under this paragraph as "artificial and ornamental fruits, grains, leaves, flowers, and stems, or parts thereof." *Isler v. U. S.*, (1920) 10 U. S. Cust. App. 74.

Dyed straw millinery ornaments, crudely resembling "fruits, grains, leaves, flowers, and stems, or parts thereof," should be classified as "artificial and ornamental fruits, grains, leaves, flowers, and stems, or parts thereof," under this paragraph, rather than

as nonenumerated articles under paragraph 385. *Johnson v. U. S.*, (1920) 10 U. S. Cust. App. 54.

Millinery ornaments consisting of clusters of black straw wound into the form of berries or grapes and set on black straw leaves attached to stems made of black straw and metal; and millinery ornaments consisting of sprays of black straw leaves and black straw roses sewed with black threads to a stiff fabric foundation are properly classified as "artificial and ornamental fruits, grains, leaves, flowers, and stems" under this paragraph. But millinery ornaments so crudely and grotesquely fashioned as to be scarcely deserving of the description ornamental and not resembling fruits, grains, leaves, flowers, and stems can not be classified under this paragraph. *R. C. Cochran Co. v. U. S.*, (1920) 10 U. S. Cust. App. 62.

Ivory pendants and brooches.—Ivory brooches, pendants, and scarf pins, carved in imitation of various flowers, are not "artificial and ornamental flowers," within this paragraph, but should be classified as manufactures of ivory under paragraph 369. *U. S. v. Darling*, (1920) 10 U. S. Cust. App. 57.

Presumption in favor of collector's finding.—Millinery ornaments consisting of straw spheroids in combination with artificial stems and sprays of artificial leaves, having been classified by the collector under this paragraph, it must be presumed, in the absence of evidence to the contrary, that the leaves and stems are chief value; and they are dutiable under the paragraph as articles in chief value of "artificial and ornamental fruits, grains, leaves, flowers, and stems." *Cochran Co. v. U. S.*, (1920) 10 U. S. Cust. App. 62.

Vol. II, p. 824, par. 351. [First ed., 1914 Supp., p. 95.]

Unusual coverings.—See note under section III, par. R, *infra*, p. 434.

Vol. II, p. 825, par. 356. [First ed., 1914 Supp., p. 95.]

"Articles or wares plated with gold or silver."—See note under par. 167.

Imitation pearls.—Not every importation regardless of size, use, or shape, which remotely resembles a pearl in color, can be regarded as an imitation pearl and assessed as jewelry. *Veith v. U. S.*, (1920) 10 U. S. Cust. App. 201.

Imitation pearl necklaces.—The provision of this paragraph, for such jewelry as is valued above 20 cents per dozen pieces indicates that, in the congressional view, there is cheaper jewelry, and serves to show that whether or not merchandise is to be classified as jewelry is not to be determined by its value. But necklaces made of wax-filled glass imitation pearl beads permanently strung

and fitted with metal clasps and imitation pearl pendants are classifiable as "jewelry" under this paragraph and not as articles of beads under paragraph 333. *U. S. v. Woolworth Co.*, (1920) 10 U. S. Cust. App. 194.

Bone watch charms.—*Prima facie*, an article in chief value of material neither precious stone nor precious metal, nor an imitation of either, is not jewelry commonly so called. Thus, watch charms made of bone are not jewelry. *U. S. v. Mandel*, (1920) 10 U. S. Cust. App. 44.

Manufactures of ivory with brass eyelets are not made of precious metal or precious stone or an imitation of either, and are not jewelry. *U. S. v. Darling*, (1920) 10 U. S. Cust. App. 57.

Vol. II, p. 827, par. 358. [First ed., 1914 Supp., p. 96.]

Appliquéd articles.—A union of two independent fabrications is essential to and determinative of the definition of the word "appliquéd" as used in this paragraph. Thus, a fabric which is ornamented upon one surface by figures composed of glue covered with flock is not appliquéd, but should be classified under the residuary provisions of paragraph 318 as a woven silk fabric not otherwise specially provided for. *U. S. v. Heyliger*, (1920) 10 U. S. Cust. App. 52; *U. S. v. Mills*, (1920) 10 U. S. Cust. App. 49.

Embroidery.—To constitute an embroidery under this paragraph there must be, by needle-work processes, an ornamental addition superimposed upon a previously completed fabric or article—not a needlework ornamentation placed upon a fabric regarded as a material only, which ornamentation constitutes substantially the completed fabric or article. *U. S. v. Field*, (1920) 20 U. S. Cust. App. 183.

Presumption of legislative sanction of judicial interpretation.—Congress is presumed to have enacted the provision for embroideries in this paragraph in harmony with the judicial interpretation of the word obtaining at that time. *U. S. v. Field*, (1920) 10 U. S. Cust. App. 183.

Vol. II, p. 831, par. 360. [First ed., 1914 Supp., p. 96.]

Needlescases.—See note under par. 135.

Unusual coverings.—See note under section III, par. R, *infra*, p. 434.

Vol. II, p. 833, par. 368. [First ed., 1914 Supp., p. 97.]

"In their natural state."—The expression of this paragraph, "in their natural state, and not the separated fibers thereof," will not be construed so as to make the first phrase simply antithetical of the second. The purpose of Congress was to exclude from

the paragraph by this provision grass and straw cloth made of grass and straw fibers, which are provided for elsewhere; and the paragraph comprehends split straw, so long as the splitting has not resulted in a decortication of the fibers. *Isler v. U. S.*, (1920) 10 U. S. Cust. App. 74.

Bone watch charms.—Watch charms made of bone should not be classified as jewelry under paragraph 356, in the absence of evidence that they are commercially known as such, but should be classified as manufactures of bone under this paragraph. *U. S. v. Mandel*, (1920) 10 U. S. Cust. App. 44.

Dyed straw articles.—Dyed straw is not straw in its "natural state" within that expression in this paragraph, and articles made of it are not dutiable hereunder. *Johnson v. U. S.*, (1920) 10 U. S. Cust. App. 54; *Cochran v. U. S.*, (1920) 10 U. S. Cust. App. 62.

Millinery ornaments in chief value of straw, but not in imitation of fruits, grains, leaves, flowers, and stems, are not dutiable under paragraph 347. Such of them as are in chief value of undyed straw are dutiable as manufactures in chief value of straw in its natural state, under this paragraph, and such of them as are in chief value of dyed straw are dutiable as manufactures not provided for under paragraph 385. *Johnson & Co. v. U. S.* (1920) 10 U. S. Cust. App. 54.

Split straw and chip material for the manufacture of millinery ornaments, too crude for classification under paragraph 347, as artificial and ornamental fruits, grains, leaves, flowers, and stems, or parts thereof, are dutiable as manufactures of chip and straw, under this paragraph. *Isler v. U. S.*, (1920) 10 U. S. Cust. App. 74.

Vol. II, p. 834, par. 369. [First ed., 1914 Supp., p. 97.]

Ivory pendants and brooches.—See note under par. 347.

Vol. II, p. 836, par. 376. [First ed., 1914 Supp., p. 98.]

Fashion plates.—See note under pars. 332 and 652.

Vol. II, p. 838, par. 381. [First ed., 1914 Supp., p. 98.]

"All smokers' articles whatsoever."—By using the words "all smokers' articles whatsoever" in this paragraph Congress manifested its intention "to reach out into all branches of trade and commerce and to gather within the dutiable provisions of this paragraph everything used chiefly by smokers, in that pursuit, and for that purpose, wherever else they may occur or within whatever other provisions of the tariff law the merchandise may be included." Thus, finished pipe stems

may be regarded as material for manufacturing or assembling pipes, still, being separate and distinct subjects of trade and use, and the language of this paragraph, "all smokers' articles whatsoever" being so comprehensive, they must be regarded as "articles" within this paragraph. *Bush v. U. S.*, (1920) 10 U. S. Cust. App. 161.

Bamboo pipe stems.—Bamboo pipe stems, 5 inches in length, one end cut off square just back of a joint, thus forming a mouthpiece, and the other end tapered to fit into the pipe, are classifiable as "smokers' articles," under this paragraph, and not as "bamboo" under paragraph 648 or "manufactures of wood" under paragraph 176. *Bush v. U. S.*, (1920) 10 U. S. Cust. App. 161.

Pipes and pipe bowls.—It is not the meaning of this paragraph that "pipes and pipe bowls" should be a separate and distinct classification from "smokers' articles," so that parts of pipes other than bowls (e. g. stems) should be excluded from the paragraph. Pipe stems are "smokers' articles" within the paragraph. *Bush v. U. S.*, (1920) 10 U. S. Cust. App. 161.

Vol. II, p. 838, par. 384. [First ed., 1914 Supp., p. 98.]

By-product lignum extract.—See note under par. 624.

Ferrosilicon.—See note under par. 102.

Vol. II, p. 839, par. 385. [First ed., 1914 Supp., p. 98.]

By-product lignum extract.—See note under par. 624.

Dyed straw millinery ornaments.—See note under par. 347.

Ferrosilicon.—See note under par. 102.

Ground oat hulls.—See note under par. 192.

Millinery ornaments in chief value of straw.—See note under par. 368.

Merchandise composed of strips of colored straw, but not resembling any of the things named in paragraph 347, should have been classified under this paragraph. *Johnson v. U. S.*, (1920) 10 U. S. Cust. App. 54.

When article may be classified as non-enumerated.—When there is no specific provision for merchandise, it can be classified under this paragraph, as a nonenumerated article only in case it is not, in material, texture, or use, similar to any article enumerated in the act. *Johnson v. U. S.*, (1920) 10 U. S. Cust. App. 54.

Vol. II, p. 843, sec. 386. [First ed., 1914 Supp., p. 98.]

Necessity of pleading paragraph in making protest.—While this paragraph, strictly speaking, is itself, in a sense, an assessing paragraph, still it may fairly be said that in the general language and common understanding of those dealing with the subject,

merchandise which becomes dutiable at a given rate by similitude with enumerated articles is regarded as being brought thereby within the enumerating paragraph for assessment. This paragraph is a legislative rule of interpretation of the scope of every duty-assessing provision of the tariff act, and, as such, it should no more be pleaded than any other rule of interpretation, construction, or evidence. Thus, a protest claiming classification under a certain paragraph is sufficient to support such classification by similitude, even though the protest makes no mention of this paragraph. *Rice v. U. S.*, (1920) 10 U. S. Cust. App. 165.

Vol. II, p. 848, par. 387. [First ed., 1914 Supp., p. 389.]

Nitric acid mixed with sulphuric acid.—Nitric acid to which approximately 20 per cent by weight and 5 per cent according to value of sulphuric acid has been added for the sole purpose of preventing corrosion of steel tank cars essential for transportation of the former acid in large quantities comes within this paragraph, rather than paragraph 5 (see 2 Fed. Stat. Ann. (2d ed.) 726), which imposes a duty of 15 per cent ad valorem upon "alkalies, alkaloids, and all chemical and medicinal compounds, preparations, mixtures and salts, and combinations thereof," not specially provided for in this section. *U. S. v. Aetna Explosives Co.*, (1921) 256 U. S. —, 41 S. Ct. 513, 66 U. S. (L. ed.) —.

Vol. II, p. 850, par. 404. [First ed., 1914 Supp., p. 100.]

American goods returned.—A claim for free entry of engines, having forced-draft fans attached, as American goods returned without advancement or improvement in value or condition under this paragraph is not supported by a statement in the foreign export entry that the engines were originally of American manufacture, and that they were shipped to Canada "for connection to the fans." With no other evidence, and without compliance with article 333, Customs Regulations of 1915, pursuant to this paragraph, the collector's classification as miscellaneous metal articles under paragraph 167 should be approved. *U. S. v. Reid*, (1920) 10 U. S. Cust. App. 85.

Burden of proof as to identity of returned goods.—Compliance with article 333, Customs Regulations, 1915, promulgated pursuant to this paragraph and prescribing the method of showing the identity of American goods returned, does not relieve an importer from the burden of proving such identity to support a protest against the decision of the collector against it. The preliminary papers required by the article to be filed with the collector in support of a claim for free entry of merchandise under the paragraph are simply intended to assist the col-

lector in deciding upon the entry and possess no conclusive or binding force upon his official action. If, in such case, the collector, for reasons which seem sufficient to him, decides against the claim for free entry and thereupon assesses duty upon the merchandise, his decision in the first instance is presumed, as in other cases, to be correct; and, upon the trial of a protest in such case, the burden is cast upon the protestant, as in other cases, to establish by lawful evidence any and all facts upon which he relies to overcome that presumption. *Hull v. U. S.*, (1920) 10 U. S. Cust. App. 211.

Vol. II, p. 853, par. 419. [First ed., 1914 Supp., p. 101.]

Cleaned and dried fish sounds.—See note under par. 34.

Vol. II, p. 854, par. 426. [First ed., 1914 Supp., p. 102.]

Everyman's library.—See note under par. 329.

Professional journals.—By the language of this paragraph "textbooks used in schools and other educational institutions" Congress did not intend to admit free of duty all the serial journals and reports issued by associations of the different professions, arts, sciences, industries, businesses, etc.; and the "Journal of the Institute of Actuaries," a paper-bound serial issued quarterly by an English organization known as the "Institute of Actuaries," being such a publication, must be denied such classification and held dutiable under the general provision of paragraph 329 for books. *U. S. v. Tice*, (1920) 10 U. S. Cust. App. 198.

The term "textbook" applies only to such books as either set out in their text the facts or principles of some branch of learning which is to be taught to students, or to such as are prepared with especial introductions, notes, glossaries, spacings, or other "editorial apparatus," which particularly adapt them for the use of students or instructors engaged in classroom work as a class apart from more general readers. The fact that a book is used in educational institutions does not make it a textbook within the meaning of that term in this paragraph. *Wakem v. U. S.* (1920) 10 U. S. Cust. App. 24.

It is not clear that the context of this paragraph does not confine the free entry accorded "textbooks" to "books" in the narrower sense, excluding "pamphlets," particularly serial pamphlets. In view of the fact that serial pamphlets are not of the same contents and not necessarily even of the same subject matter issue by issue, it is doubtful whether free entry could be decreed an entire serial. *U. S. v. Tice & Lynch*, (1920) 10 U. S. Cust. App. 198.

Vol. II, p. 857, par. 461. [First ed., 1914 Supp., p. 103.]

Construction.—In order to give effect to all the provisions of this paragraph it is necessary to construe it as according free entry to all copper ores and all products of them in whatever shape and whatever form produced short of manufactures of copper. *Lang v. U. S.*, (1920) 10 U. S. Cust. App. 228.

Copper matte.—To same effect as original annotation, see *Lang v. U. S.*, (1920) 10 U. S. Cust. App. 228.

Vol. II, p. 860, par. 498. [First ed., 1914 Supp., p. 104.]

"Chemical . . . compounds"—"Chemically compounded."—See note under par. 5.

Vol. II, p. 862, par. 517. [First ed., 1914 Supp., p. 105.]

Platinum in sheets.—The provision of this paragraph admitting free of duty iridium and platinum in native combination does not modify that of paragraph 578 admitting free of duty platinum in sheets, so as to deny free entry to platinum in sheets when artificially combined with iridium. *American Express Co. v. U. S.*, (1920) 10 U. S. Cust. App. 275.

Vol. II, p. 862, par. 518. [First ed., 1914 Supp., p. 105.]

Ferrosilicon.—See note under par. 102.

Vol. II, p. 870, par. 578. [First ed., 1914 Supp., p. 108.]

Commercial designation—platinum in sheets.—The rule that the commercial designation of imported merchandise may be shown to correspond to the tariff designation applies not only to *eo nomine* designations but also to descriptive terms. To bar the application of this rule the intention of Congress to do so must clearly appear. Thus, under a protest claiming free entry of merchandise 90 per cent platinum and 10 per cent iridium as platinum in sheets, under this paragraph, it is error to exclude evidence of commercial designation, since such merchandise, if shown to be known commercially as "platinum in sheets," is admissible free of duty as such hereunder. *American Express Co. v. U. S.*, (1920) 10 U. S. Cust. App. 275.

Vol. II, p. 875, par. 614. [First ed., 1914 Supp., p. 110.]

Crushed limestone.—Limestone, unless completely manufactured, is entitled to free entry under this paragraph. Thus, limestone crushed to diameters of from one-

sixteenth inch to 4 inches to facilitate transportation, and needing to be subjected to other manufacturing processes before being used, is admissible free of duty under this paragraph as "limestone, unmanufactured," and not dutiable under paragraph 81 as earthy or mineral substances wholly or partially manufactured." *Lackawanna Steel Co. v. U. S.*, (1920) 10 U. S. Cust. App. 93.

Vol. II, p. 876, par. 624. [First ed., 1914 Supp., p. 110.]

Nutgall extract.—See note under par. 1.
By-product lignum extract.—Lignum extract, obtained as a by-product from the manufacture of wood pulp from spruce and balsam, containing no alcohol but a substantial amount of tannin and commonly used for tanning, should be classified as "extracts of other . . . woods . . . such as are commonly used for tanning" under this paragraph rather than as "waste not specially provided for" under paragraph 384, notwithstanding that such merchandise is used for other purposes than tanning and that the instant importation was not intended to be used for tanning. It is not classifiable as tannin or as an acid not especially provided for under paragraph 1, as a chemical compound under paragraph 5, or as a non-enumerated manufactured article under paragraph 385. *Meyers v. U. S.*, (1920) 10 U. S. Cust. App. 216.

Vol. II, p. 876, par. 627. [First ed., 1914 Supp., p. 110.]

Containers of tea.—Where less than five pounds of tea is imported in a tin can and the can inclosed by a bamboo basket, the can not being an unusual covering designed for use otherwise than in the bona fide transportation of the tea, the proviso to this paragraph directs that the can shall be admitted free and duty levied on the basket. It is error to treat the can and the basket as an entirety and assess duty upon their combined values as being in chief value of bamboo under paragraph 175. *U. S. v. Brown*, (1920) 10 U. S. Cust. App. 89.

Vol. II, p. 876, par. 631. [First ed., 1914 Supp., p. 111.]

Solder reclaimed from shells.—See note under par. 154.

Vol. II, p. 879, par. 647. [First ed., 1914 Supp., p. 112.]

Squared timbers imported for the purpose of being cut up into railroad ties. but suitable for other uses also, not known as railroad ties in the form in which imported, are

admissible free as "timber . . . unmanufactured, hewn, or sawed, sided or squared." under this paragraph and not dutiable as railroad ties under paragraph 170. *Mitchell Co. v. U. S.*, (1920) 10 U. S. Cust. App. 104.

Vol. II, p. 879, par. 648. [First ed., 1914 Supp., p. 112.]

Chinese reeds.—See note under par. 173.

Round reeds in the rough.—See note under par. 173.

Bamboo pipe stems.—This paragraph excludes bamboo which has been "further advanced than cut into lengths." Thus, bamboo pipe stems cut and pierced behind a joint for the mouth and tapered at the other end for the pipe are "further advanced" and not to be classified under this paragraph. *Bush v. U. S.*, (1920) 10 U. S. Cust. App. 161.

Reeds cut into lengths.—The provision of this paragraph for "Reeds unmanufactured, . . . or not further advanced than cut into lengths suitable for sticks for umbrellas, parasols, sunshades, whips, fishing rods, or walking canes" extends, not restricts, reeds to such as are cut into such suitable lengths; so that the paragraph includes such reeds whether or not they are suitable for the uses named. And reeds which are produced by subjecting the rattans to no manufacturing processes other than removing their bark or enamel and cutting them into lengths are classifiable under this paragraph, except that such of them as are chiefly used for the manufacture of chairs are classifiable under paragraph 173. *Peabody v. U. S.*, (1920) 10 U. S. Cust. App. 220.

Vol. II, p. 880, par. 649. [First ed., 1914 Supp., p. 112.]

Ferrosilicon.—See note under par. 102.

Mechanically ground wood pulp, in sheet form.—See note under par. 320.

Vol. II, p. 880, par. 651. [First ed., 1914 Supp., p. 112.]

"Waste."—The word "waste" in this paragraph does not include only refuse or waste material resulting or left over from a process of manufacture, and does not exclude manufactured articles which, by wear and tear of use, have become worn-out, unfit and useless for the purposes for which they were made. *Central Vermont R. Co. v. U. S.*, (1920) 10 U. S. Cust. App. 31.

Shoddy.—It could not have been the intention of Congress, in the enactment of this paragraph to admit shoddy free of duty, and to exclude material for making shoddy from such exemption. *Central Vermont R. Co. v. U. S.*, (1920) 10 U. S. Cust. App. 31.

Worn-out pulp felts.—Pieces of wool felt, which had been worn out by use on paper-making machines were shown to be imported for the purpose of making shoddy, and to be commercially fit practically for no other purpose. They are admissible free as "wastes not specially provided for," under this paragraph and should not be classified as a manufacture of wool under paragraph 288. *Central Vermont R. Co. v. U. S.*, (1920) 10 U. S. Cust. App. 31.

Vol. II, p. 880, par. 652. [First ed., 1914 Supp., p. 112.]

Fashion plates.—Figures of women wearing fashionable clothes, drawn on cardboard with pen and ink or pencil and colored with water colors, designed to illustrate the clothes, are classifiable as "original drawings and sketches in pen and ink or pencil and water colors" under this paragraph rather than as manufactures of paper under paragraph 332. *MacLoughlin v. U. S.*, (1920) 10 U. S. Cust. App. 37.

Vol. II, p. 884, par. J, subsec. 4. [First ed., 1914 Supp., p. 129.]

Models of women's wearing apparel.—The provision of this subsection, exempting from duty "models of women's wearing apparel imported by manufacturers for use as models in their own establishments, and not for sale" goes to the intention of the importer at the time of entry. This is a question of fact to be decided in each case upon the testimony adduced therein. Hence, where models of women's wearing apparel are imported under bond for exportation within six months as being for use as models in importers' manufacturing establishments and not for sale, according to the provisions of this subsection, and it is shown that importers sold some, rented some, permitted some to be copied for a price and used the residue as models in their own establishments, duty is properly assessed upon them, on the application of the importers for exportation of the residue, as it does not appear that importers at the time of entry, intended them for use as models in their own manufacturing establishments and not for sale. *Grab Fashion Co. v. U. S.*, (1920) 10 U. S. Cust. App. 39.

Vol. II, p. 885, par. J, subsec. 5. [First ed., 1914 Supp., p. 130.]

Marine surface condensers.—See note under par. 167.

Boiler parts.—An importation of boiler parts lacking such distinctive and important features as furnaces, pipe, stay tubes, boiler plates, and other parts, castings, cannot be regarded as an importation of complete boilers in knockdown condition and are en-

titled to entry free of duty under this subsection as materials necessary for the building of the machinery of American vessels, and are not dutiable under paragraph 167 as manufactures of metal. *Johnson Iron Works v. U. S.*, (1921) 10 U. S. Cust. App. 268.

"Materials."—The provision of this subsection, admitting free of duty "materials" necessary for the building of the machinery of American vessels does not mean that such materials must be crude, but includes standardized parts of engines. But the importation in one shipment of enough standardized parts to make a complete engine is an importation of an engine under paragraph 167. This is not altered by the fact that the importation contained also other standardized parts of engines. *U. S. v. Hannevig*, (1920) 10 U. S. Cust. App. 124.

Manufactures distinguished.—Forced-draft fans, with engines attached, completely finished for the forcing of air through heat-r boxes into the furnaces of vessels, are not materials for American vessels within this subsection. They are finished manufactures, and should be classified under paragraph 167 as miscellaneous metal articles. *U. S. v. Reid*, (1920) 10 U. S. Cust. App. 85; *U. S. v. Carlin*, (1920) 10 U. S. Cust. App. 83.

Spare engine parts as "outfit and equipment."—Spare parts for an engine installed upon an American vessel, no claim being made that the number was greater than was necessary or that they were not placed on board for the purpose of replacing the corresponding parts of the engine as they might be broken or wear out, are "outfit and equipment" for American vessels under this subsection. *U. S. v. Hannevig*, (1920) 10 U. S. Cust. App. 124.

Importation in bond under treasury regulations.—This subsection provides that certain articles for American vessels may be imported in bond under such regulations as the Secretary of the Treasury may prescribe. These regulations are articles 406, 407 and 408, Treasury Regulations, 1915. Where the importer is compelled to pay the duties assessed before the goods are delivered to him no bond is necessary; and where the duty has been paid and there is no dispute that the merchandise was spare engine parts for an engine which was placed upon an American vessel, compliance with the regulations is unnecessary. *U. S. v. Hannevig*, (1920) 10 U. S. Cust. App. 124.

Vol. II, p. 973, sec. 2766. [First ed., vol. II, p. 636.]

Construction.—This section is exclusive, that is, the permission goes so far and no further. Anything else may not be called "merchandise," so far as the collection of customs revenue is concerned. *U. S. v. Reed*, (E. D. N. Y. 1921) 274 Fed. 724.

"Capable of being imported."—This phrase has been construed as applying only to such merchandise as may lawfully be imported into this country. In this connection the court said:

"It must not be overlooked that the statutes with which we are dealing are customs statutes, and are designed for the enforcement of the collection of revenues assessable upon dutiable articles. To this end, no doubt, it is required that all merchandise capable of importation shall be contained in the ship's manifests, so that the customs officers may determine what is subject to duty and what is not. It would not be expected that articles prohibited introduction within the United States would be mentioned in the manifest, because the presumption would be that the master would not bring them in, for if he did he would breach the law, and subject himself to the penalty imposed for importing prohibited articles. Congress, therefore, had no occasion to legislate in these statutes for the protection and the enforcement of the payment of duties on merchandise which it did not intend should be brought in under any conditions." *U. S. v. Sischo*, (C. C. A. 9th Cir. 1921) 270 Fed. 958.

Opium.—The owner and master of a vessel who does not include in his manifest opium prepared for smoking purposes is not, by this section made liable to the penalty imposed by section 2809 of the Revised Statutes, such opium not being "merchandise" within this meaning of that word as it is there used. *U. S. v. Sischo*, (C. C. A. 9th Cir. 1921) 270 Fed. 958.

Vol. II, p. 989, sec. 2809. [First ed., vol. II, p. 647.]

Purpose of section.—This statute was obviously designed to enable the government, among other things, to collect the duties upon all dutiable articles coming into this country from foreign ports, and to that end it was desirous that it be advised by the manifests of what merchandise capable of being imported was aboard ship, so that the proper assessment of duties could be made by the collector of customs. *U. S. v. Sischo*, (C. C. A. 9th Cir. 1921) 270 Fed. 958.

Failure to list prohibited articles.—The owner of a vessel who does not include in his manifest opium prepared for smoking purposes is not liable for the penalty imposed by this section, such opium not being "merchandise" within the meaning of that word as it is here used. *U. S. v. Sischo*, (C. C. A. 9th Cir. 1921) 270 Fed. 958; *U. S. v. Reed*, (E. D. N. Y. 1921) 274 Fed. 724. In the latter case, the court said:

"Under the Constitution no person can be compelled to furnish evidence against himself. To compel a man to list or include in a paper to be filed something which would

convict him or render him liable to conviction for a crime, and then to collect a penalty from him for failure to give evidence against himself of his commission of a crime, resembles closely the principles involved in prosecutions under the Volstead Law, where defendants have been accused of violating the internal revenue laws compelling them to register, put up a distillery sign, and pay a tax for the manufacture, etc., of liquor which is prohibited and for which specific penalties and punishments are provided.

"In the case of *United States v. Boze Yuginovich* and another, 254 U. S. —, 41 Sup. Ct. 551, 65 L. ed. —, decided by the Supreme Court of the United States on June 1, 1921, it was held that Congress must have necessarily intended to repeal the internal revenue laws in so far as they verbally or literally required performance of acts prohibited as crimes. In the same way it would seem that Congress could not have intended to require the captain of a vessel to make a report to the effect that he was committing a crime against the laws of the United States, in order to avoid liability for a penalty not expressly defined, but only forced out of language which, taken literally, is not broad enough to justify such interpretation."

Vol. II, p. 1009, par. B. [First ed., 1914 Supp., p. 114.]

Meaning of "bill of lading."—An express receipt is not a bill of lading within the meaning of this section. Hence a connecting carrier holding such a receipt duly indorsed will not be deemed the consignee. *United States v. Fargo*, (C. C. A. 2d Cir. 1921) 271 Fed. 180, wherein it was said:

"A distinguishing feature of the bill of lading is that it represents the goods, so that by the delivery of it, under the practice of merchants, there is a symbolical delivery of the goods and thus the obligations of contracts of sale are satisfied. By the indorsement of a bill of lading, the property rights to the goods can pass from hand to hand, without the actual necessity of removing the goods themselves or the delivery thereof. Customs Administrative Act, § 3, defines persons who might make entry of imported merchandise and who must pay the customs duties thereon. It was the evident intent of Congress to impose liability upon the owners of the merchandise and the consignee is presumptively the owner of the goods. The consignee is presumptively the owner of the goods, since it is provided that he might make entry of the goods, with attendant assumption of liability for customs duties. It is recognized that title might pass from the consignee by indorsement of a bill of lading, and it was provided that in such event the indorsee should have the rights and liabilities of the original consignee. So the practice has been that a bill of lading is surrendered only

when the goods are delivered. The transfer of title is made by indorsement of the bill of lading, and the indorsee then becomes entitled to the goods from the carrier, and, by the usage of merchants the indorsement of the bill of lading from the consignee to the new title owner becomes a fixed practice. Carriers then become subject to the rule that the goods could not be delivered, except upon surrender of the bill of lading, and the holder or transferee of the bill of lading was expected to present the bill in order to obtain delivery of the goods, and was entitled to delivery of the goods upon such presentations. *Ga., Fla. & Ala. Ry. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. ed. 948.

"An express receipt has not had the same effect of passing title. Upon presentation of a freight receipt, even though indorsed, the right to delivery of the merchandise does not follow. The carrier express company issued the receipt which authorized delivery to the consignee himself or to his duly authorized representative, and that is all. The obligation of the express company, which gives the express receipt, is to deliver to the person who shows himself to be the consignee or his authorized representative under all the circumstances. The express receipt is not demanded for the delivery of the goods, and it has not been customary, in forwarding goods, to forward the express receipt as a symbol of goods shipped. If the express receipt authorized the defendant in error to make delivery to a person on behalf of the consignee, the company is justified in making this delivery; but the fact that authorization is indorsed on the back of the express receipt does not pass title. It created a right to demand delivery of the goods, which may be revoked by a subsequent order of the consignee to the express company to disregard the indorsement. If such an order be given, the express company would be unauthorized to deliver to any one except the original consignee.

"Thus it will be observed that a bill of lading is both the receipt and a contract by the carrier to deliver to the consignee or the holder of a duly indorsed document, and an express receipt serves one purpose, to wit, a receipt limiting the carrier's liability in case of loss and damage upon contingencies named in it."

Vol. II, p. 1018, par. H. [First ed., 1914 Supp., p. 116.]

Evidence.—In an action by the United States to recover the value of merchandise which it was claimed was entered and introduced into the commerce of the United States by means of fraudulent written entries and invoices, while it is permissible for the government to prove the foreign market value where the goods were purchased, it is said that this is not essential to the establishment of the government's *prima facie* case, and that it is sufficient for the government to establish that the false statement in the

invoice tended to deprive the United States of revenue by evidence that the price paid was greater than the value given in the invoice. And if the jury is satisfied that the purchase price of the importations in question is greater than the sums made as entries when the importation took place, the jury can find fraud in making such written entries and invoices. *U. S. v. Santini*, (C. C. A. 2d Cir. 1920) 266 Fed. 303.

Vol. II, p. 1019, par. I. [First ed., 1914 Supp., p. 117.]

"Manifest clerical error."—The term "manifest clerical error" in this paragraph is one that is apparent and obvious on the face of the papers. It does not include an error which may, by extrinsic evidence, be shown to have been committed. Thus, an entry which sets out the extension in yen and the unit of value without stating what currency, obviously states upon its face that the unit of value is in yen; and extraneous proof that the extension should have been stated in dollars instead of yen does not establish a claim of "manifest clerical error" under this paragraph. The additional duty provided for by this paragraph for undervaluation should be imposed, since the yen is worth less than the dollar, and the action of the appraiser in returning the invoice to the importer for correction after it has come under his observation is forbidden by this paragraph. *Consmitter v. U. S.*, (1920) 10 U. S. Cust. App. 109.

Under this paragraph manifest clerical error cannot be shown by proof dehors the record. When an entry is made as the entrant intends to make it and carries the intended signification to the mind of the collector, there is no manifest clerical error. Thus, where merchandise is shipped from Montreal, Canada, to be entered at Rouses Point, N. Y., for transportation to New York, and the agent of the carrier makes, from the invoice, a consumption entry at Rouses Point, very greatly understating the value, the underestimation arising from a misapprehension as to whether the invoice stated the price in francs or dollars, and no disavowal of the entry was made, but an attempt is made to correct it, the collector may properly refuse to permit the correction for the reason that the application was received after the invoice and merchandise had come under the observation of the appraiser. In such case there is no manifest clerical error under this paragraph, as its showing depends upon evidence outside the record. *U. S. v. Rivers*, (1921) 10 U. S. Cust. App. 262.

In *U. S. v. Tiffany & Co.*, (1920) 10 U. S. Cust. App. 247, the invoice of goods imported from Italy stated the value as 6,488 francs. The back of the invoice bore the indorsement "Amount of invoice, lire 6,488." The value of the gold franc and the gold lira was the same but the paper lira was depreciated. The consular certificate, erroneously assuming that the lira intended

was the paper lira, stated the percentage of depreciation and the value of the merchandise accordingly. Importer entered the merchandise at such depreciated value. It was held that this was not "manifest clerical error," under this paragraph, and that the additional duty provided for herein for undervaluation was justly imposed.

Additional duties — Necessity of compliance with statutes and regulations in making assessment.—While the additional duties prescribed for undervaluation of merchandise by this paragraph, are not to be construed as penal in character, nevertheless they provide for the assessment of duties in excess of the ordinary or regular rate of duty upon similar merchandise, and they should not accrue against an importer unless the statutes and regulations upon which they depend have been substantially followed in the assessment. Thus, Article 582, Customs Regulations of 1915, requires that when the appraiser advances invoice prices to make market value an appropriate red ink notation shall be made on the invoice. A red ink notation "D" opposite an item deducted by the importer as nondutiable, the notation being intended by the appraiser and understood by the collector to mean that the item should be added again to make market value, is not a sufficient compliance with this regulation, and the collector may not assess upon such a foundation the additional duty provided for by this paragraph. *U. S. v. Cone*, (1920) 10 U. S. Cust. App. 120.

Vol. II, p. 1030, sec. 2873. [First ed. vol. II, p. 669.]

Contraband articles or goods.—The penalty provided for in this section cannot be inflicted on the master of a vessel who fails to obtain a permit to unload smoking opium the importation of which is prohibited. *U. S. v. Reed*, (E. D. N. Y. 1921) 274 Fed. 724, the court said:

"If the smoking opium cannot be considered 'merchandise,' then of course no permit to unload 'merchandise' could be obtained for the opium, and inferentially the passage of the law making smoking opium contraband has rendered futile (and therefore invalid or inferentially repealed) the provisions as to permits. Again, the criminal statutes cover the act, and the penalty under the customs law is not needed. . . . If he unloaded articles or chattels which were not 'merchandise' within the sense in which that term is used with respect to permits, he committed a crime and should be punished under other sections rather than that regulating the handling and unloading of articles capable of importation."

Vol. II, p. 1043, sec. 5. [First ed., 1912 Supp., p. 53.]

Reasonableness of rules.—A rule promulgated by the Treasury Department under this

section exacting extra pay for the inspection of baggage brought by trolley car passengers over an international toll bridge on Sundays or holidays is a reasonable one and within the power of the department to make. *International R. Co. v. Davidson*, (W. D. N. Y. 1920) 271 Fed. 313, wherein it was said:

"The rules suggested or promulgated by the collector relating to the surrender and examination of baggage carried by trolley passengers or by other vehicular passengers on Sundays or holidays on the next secular day, and the requirements that plaintiff use reasonable means to advise persons using the toll bridges that no examination of passengers' baggage and vehicles would be made by the inspectors until the day succeeding a Sunday or holiday, were not in my opinion unreasonable or unconstitutional. The collector, I think, acted within his jurisdiction, and the rights of the plaintiff are not in any way impaired, since it has the right to a special license or permit and to the service of an inspector for immediate examination of the baggage of its arriving passengers and conveyances using the bridge. It is true that there is no specific authority for licensing a toll bridge (obviously not a conveyance) for lading or unlading, yet since plaintiff concededly is owner of the bridges and trolley cars carrying the baggage of its passengers for hire and using the bridges for transportation, and collecting tolls, the provisions of the statute apply to it."

Advance notice of arrival.—The fact that it is impossible to give advance notice of the arrival of passenger's baggage does not prohibit the collector from demanding of a trolley company bringing passengers and baggage over an international bridge the extra compensation provided for by this section. *International R. Co. v. Davidson*, (W. D. N. Y. 1920) 271 Fed. 313.

Vol. II, p. 1047, sec. 2903. [First ed., vol. II, p. 681.]

Conclusiveness of consular certificate.—The consular certificate as to depreciated currency provided for by paragraph 692, Consular Regulations 1896, amended 1916, and this section, and Articles 205 and 621, Customs Regulations 1915, is conclusive as to the extent of the depreciation but not as to whether the goods were purchased with such depreciated currency or as to whether they were purchased at the price named in the invoice or certificate. *U. S. v. Tiffany*, (1920) 10 U. S. Cust. App. 247.

Vol. II, p. 1064, par. L. [First ed., 1914 Supp., p. 118.]

Appraisal — cost of production.—In *Stirn v. U. S.*, (1920) 10 U. S. Cust. App. 17, it appeared that silk in the gray was purchased in the United States and shipped to France, there treated by certain preliminary manu-

facturing processes and returned to the United States to be used in the manufacture of fabrics. It was shown that there was no market for such processed silk in either France or the United States. Accompanying the merchandise were invoices showing the various items of charge made for the processing and preparing of the silk. Upon these invoices were items of general expenses and profits, which were, however, less than 10 per cent and 8 per cent, respectively, of the outlay of every nature incident to production, which are the minimum additions permitted by this paragraph to be made for such items. It was held that the claim that the Board of United States General Appraisers proceeded upon a wrong principle of law in making additions, since these additions had already been made in the invoices, could not be sustained; and that their decision adding 10 per cent and 8 per cent of the invoice values for general expenses and profits, respectively, should be affirmed.

Vol. II, p. 1065, par. M. [First ed., vol. II, p. 119.]

Elements of dutiable value.—To make dutiable value the collector is authorized by virtue of this paragraph and paragraph N, to add to the appraised value of the merchandise *per se*, not the market value, but the cost of the containers thereof; that is to say, the price actually paid for them, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States. *Tuska v. U. S.*, (1920) 10 U. S. Cust. App. 65.

Decisions by Court of Customs Appeals—Necessity of paying appraisement appeal fee within statutory period.—The provision of this paragraph that an appeal to reappraisement "shall be deemed to be finally abandoned and waived unless within two days from the date of filing thereof the person who filed such notice shall deposit with the collector of customs a fee of \$1 for each entry." is mandatory, and the action of the Board of General Appraisers in dismissing such appeals for the reason that the fees were paid later than the prescribed two days should be approved. *Sugar Products Co. v. U. S.*, (1920) 10 U. S. Cust. App. 179.

Vol. II, p. 1071, par. N. [First ed., 1914 Supp., p. 120.]

Protests—By whom made.—When it is shown that the importations were purchased by the protestant abroad, that he owned them at the time they were brought to the United States, and that he paid the duty on them, the protest was filed by a proper party under the provision of this paragraph that it may be filed by the "owner, importer, consignee or agent of such merchandise," not-

withstanding that his name does not appear in any of the papers connected with the entry. *U. S. v. Hannevig*, (1920) 10 U. S. Cust. App. 124.

Vol. II, p. 1086, par. R. [First ed., 1914 Supp., p. 122.]

Unusual coverings.—The manifest purpose of that portion of this paragraph which levies additional duty upon unusual coverings or containers of imported merchandise is to penalize, not merchandise used as coverings or containers and imported as merchandise, but merchandise which is imported and sought to be introduced into the country, not as merchandise, but as coverings or containers. Thus, upon an importation of leather trunks containing manufactures of human hair, invoiced as leather trunks and human hair, the additional duty levied upon unusual coverings or containers by this paragraph should not be levied, since the trunks were imported as merchandise, no attempt being made to introduce them as coverings. The trunks are dutiable under paragraph 360 as manufactures of leather, and the hair goods under paragraph 351 as manufactures of human hair. *U. S. v. Yamamoto*, (1920) 10 U. S. Cust. App. 70.

The "value" of the containers of imported merchandise mentioned in this paragraph is their cost. *Tuska v. U. S.*, (1920) 10 U. S. Cust. App. 65.

Authority of collectors to appraise.—This paragraph confers no authority upon collectors of customs to appraise. *Tuska v. U. S.*, (1920) 10 U. S. Cust. App. 65.

Vol. II, p. 1115, par. M. [First ed., 1914 Supp., p. 130.]

Validity of oral application.—An oral application to the deputy collector of customs in charge of bonded manufacturing warehouses for the establishment of such a warehouse is not a compliance with this paragraph and articles 709, 710, 747, 749, and 749, Customs Regulations 1915, promulgated pursuant thereto. Under such circumstances it cannot be said that any application was made. *Agency Canadian Car, etc., Co. v. U. S.*, (1920) 10 U. S. Cust. App. 172.

Vol. II, p. 1136, sec. 21. [First ed., vol. II, p. 760.]

"Fraud."—The words "in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee" in this section, do not restrict the fraud to the owner, importer, agent, or consignee. *Zuoca v. U. S.*, (1920) 10 U. S. Cust. App. 133.

Nature of reliquidation for fraud.—A reliquidation more than a year after entry on the ground of fraud is not a criminal or quasi criminal proceeding, nor does it seek to enforce a penalty or work a forfeiture. It

is only an assessment of duties properly due and, as such, purely civil in its nature. *Zucca v. U. S.*, (1920) U. S. Cust. App. 133.

Burden of proof on reliquidation.—When reliquidation is made under this section the United States must show fraud. *Zucca v. U. S.*, (1920) 10 U. S. Cust. App. 133.

Vol. II, p. 1161, sec. 3061. [First ed., vol. II, p. 742.]

Application.—This and the following sections have application only where the article is merchandise and can be entered at the custom house. *The Goodhope*, (W. D. Wash. 1920) 268 Fed. 694.

Vol. II, p. 1161, sec. 3062. [First ed., vol. II, p. 743.]

This section was repealed by the National Prohibition Act in so far as it relates to the importation of intoxicating liquors into this country for beverage purposes. *U. S. v. One Hudson Touring Car*, (E. D. Mich. 1921) 274 Fed. 473.

Good faith of owner of vehicle.—"It is now settled that the good faith or even the entire innocence of an owner of an automobile seized for violation of the revenue laws furnishes no reason why such automobile should not be forfeited to the United States and sold in accordance with the applicable statutes, and the question as to such good faith is immaterial in libel proceedings to enforce such forfeiture and sale." *U. S. v. One Hudson Touring Car*, (E. D. Mich. 1921) 274 Fed. 473.

Vol. II, p. 1168, sec. 3082. [First ed., vol. II, p. 748.]

"Import or bring."—Where goods forbidden of importation are physically brought into the country, they are in fact imported within the meaning of the act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute. *Feathers of Wild Birds v. U. S.*, (C. C. A. 2d Cir. 1920) 267 Fed. 964.

Where bullion was brought from Mexico into the United States contrary to law by one to whom an agent of the owner had entrusted it, if such agent was acting within the scope of his authority as the owner's agent, the bullion is subject to be forfeited although the owner did not give any instructions to his agent as to the manner or means to be employed or not to comply with the law in bringing it in. *Shaar v. U. S.*, (C. C. A. 5th Cir. 1920) 269 Fed. 26.

Presumption and burden of proof.—The presumption which is raised by this section "is simply that, where possession of goods which have been proved to have been imported contrary to law is shown, the burden of explaining such possession is placed upon

the defendant. But the statute does not raise any presumption that the goods were imported contrary to law. The burden of proving this fact beyond a reasonable doubt rests upon the Government." *Sherman v. U. S.*, (C. C. A. 5th Cir. 1920) 268 Fed. 516.

Circumstantial evidence.—Where the case is purely one of circumstantial evidence the rule applies that the proof shall exclude every other reasonable hypothesis except the guilt of the accused. *Sherman v. U. S.*, (C. C. A. 5th Cir. 1920) 268 Fed. 516, wherein it was held that where the only evidence of criminality in the case of liquors alleged to have been unlawfully imported was the fact of their being found in the defendant's possession, and there was nothing to show that they were imported at a time when it was unlawful to import them, such proof was not sufficient to support a verdict of guilty.

Vol. II, p. 1186, sec. 3, par. T. [First ed., 1914 Supp., p. 122.]

"Probable cause."—"Whether probable cause was shown for the prosecution under this section is to be judged by the court. Probable cause as used means less than evidence which would justify a conviction, and in the case of seizure, circumstances which warrant suspicion." *U. S. v. Santini*, (C. C. A. 2d Cir. 1920) 266 Fed. 303.

Probable cause as the term is used in this paragraph means no more than present circumstances creating suspicion. Thus, where in the case of feathers in the possession of a person it was admitted that they were not from birds found in the United States, and the claimant's explanation as to how they came into his possession was composed of wholly inconsistent statements there was held to be sufficient to make out a case of probable cause. *Feathers of Wild Birds v. U. S.*, (C. C. A. 2d Cir. 1920) 267 Fed. 964.

1918 Supp., p. 141, sec. 501.

Synthetic alizarin.—A synthetic compound which contains alizarin is not "synthetic alizarin" and not embraced by that language in this section. *U. S. v. Lawrence & Co.*, (1920) 10 U. S. Cust. App. 177.

"*Tuscan red*," a pigment for making paint, is not brought within the exception of this section by reason of the fact that it contains alizarin and the decision of the collector subjecting it to the additional duty provided for by the section should be sustained by the Board of General Appraisers. *U. S. v. Lawrence & Co.*, (1920) 10 U. S. Cust. App. 177.

Application to passengers' baggage.—This section is not limited in its application to vessels or other conveyances carrying cargo or freight, but is also applicable to passengers' baggage. *International R. Co. v. Davidson*, (W. D. N. Y. 1920) 271 Fed. 313, wherein it was said:

"No doubt the earlier statute was intended

to apply to vessels and their cargoes, but inclusion by the amendatory act of 1911 of the words 'other conveyances,' and the later inclusion by the act of 1920, section 5, of the words 'receiving or examination of passengers' baggage,' would seem to imply extra compensation for immediate examination of passengers' baggage. A reasonable construction of the act requires, I think, that the plaintiff apply for a permit for immediate examination of baggage and unloading on the specified days, if it desires a continuance of such service."

Baggage brought in vehicle and by foot passengers on Sundays.—Under this section the collector may impound for inspection until the next day baggage brought over an international bridge on Sundays or holidays in vehicles or by foot passengers unless the bridge company pays for the extra services of inspectors on such days. *Niagara Falls International Bridge Co. v. Davidson*, (W. D. N. Y. 1920) 271 Fed. 316, wherein it was said:

"All merchandise, including vehicles and baggage carried in conveyances or by persons entering the United States, is concededly subject to inspection and examination by inspectors who perform their duties during the hours fixed by the Secretary of the Treasury. There is no provision of law requiring the inspection and examination of the conveyances or merchandise or baggage after the inspectors cease working for the day. The Act of February, 1911, amended the existing law relating to unloading of vessels arriving from a foreign port at night so as to include other conveyances. The term 'other conveyances' was no doubt used in a restricted sense to conveyances such as freight trains importing merchandise into the United States, and a special permit was granted to transporting companies upon their paying the customs inspectors for overtime to work and giving the bond required by law. No provision was made for examining the baggage of persons coming into the United States from contiguous territory over a bridge on Sundays or holidays and nights, and the collector could, I think, have refused to perform such service. He nevertheless required the inspectors to give such extra

services on Sundays and holidays. In February, 1920, however, Congress again amended the statute, and by section 5 provided that extra compensation should be paid the inspectors for working overtime and on Sundays and holidays, the rate of compensation to be fixed by the Secretary of the Treasury for services rendered 'in connection with the unloading, receiving, or examination of passengers' baggage,' and the act required payment for such services to be made by the master, owner, agent or consignee of 'such vessel or other conveyance whenever such special license or permit for immediate lading or unloading, or for lading, or unloading at night, shall be granted to the collector of customs.'

"The collector is not required to provide inspectors at the bridges to examine baggage or merchandise arriving on holidays and Sundays; and in my estimation it would not be an unreasonable rule to refuse such examination on those days, and require the impounding of baggage and merchandise until the next day. True, as contended, there is no provision for licensing the plaintiff, and thus compelling the collector to have baggage, pedestrians, and merchandise examined on Sundays and holidays; but it must not be overlooked that the Secretary of the Treasury has the right under the statute to prescribe reasonable regulations for such inspection, examination, and collection of duties."

Regulation by Secretary of Treasury relating to importations.—Regulations by the Secretary of the Treasury as to the detention and inspection of baggage and conveyances passing over bridges crossing the Niagara river between the United States and Canada, and maintained by the complainant, which provide that unless the complainant pays two days' pay for each Sunday or holiday for each customs officer performing service in connection with the said company, importation of all merchandise on Sundays and holidays will be stopped, are within the authority of the Secretary. *International R. Co. v. Davidson*, (C. C. A. 2d Cir. 1921) 273 Fed. 153; *Niagara Falls International Bridge Co. v. Davidson*, (C. C. A. 2d Cir. 1921) 273 Fed. 156.

DIPLOMATIC AND CONSULAR OFFICERS

Vol. III, p. 26, sec. 1698. [First ed., vol. II, p. 794.]

Action on official bond—Action by injured party in his own name—Construction.—The provision in this section that in case of the breach of an official bond "any person thereby injured may institute, in his own name and for his sole use, a suit on such bond"; merely obviates the necessity of bringing suit in the name of the United States for

the use of the person injured. *Cunningham v. Rodgers*, (App. Cas. D. C. 1920) 267 Fed. 609.

Action by next of kin.—An action on the official bond of a consul for failure to perform the duties imposed on him by the fifth paragraph of section 1709, *infra* this title, cannot be maintained by the next of kin as owner of a distributive share in an estate. *Cunningham v. Rodgers*, (App. Cas. D. C. 1920) 267 Fed. 609.

Vol. III, p. 30, sec. 1709. [First ed., vol. II, p. 797.]

Action on bond of consul for failure to perform duties.—An action on the bond of a consul for a failure to perform the duties imposed by the fifth paragraph of this section

cannot be maintained by the next of kin as owner of a distributive share in an estate. The administrator is the legal claimant and he alone is entitled to receive the fund. *Cunningham v. Rodgers*, (App. Cas. D. C. 1920) 267 Fed. 609.

DISTRICT OF COLUMBIA

1918 Supp., p. 151. [*Control and regulation of rentals, etc.*]

This resolution is unconstitutional because it results in the taking of private property without compensation, and is not uniform in its operation. *Willson v. McDonnell*, (App. Cas. D. C. 1919) 265 Fed. 432; *Groot v. Reilly*, (App. Cas. D. C. 1919) 266 Fed. 1008.

1919 Supp., p. 42, sec. 101.

Application of Act.—This Act has no application to a landlord and tenant proceeding begun and carried to judgment before its passage. *Thompson v. Williams*, (App. Cas. D. C. 1920) 265 Fed. 459.

1919 Supp., p. 44, sec. 108.

Constitutionality.—The provision in this section making the determination of the commission "final and conclusive" unless an appeal is taken within ten days after the filing of the determination is constitutional. *Killgore v. Zinkhan*, (App. Cas. D. C. 1921) 274 Fed. 140.

Effect of failure to appeal.—The failure to appeal from the finding of the rent commission, as provided by the terms of the Ball Act, render the finding final and conclusive in the courts. *Davis v. Cooksey*, (App. Cas. D. C. 1921) 274 Fed. 143.

ELECTIONS

Vol. III, p. 120, sec. 1. [First ed., 1912 Supp., p. 69.]

Mandamus.—There is no remedy given by mandamus to enforce the provisions of this Act. *In re Higdon*, (E. D. Mo. 1920) 269 Fed. 150. The court said: "Enforcement is by indictment and trial in the customary way. No remedy by original action in mandamus is given those injured. The proceeding here is neither an inquiry by a grand jury nor the trial of a criminal case under those acts. Though Congress might provide for federal supervision of all elections, primary, general, and special, relating to nomination and election to office under the Constitution and laws of the United States, and provide for enforcement thereof by mandamus, or any other suitable remedy, it has not done so."

Vol. III, p. 122, sec. 8. [First ed., 1912 Supp., p. 72.]

Primary election or convention.—This section applies not only to final elections for choosing Senators, but also to primaries and conventions of political parties for selection of candidates. As to such primaries and conventions it is invalid because at the time it was enacted the only source of power which Congress possessed over elections for

Senators and Representatives was U. S. Const., Art. I, § 4 (see vol. X, p. 352), which regulates the manner of holding such elections, and the language of that constitutional provision is not broad enough to include primaries. The 17th Amendment dealing with the election of Senators antedates the statute under consideration and so cannot be considered in connection with it. *Newberry v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 469, 65 U. S. (L. ed.) —, wherein the court said:

"If it be practically true that, under present conditions, a designated party candidate is necessary for an election,—a preliminary thereto,—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Birth must precede, but it is no part of either funeral or apotheosis.

"Many things are prerequisites to elections or may affect their outcome,—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the

manner of holding them gives no right to control any of these. It is settled, e. g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist; but this fact does not suffice to subject them to the control of Congress. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 S. Ct. Rep. 6.

"Elections of Senators by state legislatures presupposed selection of their members by the people; but it would hardly be argued that therefore Congress could regulate such selection. In the Constitutional Convention of 1787, when replying to the suggestion that state legislatures should have uncontrolled power over elections of members of Congress, Mr. Madison said: 'It seems as improper in principle, though it might be less inconvenient in practice, to give to the state legislatures this great authority over the election of the representatives of the people in the general legislature, as it would be to give to the latter a like power over the election of their representatives in the state

legislatures.' Supplement to Elliott's Debates, vol. 5, p. 402.

"We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people.

"It should not be forgotten that, exercising inherent police power, the state may suppress whatever evils may be incident to primary or convention. As 'each House shall be the judge of the elections, qualifications and returns of its own members,' and as Congress may by law regulate the times, places, and manner of holding elections, the national government is not without power to protect itself against corruption, fraud, or other malign influences."

EMINENT DOMAIN

1918 Supp., p. 166. [*Lands for military purposes, etc.*]

Construction.—"The provision of the act that the proceedings provided for are 'to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted' is not to be so con-

strued as to defeat the purpose of the act to vest in the Districts Court of the United States jurisdiction of the condemnation proceedings provided for, and is not to be given the effect of requiring a compliance with a state practice which is inapplicable to such a proceeding authorized to be brought, and brought, in one of those courts." *Forbes v. U. S.*, (C. C. A. 5th Cir. 1920) 268 Fed. 273.

ESTIMATES, APPROPRIATIONS AND REPORTS

Vol. III, p. 138, sec. 3679. [First ed., vol. II, p. 898.]

It is the settled and recognized policy of Congress.—To the same effect as the original annotation, see *Sutton v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 563, 65 U. S. (L. ed.) —.

Vol. III, p. 153, sec. 9. [First ed., 1909 Supp., p. 126.]

General construction of this and similar provisions.—See *Sutton v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 563, 65 U. S. (L. ed.) —.

EVIDENCE

Vol. III, p. 160, sec. 724. [First ed., vol. III, p. 2.]

Application.—This section relates to actions at law only. *The Princess Sophia*, (W. D. Wash. 1920) 269 Fed. 651.

Jurisdiction to grant bill of discovery.—A federal court has no jurisdiction in equity to grant a bill for discovery where it appears that the discovery is desired for no other purpose than the liquidation of damages caused by the nonpayment of royalties on the assignment of a patent. *Loose v. Bellows Falls Pulp Plaster Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 81.

Vol. III, p. 171, sec. 862. [First ed., vol. III, p. 8.]

Power of admiralty courts as to procedure.—“While ample powers are given to courts of admiralty and maritime jurisdiction as to forms and modes of procedure, it is a power ‘held in trust for the benefit of litigants,’ and to be applied to the practical needs of justice. *The Alert*, 40 Fed. 838; *The Hudson*, (D. C.) 15 Fed. 175; *Dealions v. La Compagnie*, etc., 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973. This power, however, must not be arbitrarily applied, but must have relation to rules of evidence, or promulgated rules of court, or statutes duly enacted.” *The Princess Sophia*, (W. D. Wash. 1920) 269 Fed. 651.

Scope and effect of rules.—The rules promulgated under the act of 1842, comprehend a complete procedure in admiralty and are independent of any other rules promulgated by the Supreme Court relating to equity procedure, and provide a procedure for discovery of facts as appears in rules 27 and 32. While admiralty courts proceed upon equitable principles, and the provisions of the equity rules should obtain, since admiralty courts are not restricted by the technical rules of the common law, the admiralty court has laid down its rules of procedure and, as is stated in *The Fred E. Richards*, (D. C.) 248 Fed. 956, it would result in confusion to borrow equity rules in an admiralty procedure. *The Princess Sophia*, (W. D. Wash. 1920) 269 Fed. 651.

Exhibition of documents—In general.—While in admiralty proceedings the distinctions of form are disregarded, exhibitions of documents should have regard to the substantial rights, and as the basis for right to the discovery special right must appear upon the face of the pleadings. *The Princess Sophia*, (W. D. Wash. 1920) 269 Fed. 651.

Specification of particular documents required.—Where a shipowner brings a petition in admiralty to limit liability of claim for damages and the claimant seeks by motion to require the petitioner to produce certain documents the motion will be denied where the claimant does not specify the particular documents required. *The Princess Sophia*, (W. D. Wash. 1920) 269 Fed. 651.

Where communications are privileged a production for inspection may not be required in admiralty under any law or rule. *The Princess Sophia*, (W. D. Wash. 1920) 269 Fed. 651.

Interrogatories serve to amplify the pleadings of the party interrogated and to procure evidence in support of the libel or defense of the party interrogated but they should not be used merely to fish into the evidence which the party interrogated may produce in support of his own allegations. *The Princess Sophia*, (W. D. Wash. 1920) 269 Fed. 651, wherein it was held that since under rule 32 claimants have a right to interrogate petitioner upon any matter charged in the libel, all documents forming the subject-matter of the litigation may be the subject of interrogatories.

Vol. III, p. 189, sec. 866. [First ed., vol. III, p. 20.]

A commission on interrogatories “is in accordance with ‘common usage’ under section 866 of the Revised Statutes, as established by rules 31 to 40 of the Admiralty Rules of this court, adopted April 1, 1901, and is in accordance with rule 46 of the new Admiralty Rules promulgated by the Supreme Court, to take effect March 7, 1921, which provide for the taking of testimony orally in open court, except as otherwise provided by statute or agreement of parties.” *The Sun*, (E. D. Pa. 1921) 271 Fed. 953.

Vol. III, p. 195, sec. 871. [First ed., vol. III, p. 24.]

Compare D. C. Code, § 1062.

Vol. III, p. 197, sec. 882. [First ed., vol. III, p. 26.]

A copy of an application for war risk insurance duly authenticated is admissible in evidence under this section. *Cassarello v. U. S.*, (M. D. Pa. 1919) 271 Fed. 486.

Vol. III, p. 212, sec. 905. [First ed., vol. III, p. 37.]

Full faith and credit—foreign divorce decree on constructive service may be collaterally attacked. *Davis v. Davis*, (Colo. 1921) 197 Pac. 241.

Vol. III, p. 220, sec. 906. [First ed., vol. III, p. 39.]

Section as excluding common-law method of proving records.—This section does not exclude the common-law method of proving records by an examined copy sustained by the oath of the person making the comparison. *Reed v. Stevens*, (Me. 1921) 113 Atl. 712.

A copy of a marriage record.—To same effect as original annotation, see *Reed v. Stevens*, (Me. 1921) 113 Atl. 712.

EXECUTIVE DEPARTMENTS

Vol. III, p. 250, sec. 161. [First ed., vol. III, p. 58.]

Conclusiveness of action of Assistant Postmaster General in removing letter carrier from office.—See annotation under vol. VIII, p. 956, sec. 6, *infra*, this volume.

Regulations become a part of the law.—Regulations under this section have the force of law and need not be promulgated in any set form or in writing. *International R. Co. v. Davidson*, (C. C. A. 2d Cir. 1921) 273 Fed. 153.

Regulations by Secretary of Treasury relating to importations.—The Secretary of the Treasury has authority under this section to adopt regulations as to the detention and inspection of baggage and conveyances passing over bridges, crossing the Niagara river between the United States and Canada and maintained by the complainant, and to provide that unless the complainant pays two days' pay for each Sunday or holiday for each customs officer performing service in

connection with the said company, importation of all merchandise on Sundays and holidays will be stopped. *International R. Co. v. Davidson*, (C. C. A. 2d Cir. 1921) 273 Fed. 153; *Niagara Falls International Bridge Co. v. Davidson*, (C. C. A. 2d Cir. 1921) 273 Fed. 156.

Mail truck subject to local speed regulations.—The various federal statutes relating to post routes and the fixing of schedules by the Post Office Department for the carrying of the mails do not prevent the application to a mail truck of a state statute prescribing the maximum speed of automobiles on public highways. *Hall v. Com.*, (Va. 1921) 105 S. E. 551.

1918 Supp., p. 170, sec. 1.

The Presidential order turning the Coast Guard back to the Treasury Department made during the World War was authorized by this section. *U. S. v. Houston*, (C. C. A. 2d Cir. 1921) 273 Fed. 915.

EXTRADITION

Vol. III, p. 285, sec. 5278. [First ed., vol. III, p. 78.]

III. Jurisdiction of courts.

VI. Fugitive from justice.

VII. Indictment, information or affidavit.

1. Indictment.

3. Affidavit.

XI. Proceedings before governor.

XII. Warrant of arrest.

XIV. Review.

1. By federal court.

2. By state courts.

3. Scope of review.

XV. Subsequent proceedings in demanding state.

III. JURISDICTION OF COURTS (p. 286)

State and federal courts.—Where habeas corpus proceedings have been instituted in the state court and the question whether the petitioner's rights under the Constitution and laws of the United States have been disregarded can be raised in that court the petitioner should prosecute a writ of error to the highest court of that state before instituting proceedings in the federal court. *Ex p. Graves*, (D. C. Mass. 1920) 269 Fed. 461.

VI. FUGITIVE FROM JUSTICE (p. 288)

Who is "fugitive from justice."—To same effect as first paragraph of original annotation, see *Hogan v. O'Neill*, (1921) 255 U. S. 62, 41 S. Ct. 222, 65 U. S. (L. ed.) —, wherein

it was also held that whether in fact a person whose interstate extradition is demanded is a fugitive from justice is for the governor of the surrendering state to determine, and his conclusion that he is such a fugitive must stand on habeas corpus unless clearly overthrown.

VII. INDICTMENT, INFORMATION OR AFFIDAVIT

1. *Indictment* (p. 290)

Technical sufficiency.—An objection to the formal sufficiency of an indictment that it does not inform the defendant whether he is indicted under a statute, and, if so, what statute, or under the common law, cannot be raised on habeas corpus proceedings. And where the indictment sufficiently charges that the petitioner and others entered into a criminal conspiracy to destroy buildings by the felonious and unlawful use of explosives and in extradition proceedings in another state there is evidence that the accused was present at the scene of the crime when the explosion took place, the petitioner is not entitled to be discharged on habeas corpus unless he shows that he was not in the demanding state at any time when it was possible for him to have committed the crime charged in the indictment. He must establish an alibi to possibility, as well as to actual presence. *Ex p. Graves*, (D. C. Mass. 1920) 269 Fed. 461.

The sufficiency of the indictment as a pleading is not open to inquiry on habeas corpus to review the issuance of a warrant

of arrest in interstate extradition proceedings. *Hogan v. O'Neill*, (1921) 255 U. S. 52, 41 S. Ct. 222, 65 U. S. (L. ed.) —.

3. Affidavit (p. 291)

Necessity.—Under the act of Congress (1 Stat. 302) on the subject of extradition, it is absolutely necessary and is an essential prerequisite that the requisition paper be accompanied by a certified copy of the affidavit or indictment. *Ex p. Gradington*, (Tex. 1921) 231 S. W. 781.

Presumption from recital of warrant.—Where the extradition warrant issued by the governor recites that the demand is accompanied by a certified copy of the affidavit on which the charge is based, the recital will on habeas corpus be presumed to be true though no affidavit appears in the record and the burden is on the relator to show that no affidavit was in fact produced. *Ex p. Gradington*, (Tex. 1921) 231 S. W. 781.

XI. PROCEEDINGS BEFORE GOVERNOR (p. 298)

Notice of foreign law.—The governor of the surrendering state in interstate extradition proceedings may take notice of the laws of the demanding state. *Hogan v. O'Neill*, (1921) 255 U. S. 52, 41 S. Ct. 222, 65 U. S. (L. ed.) —.

Sufficiency of application.—When an application for extradition stated the name of the person as that of a woman the subsequent use of the word "he" instead of "she" was held to be an inadvertence which was immaterial. *John v. Splain*, (App. Cas. 1921) 269 Fed. 717.

Fugitive under conviction in asylum state.—"Where a demand is properly made by the governor of one state upon the governor of another, for the surrender of a fugitive, the duty so to do is not absolute and unqualified, but depends upon the circumstances of each particular case. If the law of the state in which asylum has been sought has been violated by the fugitive, and he has been convicted there, and is undergoing sentence, the demands of the law thus violated may be first satisfied before obedience to the constitutional provision to surrender him arises." *State v. Saunders*, (Mo. 1921) 232 S. W. 973, holding, however, that the asylum state may waive its prior right and surrender the fugitive. See this case for a discussion as to the effect of the waiver as a pardon of the offense in the asylum state.

Sufficiency of evidence.—There is adequate ground for the return as a fugitive from justice under this section, of a person charged by authentic indictment with the commission of a criminal conspiracy in the demanding state on or about a specified date, who, by his own admission, had been personally present there and in communication with the alleged co-conspirator at or about that time, and was afterwards found in the surrendering state. *Hogan v. O'Neill*, (1921) 255 U. S. 52, 41 S. Ct. 222, 65 U. S. (L. ed.) —.

XII. WARRANT OF ARREST (p. 301)

Provision in warrant as to expenses.—The objection that the warrant for extradition explicitly provides that the demanding state shall not be responsible for the expenses of extradition has been held to be a matter for the consideration of the governor of the asylum state when he received the official demand for the arrest and delivery of the appellant as a fugitive from justice, and not to be a matter that could legally affect the inquiry before the federal court on habeas corpus, whether the requisition of the demanding state and the action thereon by the governor of the asylum state were in substantial conformity with the Constitution and the laws of the United States. *Ex p. Graves*, (D. C. Mass. 1920) 269 Fed. 461; *Ex p. Layne*, (D. C. Mass. 1920) 269 Fed. 463.

XIV. REVIEW

1. By Federal Court (p. 304)

Right to review.—Where all questions of law involved have been settled by decisions of the United States Supreme Court and of the highest court in the state, and there is no doubtful question of fact, the execution of the extradition warrant ought not to be further interfered with or delayed by judicial proceedings, and the court will refuse to allow an appeal which, it is said, would be frivolous. *Ex p. Graves*, (D. C. Mass. 1920) 269 Fed. 461; *Ex p. Layne*, (D. C. Mass. 1920) 269 Fed. 463.

Judicial notice.—Federal courts on habeas corpus to review interstate extradition proceedings will take notice of the laws of the demanding state. *Hogan v. O'Neill*, (1921) 255 U. S. 52, 41 S. Ct. 222, 65 U. S. (L. ed.) —.

2. By State Courts (p. 305)

Warrant prima facie only.—In extradition proceedings under the Constitution and laws above set forth, if the governor of the state upon whom the demand is made issues a warrant for the apprehension and delivery of such a person, the warrant is but prima facie sufficient to hold the accused, and it is open to him, on habeas corpus proceedings, to show some valid and sufficient reason why the warrant should not be executed; the presumption being that the governor has complied with the law. Where a person for whose delivery a demand was made by the executive authority of the state of Virginia upon the executive authority of the state of Georgia, under the provisions of the Constitution of the United States and the act of Congress passed in pursuance thereof, was charged in an indictment found in February, 1919, in the state of Virginia, with the commission of a crime in that state, and alleged to have been committed "within the last 12 months, and on or about the 1st day of June in the year 1918," and the uncontradicted evidence upon the trial of a habeas corpus pro-

ceeding sued out by him showed affirmatively that, if any crime was committed, it was on or about June 1, 1918, and that he was not in Virginia between March 3, 1918, and December, 1918, on which latter date he was only temporarily in that state, his residence being in Georgia, it was error for the judge to remand the prisoner to the custody of the officer. *Dawson v. Smith*, (1920) 150 Ga. 350, 103 S. E. 846.

3. *Scope of Review* (p. 305)

Prospect of lynching or unfair trial.—The court will not on habeas corpus review the issuance of a warrant for the rendition of a fugitive on the contention that by reason of local or race prejudice he may be lynched in the demanding state or may not receive a fair trial therein. *Ex p. Ray*, (Mich. 1921) 183 N. W. 774.

"The petitioners say they have incurred the enmity of a large percentage of the people of Madison county, Ill., by their participation in the industrial controversies of that county, and will be in danger of death or bodily injury if taken there, and to surrender them to the authority of Illinois will be in violation of the federal Constitution, by depriving them of the equal protection of the law. Evidence was not adduced to prove the existence of the danger alleged, and if it were proved it would not justify this court in ordering the outright release of these prisoners, charged, as they are, with the crime of murder. The duty to protect them from violence and secure to them a fair trial rests upon the officials of the state of Illinois, and we presume it will be performed." *Ople v. Weinbrenner*, (Mo. 1920) 226 S. W. 256.

Questions of fact.—The extent to which a court on habeas corpus may review the question of fact whether the accused actually was a fugitive, was stated in *Ople v. Weinbrenner*, (Mo. 1920) 226 S. W. 256, as follows: "The point of difficulty is not regarding the right of the accused to a hearing in a habeas corpus proceeding on the issue of whether he has fled from the justice of the requisitioning state. The doubt is regarding what degree of proof that the accused is not a fugitive as alleged suffices to overcome the *prima facie* case made by regular extradition documents and to require the court to order him to be discharged from custody, thereby defeating the demand for the extradition. In the present case it is contended for the petitioners that we should weigh the evidence, and if, in our opinion, it preponderates in any degree in favor of the finding that the petitioners were in Missouri and not in Illinois at the time Turner was killed, they should be discharged—a proposition said to be supported by the case of *People ex rel. v. McLaughlin* 145 App. Div. 513, 130 N. Y. Supp. 458. The question

has been before the Supreme Court of the United States several times, and so presented that a rule of general application could have been prescribed had the court thought proper to do so, but none has been prescribed in a precise form. In interpreting the section of the Revised Statutes of the United States (1014) which provides for the removal of an alleged offender who has been committed for trial in a federal district other than where the charge against him is to be tried to the latter venue, the said Supreme Court has adopted the criterion of 'probable cause' as the one by which to determine in a habeas corpus proceeding whether the prisoner shall be released or removed. *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689. But the same measure of proof has not been adopted, at least not explicitly, in cases of interstate extradition. In all the opinions on the subject rendered by that court which we have read, except one, the prisoners were remanded into custody, and in the one where the prisoner was discharged he was admitted to have been out of the state of the crime when it was perpetrated. *Hyatt v. Corkran*, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657. . . . We have before us the testimony of two or more witnesses that the plaintiffs were present at the scene of the crime and participated in the shooting. This is substantial evidence, and though we might consider the testimony preponderated which tended to show they were in St. Louis, Mo., at the time, we cannot affirm that the evidence meets the standard of the Supreme Court of the United States in being clear and satisfactory or so convincing as to admit of no question. We think said court did not mean to decide that a tribunal must be governed in proceedings like these by what it may deem the weight of the evidence, when the testimony is so conflicting that fair and honest men may differ as to where the preponderance falls. The opposite doctrine would diminish the efficacy of the extradition clause of the Constitution and of the statutes enacted to enforce it—a result to be avoided."

XV. SUBSEQUENT PROCEEDINGS IN DEMANDING STATE (p. 307)

Questions raised on habeas corpus—Scope of inquiry.—On habeas corpus proceedings instituted by one arrested on requisition, where there is no claim of irregularity on the face of the extradition papers, there is but one question open for investigation, namely, whether the accused was present in the demanding state at the time of the crime. The extradition papers prove *prima facie* that he was, and the burden is on him to establish the contrary. *Levy v. Splain*, (App. Cas. D. C. 1920) 267 Fed. 332.

FINES, PENALTIES AND FORFEITURES

Vol. III, p. 324, sec. 923. [First ed., vol. III, p. 96.]

This section was repealed by the National Prohibition Act in so far as it relates to the intoxicating liquor imported into the United States for beverage purposes. *U. S. v. One Hudson Touring Car*, (E. D. Mich. 1921) 274 Fed. 473.

Vol. III, p. 327, sec. 1041. [First ed., vol. III, p. 98.]

Mode of recovery—In general.—All judgments for penalties, whether recovered by civil or criminal proceedings, are within the provision of this section, that judgments for penalties may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. *Pierce v. U. S.*, (1921) 255 U. S. 398, 41 S. Ct. 365, 65 U. S. (L. ed.)—, *modifying and affirming* (C. C. A. 8th Cir. 1919) 257 Fed. 514, 171 C. C. A. 1.

Creditors' bill.—A judgment imposing a fine upon a corporation for accepting rebates, contrary to the Elkins Act of February 19, 1903, § 2, (see 4 Fed. Stat. Ann. (2d ed.) 564), is a debt which will support a creditors' bill by the United States to obtain satisfaction of the judgment out of the assets in the hands of the stockholders, among whom all the corporate property has been distributed, this section having provided that judgments for penalties may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. *Pierce v. U. S.*, (1921) 255 U. S. 398, 41 S. Ct. 365, 65 U. S. (L. ed.)—, *modifying and affirming* (C. C. A. 8th Cir. 1919) 257 Fed. 514, 171 C. C. A. 1, wherein the court said: "A judgment creditors' bill is in essence an equitable execution comparable to proceedings supplementary to execu-

tion. See *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200. The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disable itself from responding by distributing its property among its stockholders, and leaving remediless those having valid claims. In such a case the claims, after being reduced to judgments, may be satisfied out of the assets in the hands of the stockholders. There is no good reason why the rule should be limited to judgments arising out of civil proceedings. To the contention that the statute has not made this process available for the government in enforcing a penalty, it may be answered, as was done by the King's Bench a hundred years ago, in *King v. Woolf*, 2 Barn. & Ald. 609, 611, 106 Eng. Reprint, 488, when it was insisted that a fine due to the Crown was not a judgment debt for which execution could be levied:

"... Mischievous consequences would ensue to the Crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment; and that the preventing that will not be a mischievous consequence to anyone but himself. Here there is a judgment that the defendant do pay to the King a fine of a certain sum. By that judgment the debt becomes a debt to the King, of record; and it is payable to the King instant. . . . If we were to say that the Crown shall not be at liberty to issue an immediate execution for its own debt, we should place the Crown in a worse situation than any subject."

Vol. III, p. 332, sec. 5292. [First ed., vol. III, p. 101.]

As to remission of fine under Lever Act, see *U. S. v. Mossew*, (N. D. N. Y. 1920) 268 Fed. 383.

FISH AND FISHERIES

1918 Supp., p. 179. [*Columbia River, etc.*]

Effect of agreement on subsequent legislation.—Under the agreement entered into between the states of Oregon and Washington and ratified by this act it has been held that either state may pass a law which prescribes the right of a licensee to take fish from the Columbia river. *Olin v. Kutzmiller*, (C. C. A. 9th Cir. 1920) 268 Fed. 348. The facts and conclusions of the court are made clear by the following extract from the opinion: "At the time when the compact was entered

into, the laws of both states authorized the issuance of licenses to take salmon in the Columbia river to resident aliens who had declared their intention to become citizens of the United States. In the year 1919 the Legislature of Oregon amended its law, and provided that no license for taking or catching salmon or other food or shell fish, required by the laws of the state 'shall be issued to any person who is not a citizen of the United States.' The Legislature of the state of Washington has enacted no similar provision. The appellant, who is an alien, but who in 1892 declared his intention to

become a citizen, contends that the Oregon law of 1919 is void, in that it violates the provisions of the compact between the two states.

"We pass by the question whether by entering into the compact either state has divested itself of power to withdraw therefrom or to enact laws in derogation thereof without the assent of the other—a question which is not reached by the authorities cited by the appellant—and confine our inquiry to the question whether the amendment of 1919 is prohibited by the terms of the compact. From the language used it is clear that the contracting parties did not intend to divest either state of all power to enact without the other's consent legislation over the subject which was embraced therein. They left the Legislature of each state free to enact any law on the subject of the regulation and protection of fishing which would not affect the jurisdiction of the other state in the waters over which their jurisdiction was concurrent. A law which prescribes the qualification of a licensee by either state is clearly not a law which affects the concurrent jurisdiction. A law of Oregon which declares

that such a license shall issue in that state only to residents and citizens thereof cannot come in conflict with a law or regulation of Washington, under which a license may there be issued to a resident alien who has declared his intention to become a citizen, nor can it, in any conceivable way, affect the rights of citizens or residents of the latter state. Each state has the power to deal with the question of the right of its own subjects to take fish in the waters which are subject to the concurrent jurisdiction. It is only as to its common right with the adjoining state to take fish from those waters that its right is limited by the compact. Many conceivable regulations would be within the prohibition of the compact. Thus one state, without the consent of the other, may not change the open and closed seasons, may not prescribe the manner of taking fish, the number permitted to be taken, or the permissible fishing gear and appliances. All such matters affect the concurrent jurisdiction. It is not so with the designation of the qualifications of the licensees of either state to fish in the waters to which the concurrent jurisdiction extends."

FOOD AND DRUGS

Vol. III, p. 358, sec. 1. [First ed., 1909 Supp., p. 137.]

State statutes.—"Where the state law is not in conflict with the national act, a broad latitude is allowed states in protecting their citizens from adulterated or misbranded articles." *Royal Baking Powder Co. v. Emerson*, (C. C. A. 8th Cir. 1920) 270 Fed. 429.

This Act does not prohibit the passage of a similar act by a state in respect to intrastate transactions. *Royal Baking Powder Co. v. Donohue*, (D. C. Mont. 1920) 265 Fed. 406.

Article need not be dangerous to health.—It is not necessary under this Act that an article in order to be unlawfully adulterated or misbranded must be dangerous to the health of the people. *U. S. v. Krumm*, (E. D. Pa. 1921) 269 Fed. 848.

Vol. III, p. 360, sec. 2. [First ed., 1909 Supp., p. 137.]

Shipment induced by government agent.—Where a government agent writes a letter to a shipper requesting the shipment to him of misbranded articles, not for the purpose of discovering violations of the law, but with the intention and purpose of inducing the shipper to violate the statute, it is contrary to public policy to hold him guilty. *U. S. v. Eman Mfg. Co.*, (D. C. Colo. 1920) 271 Fed. 353. In this case it was held that the

facts that there was no evidence of any shipments, other than the one in question, ever having been made, or of evidence from which the agent could reasonably believe or suspect that the defendant had on other occasions violated the statute, were persuasive of the agent's intention to induce the shipper to violate the law.

Indictment—Averment as to packages.—An indictment need not allege that the packages were original unbroken packages. "While the Food and Drugs Act prohibits shipping or delivering for shipment in interstate or foreign commerce any article of food which is adulterated or misbranded, it does not restrict the offense of shipping or delivering for shipment to articles in original unbroken packages; the restriction to original unbroken packages applying only to those who receive in interstate commerce and, having received, deliver in original unbroken packages any adulterated or misbranded articles." *U. S. v. Krumm*, (E. D. Pa. 1921) 269 Fed. 848.

Substance contained in packages.—In *U. S. v. Krumm*, (E. D. Pa. 1921) 269 Fed. 848, an indictment charged that the article of food was adulterated, "in that a substance, to wit, a product prepared from flour, had been substituted in whole or in part for macaroni, to wit, a product prepared from semolina, which the article purported to be." The second count charged that the article of food was misbranded, in that the word "macaroni" "was false and misleading, in

this: That it represented that said article was macaroni, to wit, a product made from semolina, whereas, in truth and in fact, said article was not macaroni, to wit, a product made from semolina, but was a product made from flour." The court said: "As to the averments in relation to the substance contained in the packages, I think they are lacking in that particularity in both counts which should be observed to inform the defendant with certainty of the charge he is to meet at the trial. The offense under the first count, adulteration, arises, in the case of food, 'if any substance has been substituted wholly or in part for the article,' and the offense of misbranding arises, 'if the packages containing it or its label shall bear any statement, design, or device, regarding the ingredients or substances contained therein, which statement, design, or device shall be false or misleading in any particular.' According to the Century Dictionary, macaroni is a paste or dough prepared originally and chiefly in Italy from the glutinous granular flour of a hard variety of wheat. According to the Standard Dictionary, it is an Italian paste made into slender tubes from the flour of hard glutinous wheat mixed with water. Semolina is defined to be the hard grains retained in the bolting machine after the fine flour has passed through.

"If the article in question, as averred in the first count, was prepared from flour, or, as averred in the second count, was made from flour, it was apparently macaroni. But if it is intended to charge that macaroni is not made from the whole of the flour which comes from the mill, but in order to be macaroni must be made from the large, hard grains retained in the bolting machine after the fine flour had passed through, the counts are lacking in averments that semolina is not a part of the substance known as flour. Flour may be fine or coarse, it may be made from the whole grains of the wheat, as 'whole wheat flour,' or it may be the fine bolted flour. If it is meant by the indictment to charge that, in order for a substance to be macaroni, it must be made wholly from semolina, and not contain any of the fine flour which, upon passing through the bolting machine, leaves a residuum of semolina, the information should plainly so state."

Vol. III, p. 371, sec. 7. [First ed., 1909 Supp., p. 138.]

Application.—A sale of food to be delivered within the state is not brought under the Federal Food Act by the fact that the purchaser may intend to deal with the food in interstate commerce. *Lewiston Milling Co. v. Cardiff*, (C. C. A. 9th Cir. 1920) 266 Fed. 753.

Vol. III, p. 379, sec. 8. [First ed., 1909 Supp., p. 139.]

Words given ordinary meaning.—The language used in a label is to be given the meaning ordinarily conveyed by it to those to whom it is addressed. *Hall v. U. S.*, (C. C. A. 5th Cir. 1920) 267 Fed. 705.

Misleading statements as to curative properties of drugs — Evidence.—On a prosecution for thus misbranding drugs it has been held proper to permit a doctor to testify that the preparations which have been analyzed by a chemist and shown to the witness are absolutely worthless and have no food, curative or medical value. *Kar-Ru Chemical Co. v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 921.

Questions for jury.—In *Kar-Ru Chemical Co. v. U. S.* (C. C. A. 9th Cir. 1920) 264 Fed. 921, it was held that under the evidence it was a question of fact for the jury whether the preparations offered to the public by the defendant were in fact misbranded in the statements regarding their therapeutic or curative effect and whether such statements were false and fraudulent.

Water as drug.—Water which is recommended by the labels used as possessing alleviative or curative properties for certain ailments is regarded as a drug within the meaning of this act. *Bradley v. U. S.*, (C. C. A. 5th Cir. 1920) 264 Fed. 79.

Illustrations of misbranding — Medicine.—Where language used on a label amounted to an assertion that the article referred to might be expected to have a curative or alleviating effect on the classes of ailments mentioned there was held to be a misbranding where the evidence showed what the ingredients were and that such ingredients could not, singly or in combination, have any remedial or beneficial effect on any ailment of the kinds mentioned in the label, of which fact the manufacturer and distributor of the article was aware. *Hall v. U. S.*, (C. C. A. 5th Cir. 1920) 267 Fed. 795.

Vol. III, p. 392, sec. 10. [First ed., 1909 Supp., p. 141.]

Delivery to owner.—The release of articles seized under this section is discretionary with the court, the provision therefor being permissive and not mandatory. Thus, where the misbranding is fraudulent and injurious to competitors in the trade and the claimant has been previously convicted and had numerous other proceedings pending against him the court may refuse to exercise its discretion in favor of the claimant. *U. S. v. Two Cans of Oil of Sweet Birch, etc.*, (S. D. N. Y. 1920) 268 Fed. 866.

FOOD AND FUEL

1918 Supp., p. 181, sec. 1.

Constitutionality.—The war powers of Congress must be held to be equal to whatever is necessary to successfully prosecute a war and maintain the public safety. In modern wars, not only armies and peoples, but industries, must be mobilized. Every citizen and every dollar must fight. Economic control is as important as military. Disaster and discontent at home are as fundamental and vital as in the field. The powers of Congress, in time of war, are comparable to the police powers of the states in time of peace, and equally incapable of fixed limits. No doubt is entertained of the original power to make this legislation. *U. S. v. Oglesby Grocery Co.*, (N. D. Ga. 1920) 264 Fed. 691. To same effect, see *Weed & Co. v. Lockwood*, (C. C. A. 2d Cir. 1920) 266 Fed. 785; *U. S. v. Suedlow*, (D. C. Colo. 1920) 264 Fed. 1016.

Duration of war power.—The war power of Congress did not expire with the cessation of the war and the signing of the armistice, there having been no proclamation of the President to that effect. *U. S. v. Oglesby Grocery Co.*, (N. D. Ga. 1920) 264 Fed. 691.

Act as authorizing President to fix prices for all necessities.—See *Standard Chemicals, etc., Corp. v. Waugh Chemical Corp.*, (1921) 231 N. Y. 51, 131 N. E. 566.

Act as affecting right of state to tax coal.—See *Pennsylvania Coal Co. v. Saddle River Tp.*, (N. J. 1921) 114 Atl. 157.

Effect on State Anti-Trust Act.—This act does not supersede or annul a state anti-trust act, at least with respect to insurance companies which are not within the purview of the federal act. *Nugent v. Robertson*, (Miss. 1921) 88 So. 895.

Judicial notice is taken of administrative rules and regulations adopted under this act. *Lawrenceburg Roller Mills Co. v. Jones*, (1920) 204 Ala. 59, 85 So. 719.

1918 Supp., p. 182, sec. 2.

Corporation organized as government agency—liability to suit.—In *Federal Sugar Refining Co. v. U. S. Sugar Equalization Board*, (S. D. N. Y. 1920) 268 Fed. 575, it was held that a corporation organized under state laws to be used as an agency of the government could be sued.

1918 Supp., p. 183, sec. 4.

For decisions under this section as re-enacted, see annotations to 1919 Supp. p. 60, sec. 2, *infra*, this volume, p. 418.

Constitutionality.—See *Detroit Creamery Co. v. Kinnane*, (E. D. Mich. 1920) 264 Fed. 845.

Sufficiency as a criminal statute.—This section "is insufficient to found a criminal charge upon, because there is no penalty provided for the violation of it. It does not of

itself create an offense, as that word is used in the criminal law, and there is no general penalty clause in the statute to cover it." *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683. To same effect, see *Mossew v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 18, 11 A. L. R. 1261; *U. S. v. People's Fuel, etc., Co.*, (D. C. Ariz. 1920) 271 Fed. 790.

But the provisions of this section were held not to be too indefinite for enforcement in *U. S. v. Oglesby Grocery Co.*, (N. D. Ga. 1920) 264 Fed. 691.

The term "any necessities" as used in this section does not include all necessities but only such articles as are stated in section 1 to be called "necessaries" in the later sections. In such case the rule of *ejusdem generis* may not be applied to broaden the scope of the term, in the absence of any more general phrase, such as "other supplies" or "other articles," in section 1. *U. S. v. American Woolen Co.*, (S. D. N. Y. 1920) 265 Fed. 404.

1918 Supp., p. 183, sec. 5.

Power to revoke license implied.—*Kuenter v. Meredith*, (N. D. Ill. 1920) 264 Fed. 243.

1918 Supp., p. 184, sec. 6.

Section as indefinite.—The language of this section as to when necessities should be deemed to be hoarded was held not to be factually indefinite and uncertain in *Merritt v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 870.

Sugar was held to be a necessary under the provisions of this act in *Merritt v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 870.

Contract violative of act.—If a contract for the purchase of flour calls for the delivery of a quantity which with that on hand is greater than the reasonable business requirements of the buyer, the seller is discharged from performance, and it is immaterial that the contract was made before the passage of the act, since its performance would constitute a violation thereof. *Lawrenceburg Roller Mills Co. v. Jones*, (1920) 204 Ala. 59, 85 So. 719.

Judicial notice was taken of a proclamation made by the President under this act in *Merritt v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 870.

The burden of proof is on defendant to show facts bringing him within the exceptions of the provisions of the statute. *Merritt v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 870.

Evidence.—In *Merritt v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 870, the evidence was held to sufficiently show the reasonable requirements of the defendant for the consumption and use of sugar by himself and his dependents.

1918 Supp., p. 185, sec. 9.

Section held constitutional, see *Hillsboro Coal Co. v. Knotts*, (S. D. Ill. 1920) 273 Fed. 221; *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683.

1918 Supp., p. 185, sec. 10.

Section not repealed.—This section was not repealed by the Act of March 2, 1919. *U. S. v. McGrane*, (C. C. A. 3d Cir. 1921) 270 Fed. 761; *Benedict v. U. S.*, (E. D. N. Y. 1920) 271 Fed. 714.

Right to jury trial.—In *U. S. v. Pfitsch*, (1921) 256 U. S. —, 41 S. Ct. 569, 65 U. S. (L. ed.) —, it was held that the exclusive jurisdiction granted to the federal district courts by this section was to be exercised in accordance with the law governing the usual procedure of the district court in actions at law for money compensation in which the right to a jury trial was an incident, and not in accordance with the provisions of the law governing the exceptional jurisdiction concurrent with the court of claims where it sat without a jury.

As to the right to a jury trial in an action under this section it is said: "In such a suit, how was the court to hear and determine the controversy? Issues in the District Court are determined in certain causes, equity, admiralty, and bankruptcy, by a judge, and in others by the combined work of judge and jury. Which method did Congress have in view when it enacted 'jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies'? Certain it is the jurisdiction was not committed to a judge, or to the court sitting as a judge. It was committed to the District Courts without limitation, and common practice and common sense alike suggest that Congress had nothing else in view than a jury trial." *U. S. v. McGrane*, (C. C. A. 3d Cir. 1921) 270 Fed. 761.

The owner of property requisitioned by the President under this section, is entitled to have the question as to what amount will constitute a just compensation determined by a jury. *Filbin Corp. v. U. S.*, (E. D. S. C. 1920) 265 Fed. 354.

Amount involved.—Jurisdiction was conferred on the District Court in cases arising under this section regardless of the amount involved, and in no way affected or restricted by the \$10,000 limitation contained in section 24, paragraph 20 of the Judicial Code. *U. S. v. McGrane*, (C. C. A. 3d Cir. 1921) 270 Fed. 761.

A direct writ of error from the Supreme Court to a district court does not lie in a writ brought conformably to this section by a person dissatisfied with the President's award of compensation for war supplies requisitioned by him. *U. S. v. Pfitsch*, (1921) 256 U. S. —, 41 S. Ct. 569, 65 U. S. (L. ed.) —.

1918 Supp., p. 186, sec. 12.

Effect on prior contracts.—This act did not invalidate prior contracts, and accordingly nonperformance of a contract for the sale of flour made before its enactment, was not excused by the act and the regulations made thereunder whereby a price in excess of that stipulated in the contract was fixed. *Rock v. Deason*, (1920) 146 Ark. 124, 225 S. W. 317.

State control of commission merchants excluded.—By the Food Control Act, Congress acting under the war power of the Constitution, authorized the taking control and regulation of the business of public stockyards, including the business of commission men buying and selling live stock there. Under such authority the government assumed control of the public stockyards at South St. Paul and of the business of commission men doing business there; and during such control the state could not interfere by fixing and enforcing commission charges through the delegated authority of the Railroad and Warehouse Commission pursuant to Laws Ex. Sess. 1919, c. 39. *State v. Rogers*, (Minn. 1921) 182 N. W. 1006.

1918 Supp., p. 188, sec. 15.

Effect to render performance of contract impossible.—The act did not terminate a contract whereby a distillery agreed to pay for the removal of offal. *Eminence Distillery Co. v. Fremd*, (1921) 191 Ky. 191, 229 S. W. 369.

1918 Supp., p. 191, sec. 24.

Duration of Act.—In *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683, the defendants in a prosecution under this act, while conceding that Congress, under the war power, could validly enact it at the time of its passage, contended that it did not follow that the act continued in force, regardless of an actual condition of peace, until Congress saw fit to terminate its operation. This contention was overruled.

1918 Supp., p. 191, sec. 25.

Price fixing under war legislation.—See annotation under Vol. XI, p. 447, amend. 5, *infra*, this volume.

Constitutionality.—This section is constitutional as a war measure. *U. S. v. Ford*, (S. D. Ohio 1920) 265 Fed. 424.

1918 Supp., p. 194, sec. 26.

Constitutionality.—This section is unconstitutional and void as making an arbitrary and unreasonable classification in violation of the "due process clause" of the Fifth Amendment. *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683.

1919 Supp., p. 60, sec. 1.

Power of Congress to enact amendments.—Congress had power to enact these amendments, since at the date of their passage a state of war still technically existed. *U. S. v. Russel*, (E. D. La. 1920) 265 Fed. 414; *U. S. v. Bernstein*, (D. C. Neb. 1920) 267 Fed. 295, the latter case holding, however, that such a war measure must be constitutional.

"Wearing apparel."—Bolts of cloth are not included in the term "wearing apparel," as used in this section. *U. S. v. American Woolen Co.*, (S. D. N. Y. 1920) 265 Fed. 404. Regarding the scope of the term "wearing apparel" as used in this section, the court said: "We come then to the meaning of the term 'wearing apparel.' Concededly bolts of cloth are not, in and of themselves, wearing apparel. It is contended, however, that, interpreted in the light of reason, 'wearing apparel' must be held to include the material used to make up a garment; in other words, that the legislative intent to secure reasonable prices in the distribution of wearing apparel cannot possibly, or perhaps reasonably, be carried out, unless the limitations imposed upon the distribution of the made-up garments are extended to the materials out of which they are made.

"While Congress had as much power to regulate the distribution by the producer or manufacturer of the wool, cotton, or silk, the dyestuffs, the cloth, the buttons, the thread, or any other ingredients, as of the finished or partly finished garment, properly designated as 'wearing apparel,' and while such regulation would doubtless secure a more effectual control of the distribution by the garment manufacturer or the retailer of the finished product, I can find in the act no intent thus to control the distribution of all, or indeed any, of the ingredients that enter into wearing apparel. Apt words to indicate such an intent were readily available. Indeed, in section 1 Congress expressly included 'fertilizer ingredients,' and did not limit the control to 'fertilizers.' When, therefore, Congress used an expression having a clear and definite meaning, I am unable to find any ground thus to broaden the ordinary and trade signification of the word, or by implication to bring other articles within the statutory prohibitions."

1919 Supp., p. 60, sec. 2.

Constitutionality.—Congress, in attempting, as it did in the Lever Act of August 10, 1917, § 4, as re-enacted in the Act of October 22, 1919, § 2, to punish criminally any person who wilfully makes "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," violated U. S. Const., 5th and 6th Amendments, which require an ascertainable standard of guilt, fixed by Congress rather than by courts and juries, and secure to accused persons the

right to be informed of the nature and cause of accusations against them. *U. S. v. Cohen Grocery Co.*, (1921) 255 U. S. 81, 41 S. Ct. 298, 65 U. S. (L. ed.) —, 14 A. L. R. 1045, *affirming* (E. D. Mo. 1920) 264 Fed. 218. See to the same effect *Tedrow v. A. T. Lewis, etc., Co.*, (1921) 255 U. S. 98, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Kinnane v. Detroit Creamery Co.*, (1921) 255 U. S. 102, 41 S. Ct. 304, 65 U. S. (L. ed.) —; *Weed v. Lockwood*, (1921) 255 U. S. 104, 41 S. Ct. 305, 66 U. S. (L. ed.) —; *G. S. Willard Co. v. Palmer*, (1921) 255 U. S. 106, 41 S. Ct. 305, 65 U. S. (L. ed.) —; *Oglesby Grocery Co. v. U. S.*, (1921) 255 U. S. 108, 41 S. Ct. 306, 65 U. S. (L. ed.) —. See also *Kennington v. Palmer*, (1921) 255 U. S. 100, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Weeds v. U. S.*, (1921) 255 U. S. 109, 41 S. Ct. 306, 65 U. S. (L. ed.) —; *U. S. v. Yount*, (W. D. Pa. 1920) 267 Fed. 861; *U. S. v. Bernstein*, (D. C. Neb. 1920) 267 Fed. 295; *Lamborn v. McAvoy*, (E. D. Pa. 1920) 265 Fed. 944; *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683; *U. S. v. Russel*, (E. D. La. 1920) 265 Fed. 414; *U. S. v. Rosenblum*, (W. D. Pa. 1920) 264 Fed. 578; *Weed v. Lockwood*, (W. D. N. Y. 1920) 264 Fed. 453; *U. S. v. Spokane Dry Goods Co.*, (E. D. Wash. 1920) 264 Fed. 209.

A conspiracy "to exact excessive prices for any necessities" could not be made punishable criminally, as was attempted by Congress in the Lever Act of August 10, 1917, § 4, as re-enacted in the Act of October 22, 1919, § 2, without violating U. S. Const., 5th and 6th Amendments, since such provision is not sufficiently specific to create a standard of guilt, and to inform the accused of the nature and cause of the accusation against him. *Weeds v. U. S.*, (1921) 255 U. S. 109, 41 S. Ct. 306, 65 U. S. (L. ed.) —, wherein it was said: "As the only difference between the charges in the *L. Cohen Grocery Co. Case*, *supra*, and those in this is the fact that here, in one of the counts, there was a charge of conspiracy to exact excessive prices, it follows that the ruling in the *Cohen Case* is decisive here unless the provision as to conspiracy to exact excessive prices is sufficiently specific to create a standard, and to inform the accused of the accusation against him, and thus make it not amenable to the ruling in the *Cohen Case*. But, as we are of the opinion that there is no ground for such distinction, but, on the contrary, that the charge as to conspiracy to exact excessive prices is equally as wanting in standard, and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the *Cohen Case*, it follows, for reasons stated in that case, that the judgment in this must be reversed and the case remanded, with directions to set aside the sentence and quash the indictment."

Statute as embracing individual price fixing.—The price at which a commodity is sold is comprehended by the provision of the Lever Act of August 10, 1917, § 4, as

re-enacted by the Act of October 22, 1919, § 2, making it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities, or to conspire to exact excessive prices for any necessities. *U. S. v. Cohen Grocery Co.*, (1921) 255 U. S. 81, 41 S. Ct. 298, 65 U. S. (L. ed.) — (*affirming*) (E. D. Mo. 1920) 264 Fed. 218) wherein the court said: "The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that these propositions are without merit, first, because the words of the section, as re-enacted, are broad enough to embrace the price for which a commodity is sold, and second, because, as the amended section plainly imposes a penalty for the acts which it includes when committed after its passage, the fact that the section, before its re-enact-

ment, contained no penalty, is of no moment. This must be the case unless it can be said that the failure at one time to impose a penalty for a forbidden act furnishes an adequate ground for preventing the subsequent enforcement of a penalty which is specifically and unmistakably provided."

Sufficiency of indictment.—See *U. S. v. Robinson*, (W. D. Okla. 1920) 266 Fed. 240; *U. S. v. Myatt*, (E. D. N. C. 1920) 264 Fed. 442; *U. S. v. L. Cohen Grocer Co.*, (E. D. Mo. 1920) 264 Fed. 218; *U. S. v. Spokane Dry Goods Co.*, (E. D. Wash. 1920) 264 Fed. 209.

1919 Supp., p. 61. [*United States Sugar Equalization Board, etc.*]

Fixing price of sugar.—In *Pharr v. C. D. Kenny Co.*, (C. C. A. 5th Cir. 1921) 272 Fed. 37, it was held that the Food Administration could not arbitrarily fix the price at which future sales of sugar should be made.

HABEAS CORPUS

Vol. III, p. 427, sec. 751. [First ed., vol. III, p. 162.]

I. Introductory.

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X. Extradition proceedings.

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I. INTRODUCTORY

1. Definition and Nature (p. 428)

Purpose of writ.—The writ of habeas corpus is a legal process, used to obtain summary relief from unlawful restraint of personal liberty. Its purpose is simply to free the person from the unlawful restraint. *Bens v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 152.

"A writ of habeas corpus can never be used for the purpose of correcting erroneous conclusions of fact drawn by those charged by the law with the duty of ascertaining the facts." *U. S. v. Wong Lai*, (C. C. A. 9th Cir. 1921) 270 Fed. 57.

III. SCOPE OF WRIT

1. Generally (p. 430)

Inquiry as confined to jurisdiction.—"If the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally. The defendant, who is imprisoned under and by virtue of such a judgment, may be discharged from custody on habeas corpus." *Ex p. Craig*, (C. C. A. 2d Cir. 1921) 274 Fed. 177.

IV. AS SUBSTITUTE FOR WRIT OF ERROR

1. Rule Stated (p. 431)

Rule against use as substitute.—To the same effect as the original annotation, see *Bens v. U. S.* (C. C. A. 2d Cir. 1920) 266 Fed. 152; *Ex p. Shears*, (W. D. Wash. 1920) 265 Fed. 959.

"A writ of habeas corpus cannot be made to perform the office of a writ of error. Nor can it be invoked to review an erroneous judgment of a court of competent jurisdiction. It challenges the jurisdiction of the court." *Ex p. Craig*, (C. C. A. 2d Cir. 1921) 274 Fed. 177.

Errors and irregularities.—Questions of mere error and irregularities are generally reviewable only by writ of error or certiorari, for which a writ of habeas corpus is not a substitute. *Ormsby v. U. S.*, (C. C. A. 6th Cir. 1921) 273 Fed. 977.

10. Sufficiency of Evidence (p. 436)

Review of evidence.—Upon habeas corpus, the court may review the evidence, to ascer-

tain what it really shows, and, if it finds that all of the evidence, taken together, does not support the commissioner's finding of probable cause, his ruling may be disregarded and the defendant discharged. *U. S. v. Kallas*, (W. D. Wash. 1921) 272 Fed. 742.

Right to discharge.—A prisoner held by the commissioner will not be discharged on habeas corpus for mistakes by the commissioner in the admission of testimony, part of which is irrelevant or immaterial; but the holding of the accused is not authorized if there is no competent evidence against him. *U. S. v. Kallas*, (W. D. Wash. 1921) 272 Fed. 742.

12. Sentence (p. 436)

Void sentence.—Where a district court has imposed a void sentence and habeas corpus is brought in another district court, the proper practice is to remit the prisoner to the court wherein he was sentenced for further action by that court. *Davis v. Anderson*, (C. C. A. 8th Cir. 1921) 270 Fed. 767; *Price v. Zerst*, (N. D. Ga. 1920) 268 Fed. 72; *Rogers v. Desportes*, (C. C. A. 4th Cir. 1920) 268 Fed. 308.

Review of judgment and sentence of another district court.—In a habeas corpus proceeding in a district court that court cannot exercise appellate power to compel another district court to correct its judgment so as to conform to the views of the judge before whom the habeas corpus is held. *Rogers v. Desportes*, (D. S. C. 1920) 268 Fed. 86. It was said in this connection: "The District Court of the United States for the Northern District of Georgia is a court of primary jurisdiction, in exactly the same class as the District Court of the United States for the Eastern District of South Carolina. It has no greater powers or jurisdiction. Certainly it is entirely devoid of any appellate or supervising power over the latter court. Under the judicial system of the United States, the only courts possessing these powers over the District Court for the Eastern District of South Carolina are the Circuit Court of Appeals for the Fourth Circuit and the Supreme Court of the United States. The District Court for the Northern District of Georgia is in a different judicial circuit, and possesses no judicial connection with the District Court for the Eastern District of South Carolina. Yet the exercise of the jurisdiction to overrule the judgment and correct the assumed errors of the District Court for the Eastern District of South Carolina is precisely what the judge of the District Court for the Northern District of Georgia has attempted to do by his order in this matter. He has held that the well-considered judgment and sentence of the District Court for the Eastern District of South Carolina is erroneous, and has ordered the prisoners back to that court, that it may correct its judgment, so as to conform the sentence to the views of the judge of the District Court for the Northern District of Georgia.

"Such action is wholly unwarranted by any provision of law and would be destructive of the method of the orderly correction of the errors of courts of primary jurisdiction through the courts of appropriate and authorized appellate jurisdiction. If the District Court for the Northern District of Georgia can arrogate to itself the power to supervise the action of the District Court of the Eastern District of South Carolina, all the other 90 (or more) districts in the United States may do the same." This decision was affirmed by *Rogers v. Desportes*, (C. C. A. 4th Cir. 1920) 268 Fed. 308, wherein the court further remarked as to this phase of the case: "Judge Sibley, District Judge for the Northern District of Georgia, in which the Atlanta penitentiary is situated, had jurisdiction to entertain the writ of habeas corpus and to order the release of the petitioners if he found the sentence was absolutely void. The correctness of his judgment was reviewable by the Circuit Court of Appeals for the Fifth Circuit, and by certiorari by the Supreme Court of the United States. His order remanding the petitioners to the Eastern district of South Carolina for resentencing was not binding on the judge of the Eastern district of South Carolina, for Judge Smith of that district is of equal authority with Judge Sibley. Nevertheless, in the present unsatisfactory state of the law we incline to think that Judge Sibley adopted the most convenient practice. Upon the arrival of the petitioners in the Eastern district of South Carolina, Judge Smith was at perfect liberty to hold that his original sentence was correct, refuse to alter it, and order the petitioners remanded to the Atlanta penitentiary. This order gave them the opportunity to apply for a writ of habeas corpus before him, and, upon his refusal to discharge them, to bring the matter by appeal to this court. The result is that the sentence of Judge Smith, alleged to be erroneous, is reviewed by this court having jurisdiction to correct his errors, rather than by the Court of Appeals of the Fifth Circuit whose office is to correct errors in that circuit. This is unfortunate circuitry, but it seems to be unavoidable until a more expeditious method is prescribed by statute by which District Courts of this circuit will have jurisdiction in habeas corpus, as to persons confined in the Atlanta penitentiary from the District Courts in this circuit, alleging their confinement to be illegal. It seems hardly necessary to say that Judge Sibley's holding that the sentence was illegal is not binding on this court as *res adjudicata*. He did not undertake to make it so. The only judgment made by him was that the petitioners should be returned to the Eastern district of South Carolina for resentencing. He expressly refused to make any judgment discharging them."

VI. FEDERAL INTERFERENCE WITH CUSTODY OF STATE COURT (p. 438)

1. Rule Stated (p. 438)

See annotation under Vol. III, p. 449, sec. 753, VI, *infra*, p. 453.

Where a person is in custody, under process from a state court.—To same effect as original annotation, see *Ex p. Shears*, (W. D. Wash. 1920) 265 Fed. 959.

Sufficiency of indictment.—In *Teregno v. Shattuck*, (D. C. Mass. 1920) 265 Fed. 797, the petitioner contended that the language of the indictment was not sufficient to support the judgment against him. Answering this contention, the court said:

"It has been repeatedly held that upon such a question the judgment of the state courts having jurisdiction is conclusive, and cannot be reviewed on habeas corpus in the federal courts.

"It is within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning; and if in so doing he erred, and held the verdict to be sufficiently certain to authorize the imposition of punishment for the highest grade of the offense charged, it was an error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of habeas corpus. The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court, possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment, is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on habeas corpus, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime." *White, J., In re Eckart*, 166 U. S. 481, at pages 482, 483, 17 Sup. Ct. 638 (41 L. ed. 1085).

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense"—citing authorities. *Pitney, J., Frank v. Mangum*, 237 U. S. 309, 326, 35 Sup. Ct. 582, 586 (59 L. ed. 969).

"See, also, *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. ed. 119; *Murphy*

v. Mass., 177 U. S. 155, 20 Sup. Ct. 639, 44 L. ed. 711; *Storti v. Mass.*, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. ed. 120."

VIII. REVIEW OF PROCEEDINGS OF SPECIAL TRIBUNALS

2. Courts-martial (p. 443)

Application of rule.—Where a defendant was discharged on writ of habeas corpus from confinement in the U. S. Disciplinary Barracks at Fort Leavenworth, to which he had been sentenced by general court-martial on conviction of offenses against the 95th and 96th articles of war, it was declared that if there was jurisdiction in that court over the offenses and the person, and it did not exceed its power, the confinement should have been held to be lawful and the prisoner's discharge denied. *McRae v. Henkes*, (C. C. A. 8th Cir. 1921) 273 Fed. 108.

3. Immigration (p. 443)

Rule stated.—To same effect as original annotation, see *White v. Fong Gin Gee*, (C. C. A. 9th Cir. 1920) 265 Fed. 600.

If the present detention of aliens ordered to be deported is legal, irregularities or even illegalities in their original arrest and commitment can not be redressed in habeas corpus proceedings. *In re Kosopud*, (N. D. Ohio 1920) 272 Fed. 330.

IX. CONTEMPT PROCEEDINGS (p. 444)

Commitment for contempt.—To the same effect as first paragraph of original annotation, see *Ex p. Craig*, (C. C. A. 2d Cir. 1921) 274 Fed. 177.

X. EXTRADITION PROCEEDINGS

2. Interstate

Generally.—Where on a habeas corpus proceeding in a federal court it appears that the petitioner is held by color of law by a state court after having been extradited from another state, the manner of any irregularity of the extradition may not be inquired into by the federal court. *Ex p. Shears*, (W. D. Wash. 1920) 265 Fed. 959.

Presence in demanding state at time of crime.—To same effect as original annotation, see *Levy v. Splain*, (App. Cas. D. C. 1920) 267 Fed. 333, wherein it was said:

"The evidence shows without doubt that Levy was not in Massachusetts on the 1st day of January, 1918, and the court below so found. He was there in September, 1917, and again about the middle of January, 1918. On the 8th day of June, 1918, the indictment was returned. The trial court, in disposing of the case, said:

"Under the law here, as in Massachusetts by statute, . . . the fact that this conspiracy was laid on the 1st day of January, 1918, is not binding upon the prosecution there, and it would not be here. You can

show that the crime was committed any time within three years from the finding of the indictment. Nothing more is required in extradition than is required on the trial of an indictment.'

"A similar view was urged by counsel for the state in *Hyatt v. People ex rel. Corkran*, 188 U. S. 691, 711, 23 Sup. Ct. 456, 459 (47 L. ed. 657); but the court refused to adopt it, saying:

"In the case before us it is conceded that the relator was not in the state at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments, and when those facts are proved, so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever, committed.'

"In the case at bar, as in that case, there is no proof or offer of proof that the crime was in truth committed on some other day than that named in the indictment, and that the day therein named was erroneously stated. Consequently, to paraphrase the language of the Supreme Court of the United States, it was sufficient for Levy to show that he was not in the state at the time named in the indictment, and when that fact was proved, so that there was no dispute in regard to it, and there being no claim of any error in the dates named in the indictment, the fact so proved is sufficient to show that Levy was not in the state when the crime was, if ever, committed.

"This court ruled, in *Hayes v. Palmer*, 21 App. D. C. 450, 461, that if the person sought offered proof showing with precision that he had left the demanding state before the date of the alleged crime, it would then devolve upon the person detaining him 'to show that he was a fugitive from justice by producing evidence that he was in the state at the time charged in the indictment, or to prove that said date had been erroneously charged and could be carried back to the necessary time.' This is in line with the doctrine of the *Hyatt* case. In view of these holdings, which, so far as we can ascertain, have not been modified in any wise by subsequent

decisions, we are constrained to say that Levy cannot be held.

"It is true that in *Ex parte Montgomery* (D. C.) 244 Fed. 967, 970, an extradition case, the court decided it was not necessary to prove that the person charged with the crime was in the demanding state on the date on which the crime was laid in the indictment. But that was a conspiracy case with a *continuando*. 'While the indictment here mentions specially but a single day,' said the court, 'it also alleges a conspiracy claimed to have been hatched during two years preceding the indictment. Conspiracy is a *continuando* crime, and the rule is now well settled that the demanding state is not bound, either upon the trial or in the extradition proceedings, by the specific date laid.' In *United States v. Kissel*, 218 U. S. 601, 605, 31 Sup. Ct. 124, 54 L. ed. 1168, it was also said that a conspiracy was a continuing crime. But this language must be read in the light of the facts. In that case the indictment charged the defendants with having committed the crime upon a certain date 'and from that day until the day of presenting the indictment.'

"If the indictment in the case before us had charged Levy with having conspired on the 1st of January, and from that date until the date of presenting the indictment, June 8, 1918, or until the last of January, 1918, the testimony that he was in Massachusetts about the middle of January of that year would have been sufficient to warrant his surrender to Massachusetts; but the indictment does not read that way. There is nothing, therefore, in either of those cases, which authorizes us to disregard the rule announced in unmistakable terms in the *Hyatt* and *Hayes* Cases."

Vol. III, p. 449, sec. 753. [First ed., vol. III, p. 167.]

I. Introductory.

VI. Constitution, laws or treaties.

I. INTRODUCTORY (p. 449).

Scope of jurisdiction.—Where a person is held in custody by state officials it has been held that in order to entitle him to relief in the federal court under the writ of habeas corpus, it must appear that he is held in custody in violation of the Constitution of the United States; that he cannot have relief on habeas corpus, if he is held in custody by reason of conviction upon a criminal charge before a court having jurisdiction over the subject-matter of the offense, the place where it was committed, and the person of the prisoner; that, if the proceedings in the courts of a state are based on a law not repugnant to the federal Constitution, and conducted according to the settled course of procedure under the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to estab-

lished modes of procedure, this is "due process of law" in the constitutional sense; and, finally, that habeas corpus will lie only where the judgment under which the party is detained is shown to be absolutely void for want of jurisdiction in the court, either because such jurisdiction was absent in the beginning, or was lost in the course of the proceedings. *U. S. v. Briggs*, (W. D. Pa. 1920) 266 Fed. 434.

Application to state courts.—"The statute does not purport to apply to the courts of the states and Congress had no authority, had it attempted so to do, to prescribe the powers of the state courts and the practice to be followed in matters within their jurisdictions." *State v. Martineau*, (Ark. 1921) 232 S. W. 609.

VI. CONSTITUTION, LAWS OR TREATIES (p. 454)

In general.—Where there is a denial or invasion of a constitutional right the prisoner may be discharged on habeas corpus. *Ex p. Craig*, (C. C. A. 2d Cir. 1921) 274 Fed. 177.

Prisoner held under state process.—A federal court has jurisdiction on habeas corpus to inquire into the cause of detention of a prisoner held under state process. *Ex p. Ramsey*, (S. D. Fla. 1920) 265 Fed. 950.

Vol. III, p. 462, sec. 754. [First ed., vol. III, p. 172.]

Verification—Next friend.—"The practice of a next friend applying for a writ is ancient and fully accepted. There are many instances and circumstances under which it may not be possible nor feasible that the detained person shall sign and verify the complaint. Inability to understand the English language or the situation, particularly in the case of aliens, impossibility of access to the person, or mental incapacity are all illustrations of a proper use of the 'next friend' application. . . . But the complaint must set forth some reason or explanation satisfactory to the court showing why the detained person does not sign and verify the complaint and who 'the next friend' is. It was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." *U. S. v. Houston*, (C. C. A. 2d Cir. 1921) 273 Fed. 915.

Vol. III, p. 464, sec. 755. [First ed., vol. III, p. 173.]

Power of circuit judge.—"While a circuit judge may not issue a writ of habeas corpus as one of the members constituting the Circuit Court of Appeals, there is still the authority vested in him as a circuit judge to do so, and there is a mandatory provision of the statute requiring him to issue a writ of habeas corpus if the petition be sufficient."

Ex p. Lamar, (C. C. A. 2d Cir. 1921) 274 Fed. 160. To same effect, see *Ex p. Craig*, (C. C. A. 2d Cir. 1921) 274 Fed. 177. In the former case the court said:

"The right to grant this important writ is given to every judge of the District Court. It has been held that the power vests in a Justice of the Supreme Court. *Ex p. Bollman*, 8 U. S. (4 Cranch) 95, 2 L. ed. 554. When the Circuit Courts were abolished, the statute providing for the right of a judge to grant the writ of habeas corpus was not repealed or amended, thus taking away the power from a circuit judge. Circuit judges have become appellate judges, and while they have no original jurisdiction as a court, they have reserved to them the right thus vested by the statute and by the ancient law. I therefore conclude that I have the power to grant the writ of habeas corpus."

When writ need not be awarded.—Even though the real grounds for the release prayed for by the petitioner were his unlawful induction into, and retention in, the military service, in the total absence of any showing, or, in fact, allegation, of an attempt to avail himself of the proper legal remedy for obtaining appropriate relief, he is not entitled to the extraordinary writ of habeas corpus. *Ex p. Kerekes*, (E. D. Mich. 1921) 274 Fed. 870.

Allegations of petition assumed to be true.—In a habeas corpus proceeding the court is bound to assume the truth of the allegations in the petition. *Ex p. Kerekes*, (E. D. Mich. 1921) 274 Fed. 870.

Vol. III, p. 469, sec. 761. [First ed., vol. III, p. 174.]

Scope of hearing.—"On a writ of habeas corpus the inquiry is addressed, not to errors, but to the question of whether the proceedings and judgment rendered therein are for any reason void, and, unless it is affirmatively shown that the conviction under which the petitioner is found is void, he is not entitled to his discharge." *Ex p. Lamar*, (C. C. A. 2d Cir. 1921) 274 Fed. 160.

Vol. III, p. 475, sec. 763. [First ed., vol. III, p. 175.]

Review of decision of habeas corpus proceeding.—In the federal courts in cases where there has been no trial by jury, ordinarily the remedy for a review of a decision in a habeas corpus proceeding is by appeal and not by writ of error. *U. S. v. Uhl*, (C. C. A. 2d Cir. 1920) 266 Fed. 646.

Vol. III, p. 481. [Appeals to Supreme Court.] [First ed., 1909 Supp., p. 293.]

Effect of provision.—The sole effect of the act of 1908 upon appellate jurisdiction in

habeas corpus cases is to further restrict appeals direct to the Supreme Court by requiring a certificate of probable merit by the trial court in cases where custody under state judicial process was challenged. It will not be construed as allowing appeals to

the Circuit Court of Appeals in habeas corpus cases where the confinement is by virtue of process out of a state court and the trial judge will not certify the existence of probable cause for appeal. *Grammer v. Fenton*, (C. C. A. 8th Cir. 1920) 268 Fed. 943.

HAWAIIAN ISLANDS

Vol. III, p. 518, sec. 81. [First ed., vol. III, p. 205.]

Decision of Supreme Court as binding on federal court.—A decision of the Supreme Court construing prior decisions of the Supreme Court relating to the common law doctrine of the presumption of a grant has been held to be binding on the Circuit Court of Appeals. *Hawaii v. Hutchinson Sugar Plantation Co.*, (C. C. A. 9th Cir. 1921) 272 Fed. 856.

1918 Supp., p. 202, sec. 1.

Revenue Law and Volstead Act distinguished.—"The theory of the old revenue laws made the manufacture of liquors lawful and recognized it as a lawful way of producing government revenue. The Volstead Act no longer recognizes it as a producer of revenue, but outlaws both the making of and the traffic in liquor, except for stated and limited uses, for which uses, and pursuant only to a permit, it may now only be made at all." *U. S. v. Stafoff*, (E. D. Mo. 1920) 268 Fed. 417.

IMMIGRATION

Vol. III, p. 630, sec. 22. [First ed., 1909 Supp., p. 171.]

Rules and regulations.—To same effect as original annotation, see *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

Vol. III, p. 633, sec. 2. [First ed., vol. III, p. 298.]

Pleading.—Where an employer when sued by an employee for wages, wishes to avoid liability on the ground that the alleged contract of employment is in violation of the contract labor laws of the United States, he must allege such defense in his answer. *Whittingslow v. Thomas*, (Mass. 1921) 129 N. E. 386. The court said:

"If the defendant, after availing himself of the plaintiff's services for seventeen months, desired to avoid paying for them on the ground that they were performed under a contract that was illegal by force of the federal Contract Labor Law, it was necessary for him to set up that defense in his answer. *R. L. c. 173, § 27*; *Cassidy v. Farrell*, 109 Mass. 397; *Suit v. Woodhall*, 116 Mass. 547; *O'Brien v. Shea*, 208 Mass. 528, and cases cited at page 535, 95 N. E. 99, at page 101, Ann. Cas. 1912A, 1030. Failing so to plead, he could not as of right offer evidence of such illegality, or avail himself of it when disclosed in the plaintiff's testimony.

See *Cardoze v. Smith*, 113 Mass. 250, 252. It was said in *O'Brien v. Shea*, *supra*:

"The court will recognize no absolute duty to interfere and of its own mere motion to sustain a defense not set up by the party, and generally will not so interfere, unless, first, the plaintiff's declaration shows that he relies upon an illegal agreement or violation of law, or, secondly, unless he has been obliged to show his own guilt in fully proving his case."

"Neither alternative is present here. The plaintiff did not declare on an express contract, much less an illegal one. And as all the evidence is not before us, we cannot say that the work, plainly lawful in itself, was not performed under an implied contract, rather than under an express one, the making of which was denied by the defendant. See *Day v. Caton*, 119 Mass. 513, 20 Am. Rep. 347; *Goddard v. Rawson*, 130 Mass. 97; *Spencer v. Spencer*, 181 Mass. 471, 63 N. E. 947; *Dickey v. Trustees of Putnam Free School*, 197 Mass. 468, 84 N. E. 140.

"Assuming then that a contract such as the plaintiff testified to would be in violation of said Contract Labor Law of 1885 (see *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. ed. 226; *United States v. Laws*, 163 U. S. 258, 16 Sup. Ct. 998, 41 L. ed. 151; *In re Ellis* [D. C.] 124 Fed. 637; *Ellis v. Williams*, 200 U. S. 623, 26 Sup. Ct. 753, 50 L. ed. 625) under the pleadings it is not now open to the defendant to avail himself thereof."

Vol. III, p. 637, sec. 1. [First ed., 1909 Supp., p. 161.]

Exclusion pursuant to presidential proclamation.—In view of the proclamations of Presidents Roosevelt and Taft pursuant to the provisions of the section directing the exclusion of Japanese laborers from this country, such a laborer may be excluded even if he arrives at a port of this country with a passport. A fortiori if he surreptitiously enters the United States without a passport, he may be deported. *Akira Ono v. U. S.*, (C. C. A. 9th Cir. 1920) 267 Fed. 359.

Vol. III, p. 640, sec. 2. [First ed., 1912 Supp., p. 89.]

I. Authority of Congress over immigration.

VIII. Persons solicited to migrate.

I. AUTHORITY OF CONGRESS OVER IMMIGRATION (p. 641)

Authority as plenary.—To the same effect as the original annotation, see *Lauria v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 261; *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17. In the latter case, the court said: "It has been repeatedly held that 'the right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace,' is 'an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare;' that this 'power to exclude and to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.'"

VIII. PERSONS SOLICITED TO MIGRATE
(p. 646)

Contract laborers.—Statements in letters to aliens that the writer was in need of laborers both skilled and unskilled, stating wages paid and asking when the aliens could report for duty, amounted to an implied offer of employment and a solicitation to migrate to this country to perform labor here, so that they were contract laborers within the meaning of this section. *U. S. v. International Silver Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 925.

Vol. III, p. 654, sec. 4. [First ed., 1909 Supp., p. 164.]

Construction.—"This section is not limited to encouragement by prepaying trans-

portation of contract laborers but extends to encouragement 'in any way.' Asking contract laborers, who said they were ready to start at once if assured of employment by the defendant, when they will report for duty is a manifest encouragement." *U. S. v. International Silver Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 925, wherein it was further held that the replies of the defendant to the letters of the aliens were not mere courtesies and as such not a violation of the Act.

Vol. III, p. 673, sec. 20. [First ed., 1909 Supp., p. 170.]

III. Proceedings for deportation.

VIII. Habeas corpus.

III. PROCEEDINGS FOR DEPORTATION
(p. 675)

Bail.—The court ordinarily has no power to interfere with the discretion of the immigration authorities as to granting or refusing bail or as to the amount of bail. Some abuse of the power vested in them by statute must be shown in order to warrant an interference by the court. *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

VIII. HABEAS CORPUS (p. 679)

When granted.—To same effect as second paragraph of original annotation, see *Akira Ono v. U. S.*, (C. C. A. 9th Cir. 1920) 267 Fed. 359; *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17, the latter case also holding that if the proceedings in the Department of Labor are shown to be unfair, or otherwise lacking in the essential elements of due process of law, or if the Secretary of Labor is proceeding on an erroneous view of the law, the courts must review.

Vol. III, p. 681, sec. 21. [First ed., 1909 Supp., p. 170.]

Review by court.—Deportation proceedings are administrative in their nature and such power as the district court has is by habeas corpus, which reviews only the legality of the final restraint, and then only to see whether the discretionary powers granted have been honestly used, or exceeded. *In re Weinstein*, (D. C. N. Y. 1920) 271 Fed. 5.

Review of deportation proceedings extends only to the inquiry whether the discretionary powers of the executive have been exceeded. There is no judicial power to review or reverse a finding of fact based on evidence. *U. S. v. Uhl*, (C. C. A. 2d Cir. 1921) 271 Fed. 676.

The construction of the statute, the applicability of the statute to the particular case, and the question whether or not the reasons given by the Secretary of Labor for the deportation agree with the requirements

of the act are questions of law which are reviewable by the courts. *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

1918 Supp., p. 212, sec. 1.

Constitutionality.—"It has been settled by repeated decisions that Congress has power to exclude any and all aliens from the United States; to prescribe the terms and conditions on which they may come in or on which they may remain after having been admitted; to establish the regulations for deporting such aliens as have entered in violation of law, or who are here in violation of law; and to commit the enforcing of such laws and regulations to executive officers. The deportation of an alien who is thus found here in violation of law, or of the conditions prescribed by Congress either as to his right to be admitted or his right to remain, is not a deprivation of liberty without due process of law." *In re Kosopud*, (N. D. Ohio 1920) 272 Fed. 330.

Chinese aliens.—This act has been held to be applicable to Chinese aliens seeking readmission to the United States. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

Seamen.—An alien employed as a seaman on a vessel of American registry and therefore entitled to be returned to the United States when discharged in a foreign port on account of injury or illness, and who at the instance of the American consul was brought back to this country by the master of another vessel who signed him on as a member of the ship's company, formally and for the unusual wage of twenty-five cents per month, was an American seaman within the meaning of this section. *The Santa Elena*, (S. D. N. Y. 1920) 271 Fed. 347.

1918 Supp., p. 214, sec. 3.

Construction.—This section does not operate as a repeal of R. S. sec. 2169 (6 Fed. Stat. Ann. (2d ed.) 944), in so far as it embraces the words "white persons." *In re Bhagat Singh Thind*, (D. C. Ore. 1920) 268 Fed. 663, wherein the court said:

"Repeals by implication are not favored, and, unless there is manifest repugnancy between the later and the former act, the former must remain operative. The argument is that, as Congress eliminated the words 'white persons' from the Immigration Act, the act in question, it must be inferred that it intended to eliminate these words also from section 2169, and thus to amend that section accordingly. This does not necessarily follow. Congress was dealing with the subject of immigration, and not of naturalization, and it may well be that Congress designed thenceforth to exclude Hindus from entry into the United States, and still permit such as were domiciled here the privilege of being naturalized. In this light, I see no repugnancy between the act and sec-

tion 2169 and other naturalization regulations."

"Contagious disease."—The decision of the board of special inquiry whether an alien shall be excluded because afflicted with a contagious disease is final where based on the classification by the Surgeon General of the disease with which the alien is afflicted as contagious. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

"A person likely to become a public charge" is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty." *Wallis v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 509.

Temporary absence.—A rule of the department which provides that an absence not exceeding six months shall be deemed a "temporary absence" within the meaning of the seventh proviso of this section is not unreasonable and its application to a Chinese merchant seeking readmission has been held not to be unfair. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

Questions arising on deportation.—Where an alien is sought to be deported under the provisions of this Act, the real question is whether the case shows that the alien was found illegally here, and, if so, whether there exists any legal authority for his deportation. *Akira Ono v. U. S.*, (C. C. A. 9th Cir. 1920) 267 Fed. 359.

Power of court to order release on bond.—Where the immigration authorities have refused admission to an alien and issued an order of deportation the district court has no power to order his release on the giving of a bond conditioned that he will not "become a public charge." *Wallis v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 509.

Scope of review of decision by immigration authorities.—"The court's jurisdiction, when the remedy of a writ of habeas corpus is invoked in immigration cases, is to inquire whether the ground of exclusion given by the administrative authorities is without any evidence to support it. Unless there is no evidence at all proving or tending to prove that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive upon the court, even though the evidence to the contrary be very strong." *Wallis v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 509.

1918 Supp., p. 218, sec. 4.

Re-entry after deportation.—Where it was contended that by implication it followed from the language of this section that a deported alien has the right to re-enter the United States after the expiration of the one-year period the court declared that there was no merit in the proposition. It was said that this section "provides in plain terms that any alien who shall, after he has been excluded and deported, or arrested and deported, in pursuance of the provisions

of this act, which relate to prostitutes, procurers, or other like immoral persons, attempt thereafter to return to or enter the United States, shall be deemed guilty of misdemeanor." *Mills v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 625.

Attempt to re-enter as offense.—In reply to a contention that no offense against the United States is defined by this statute and that an indictment which alleges an attempt to return to and enter the United States, an act which is not in itself a crime, cannot be made a crime, it has been said: "In the present case the statute expressly makes the attempt a punishable offense. The attempt is in itself a substantive offense. It is the act of crossing the boundary line into the United States. It is not an attempt to commit an independently described offense, in the sense in which the word 'attempt' is ordinarily used in criminal law. It is the actual re-entry into the United States." *Mills v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 625.

Presumption.—Where Canadian citizenship was shown to have existed at a certain date a presumption arises that it continued until a showing to the contrary has been made. *Mills v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 625.

Indictment.—In *Mills v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 625, the plaintiff in error was convicted and sentenced under an indictment which charged that on January 18, 1920, she knowingly, willfully, and unlawfully attempted to return and enter the United States from foreign territory contiguous thereto, to wit, the Dominion of Canada; the Secretary of Labor not theretofore having consented to any reapplication by her for admission into the United States, she having been theretofore, on July 29, 1917, arrested and deported from the United States of America to the Dominion of Canada, on the charge that she had been found in the United States, connected with the management of a house of prostitution in the United States, and the arrest and deportation having been made by virtue of a warrant issued March 13, 1917, by the Department of Labor. The warrant was set forth in full, and it recited among other things, that the plaintiff in error was found in the United States in violation of the Immigration Act of February 5, 1917 (39 Stat. 874).

Error was assigned to the order overruling the demurrer to the indictment, and it was contended that the indictment failed to charge an offense, in that the warrant of deportation therein set forth, which was dated March 13, 1917, was expressly based upon the Immigration Act of February 5, 1917, an act which went into effect on May 1, 1917, and was not in force at the date of the warrant. The court said: "The previous Act of February 20, 1907 (34 Stat. 898), as amended in 1910 (36 Stat. 264), was in force, however, and the provisions of that law as amended are identical with the pro-

visions of the Act of February 5, 1917, so far as they concern the charge against the plaintiff in error.

A similar contention was presented to this court in *Akira Ono v. United States* (C. C. A.) 267 Fed. 359, where the order of the Secretary of Labor, directing the arrest of a Japanese person and ordering that he be granted a hearing to show cause why he should not be deported, recited that he had entered the United States in violation of the Act of February 5, 1917, although the entry occurred before the passage of the act, this court held that the erroneous mention of the statute of February 5, 1917, was unimportant for the reason that the real question was whether the case showed that the appellant was found illegally here, and, if so, whether there existed legal authority for his deportation. In *Guiney v. Bonham*, (C. C. A.) 261 Fed. 582, 8 A. L. R. 1282, we held that, although a warrant of arrest for deportation is in terms based on a particular statute, the alien may be deported under a later statute, which under the facts charged is applicable."

Evidence.—The admission of a Canadian naturalization certificate to show that the husband of a woman who had been deported was an alien has been held not to be error though no proof was offered that the court by which the certificate was issued had power to issue it, no objection having been interposed to the admission of the certificate in evidence. *Mills v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 625.

1918 Supp., p. 220, sec. 8.

Chinese laborers.—A person bringing Chinese laborers into the United States, who, because of failure actually to land the aliens in the United States, did not proceed far enough to violate the Chinese Exclusion Act of July 5, 1884, § 11, 2 Fed. Stat. Ann. (2d ed.) p. 76, may be prosecuted under this section, it being broader and more comprehensive in its terms. *U. S. v. Butt*, (1920) 254 U. S. 38, 41 Sup. Ct. 37, 65 U. S. (L. ed.) —.

1918 Supp., p. 225, sec. 15.

Seaman detained at hospital.—Under this section a master and his ship are relieved from responsibility for the safe keeping of an alien seaman while he is detained at a marine hospital. *The Santa Elena*, (S. D. N. Y. 1920) 271 Fed. 347.

1918 Supp., p. 226, sec. 16.

Examination by one medical officer.—An examination by one medical officer instead of two has been held not to render the hearing unfair where there is no showing that the rights of the alien were in any way prejudiced thereby and the finding of the medical officer as to the alien being afflicted with a disease which would bar his admission is not disputed. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

Discrimination in examination.—In *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10, it was alleged in the petitions that by the action of the immigration officials at San Francisco the appellants have been denied their rights under article 2 of the Treaty with China of November 17, 1880 (22 Stat. 826), which guarantees to Chinese subjects the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation. They alleged that on their return to the United States by steamer discrimination was made between the petitioners and the first cabin passengers, in that the former were compelled to go to the Angel Island Immigration Station and to the Immigration Hospital for the purpose of having particular examination made of their physical condition, and that this test was imposed upon them simply and solely because they were Chinese aliens, whereas first cabin passengers were submitted to no such test. The court said: "To this it is to be said that, if special examination was made of second-class Oriental passengers only, it should be assumed that it was done for the reason that the disease of clonorchiasis was most likely to be found among such passengers, the source of the disease being supposed to be a diet of raw fish, and it should be assumed that in failing to subject first-class passengers to like test there was no discrimination against Chinese persons, or withholding of their rights. The officers presumably did their duty in subjecting the petitioners to the test. If they failed to do their duty as to other passengers, it is not a ground for disturbing the conclusions of the board of special inquiry as to the appellants."

Rights of alien after admission.—Where an alien has been admitted the fact that in ignorance of his right he voluntarily returns does not render his subsequent detention legal. *Ex p. Chin Shue Wee*, (D. C. Mass. 1921) 272 Fed. 480.

Power of bureau after admission.—After an alien has been admitted, the case is regarded as closed before the immigration tribunal. If thereafter it develops that the admission was procured by fraud, the alien cannot be retaken and deported, except upon warrant proceedings under section 19 of the Immigration Act and rule 22, which provide fully for such cases. The original jurisdiction to hold and exclude is apparently based on the custody of the alien's person acquired at the time of his landing and continued by his detention. Once the alien has been formally discharged, and the discharge has become practically effective, jurisdiction under the original proceeding is regarded as having expired. *Ex p. Chin Shue Wee*, (D. C. Mass. 1921) 272 Fed. 480.

Time to appeal.—"The Immigration Rules do not explicitly provide as to the time when an appeal shall be taken by a dissenting member of the board. They say, 'An appeal

may also be taken by a board member who dissents from a majority vote to admit' (Rule 17, subd. 2), and that 'Appeals must be filed promptly' (Rule 17, subd. 3). An alien loses his right of appeal, except in the discretion of the immigration officer, unless it is taken within forty-eight hours after the decision. By the practice of the department, an appeal by a dissenting member of the board from an order of admission is taken at the time when the decision of the board to admit is made, and it stays the admission pending the appeal. Without such an appeal the vote becomes effective at once." *Ex p. Chin Shue Wee*, (D. C. Mass. 1921) 272 Fed. 480.

1918 Supp., p. 228, sec. 17.

Hearing and determination.—A hearing on proceedings for deporting aliens by the executive officers to whom is committed the administration of the immigration laws may be made conclusive when fairly conducted. "Any alien complaining of such proceedings or a deportation order in court must show that the officers conducting them were guilty of manifest unfairness or abused the discretion committed to them, otherwise the order of such executive officers, within the authority conferred by statute, is final and conclusive. It is further settled that the courts will not weigh the evidence upon which executive officers acted, so that if there is any evidence substantially tending to support the ground upon which the order of deportation is based, the finding of such executive officers upon the evidence must be accepted as conclusive and binding upon the courts." *In re Kosopud*, (N. D. Ohio 1920) 272 Fed. 330.

Right to counsel.—In a case where the question as to the right of counsel arose it was said: "The only legal inquiry upon the foregoing facts is whether or not the petitioners were denied counsel in such a way as to deprive them of a fair hearing. Manifestly the absence of counsel when they were being interrogated by the arresting officers is immaterial. The situation in that respect is no different from that which exists in most cases of arrest on a criminal charge. The aid and assistance of counsel at or during the hearing before the immigration inspector, and before the order of deportation is made, is the privilege which the law accords to aliens charged with being unlawfully within the United States. Nor does it make a hearing before an immigration inspector unfair and subject to review because the alien may not have had the benefit of counsel at the beginning of those proceedings. It is sufficient if, during the hearing, he is advised of his rights or is accorded counsel, and no part of the evidence previously taken or used against him is concealed or withheld from his counsel and he is not thereby deprived of the privilege of bringing forward any ex-

planatory or rebutting evidence." *In re Kosopud*, (N. D. Ohio 1920) 272 Fed. 330.

Conclusiveness of decision.—In the case of a Chinaman it has been said that the final decision of the executive department when the proceedings before it are fairly conducted is conclusive upon the courts. *U. S. v. Wong Lai*, (C. C. A. 9th Cir. 1921) 270 Fed. 57.

1918 Supp., p. 230, sec. 19.

Power of Congress in general.—Congress has the right to exclude or deport aliens in its discretion as an inherent right of sovereignty. *Ex p. Gin Kato*, (W. D. Wash. 1920) 270 Fed. 343.

Statute and treaty in conflict.—Should an act of Congress and a treaty stipulation be in irreconcilable conflict, the duty of the court is to follow the last expression of the legislative branch, and leave the question of breach of treaty stipulation to the executive branch of the government. *Ex p. Gin Kato*, (W. D. Wash. 1920) 270 Fed. 343, holding that there was no conflict between the statute and treaty stipulations between the United States and Japan.

This section repeals any provisions of the Chinese exclusion acts not in harmony with it. *Chin Shee v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 801.

Retrospective operation.—"Section 19 of the Alien Immigration Act provides that the provisions of this section, with the exceptions heretofore noted, shall be applicable irrespective of the time of entry into the United States. The Department of Labor in immigration, prescribing rules on May 1, 1917, provided as follows:

"'Subdivision 1. *Classes of Warrant Cases.*—All cases in which aliens may be arrested and deported are either stated in detail or mentioned in section 19. They fall into the following divisions. With respect to each of these divisions the law is retrospective or not and the time within which deportation proceedings may be instituted is limited or not, as indicated below.'

"(S) —'Any alien who was convicted or who admits the commission prior to entry of a felony or other crime or misdemeanor involving moral turpitude; no limitation; retrospective.'

"We find this rule to be warranted by the statute. We think that the intention of Congress was plain to make an alien of the class to which the appellant belongs, subject to apprehension and deportation whenever found, even though his entry into the country was prior to the effective date of the Alien Immigration Act of 1917." *Lauris v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 261.

The five year limitation does not apply to one who "has been found employed by, in, or in connection with a house of prostitution." *Ex p. Gin Kato*, (W. D. Wash. 1920) 270 Fed. 343. Nor is it applicable to members of a class excluded from the United States by section 3, as, for instance, one con-

victed of crime or who admits the commission of crime before entry. *Lauris v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 261, wherein it was said: "Since it is provided by section 3 that certain classes, 'idiots, imbeciles, feeble-minded persons, epileptics, insane persons, * * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude,' shall be excluded from the United States, it is apparent that Congress intended, when it legislated as to this, in section 19 of the act, to extend the time for deportation to the specific cases mentioned beyond the five-year period. It is only by this construction of the statute, that due regard can be given to each provision of section 19. To so construe the act as to require the apprehension and taking into custody and deporting the emigrant prior to the five-year limitation, would be to disregard some of the provisions of section 19 and would lead to conclusions which would be dangerous to the public. We think Congress intended to pronounce classes of aliens who are undesirable and, by general provision of law, exclude all within five years, but provided specifically that certain classes, including the class to which the appellant belongs, might be taken into custody and deported at any time."

Time of entry as controlling.—The provisions of this section are applicable to the classes of aliens mentioned therein without regard to the time of the entry into the United States. *Ng Fung Ho v. White*, (C. C. A. 9th Cir. 1920) 266 Fed. 765.

The right under this section to deport an alien whose entry was prior to the passage of this act is not barred by section 38 of the act. *Mon Singh v. White*, (C. C. A. 9th Cir. 1921) 274 Fed. 513.

Advocating unlawful destruction of property—Sufficiency of evidence.—In *U. S. v. Uhl*, (C. C. A. 2d Cir. 1920) 266 Fed. 34, the evidence was held sufficient to justify the deportation of an alien on the ground that he advocated the unlawful destruction of property.

Advocating overthrow of government by force—In general.—The question is not one of degrees of imminence of overthrow by force and violence but rather whether that is the ultimate purpose of the organization. *U. S. v. Wallis*, (S. D. N. Y. 1920) 268 Fed. 413.

The manifesto and programme of the Communist party being of such character as to easily lead a reasonable man to conclude that the purpose of the Communist party is to accomplish its end, namely, the capture and destruction of the state, as now constituted, by force and violence, it has been held that membership in such party is ground for deportation. *U. S. v. Wallis*, (S. D. N. Y. 1920) 268 Fed. 413.

Chinese—In general.—Under this section the Secretary of the Interior within the

limitations stated therein, has authority to arrest and deport on departmental warrant, alien Chinese persons found within the United States in violation of the Chinese Exclusion Law, where entry was made prior to the date the above referred to act went into effect; i. e., May 1, 1917. *Ng Fung Ho v. White*, (C. C. A. 9th Cir. 1920) 266 Fed. 765.

Chinese merchant.—The status of one as a former domiciled Chinese merchant is not a bar to deportation under this act. *Hee Fuk Yuen v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 10.

Chinese woman.—A Chinese woman may, under this section, be deported for prostitution without being given a judicial hearing as provided in section 13 of the Chinese Exclusion Act (2 Fed. Stat. Ann. (2d ed.) p. 86). And this is true though her entry into the United States took place prior to the passage of this section. *Chin Shee v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 801. The court said: "Nor can the appellant complain that the law was enacted after her entry into this country and after her status as to her right to remain here had become fixed. It has long since been settled that every sovereign and independent nation has the right and inherent power to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, whether in war or in peace. *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Wong Wing v. United States*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140. The applicant, therefore, cannot complain that she was not given a judicial hearing within the intentment of section 13 of the Act of September 13, 1888."

A Japanese laborer who enters the United States surreptitiously without a passport, after deserting a ship on which he is working, may be deported at any time within five years after his entry. *Akira Ono v. U. S.*, (C. C. A. 9th Cir. 1920) 267 Fed. 359.

Deportation for fraud in obtaining admission.—The fact that aliens are admitted into the United States, and that certificates of identity are issued to them, does not foreclose the right of the immigration authorities to institute new proceedings, provided they have sufficient reason to believe that the original findings are founded upon evidence which was false and perjured, and that the aliens are not lawfully within the United States. If certificates have been issued, the burden of attack is upon the government; but if evidence sufficient to show that the original certificates are invalid is introduced, deportation may follow. *Ng Fung Ho v. White*, (C. C. A. 9th Cir. 1920) 266 Fed. 765.

Effect of marriage to American citizen.—Where a woman has illegally returned to the United States after having been deported as an alien prostitute, her status is not changed by her marriage to an American citizen. *Ex p. Flores*, (D. C. Ariz. 1921) 272 Fed. 783.

Decision of Secretary of Labor as conclusive.—Where a Chinese boy applies for admission to this country on the alleged ground that his father is a Chinese merchant engaged in business in the United States, the decision of the Secretary of Labor that the father is not a merchant is conclusive under this section even if wrong. *White v. Fong Gin Gee*, (C. C. A. 9th Cir. 1920) 265 Fed. 600. See also *Ex p. Ah Sue*, (W. D. Wash. 1920) 270 Fed. 356.

The determination of the Secretary of Labor in deportation proceedings as to the identification of an alien as the person who entered without inspection has been held conclusive. *Mon Singh v. White*, (C. C. A. 9th Cir. 1921) 274 Fed. 513.

The credibility of witnesses is for the Secretary of Labor to pass upon and his judgment cannot be questioned so long as the evidence is sufficient to support his conclusion. *Chin Shee v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 801.

Privilege of counsel.—Relief on habeas corpus will not be given on the ground that privilege of counsel was not granted where on the conclusion of the preliminary examination the petitioner was advised of her right and employed counsel and all of the testimony was thereafter taken including her own re-examination. *Ex p. Ah Sue*, (W. D. Wash. 1920) 270 Fed. 356.

The examination of an alien where preliminary in character is permissible under the statute without the presence of counsel and if at subsequent stages he is represented by counsel his constitutional right is fully protected. *Chin Shee v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 801.

Procedure.—The statute expressly provides for a summary hearing, and it is not required that the secretary should, in a hearing for deportation, observe the technical rules of law and procedure that are accorded to parties in a criminal proceeding. *Chin Shee v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 801.

Evidence.—The ordinary rules of evidence do not apply to proceedings before immigration officers for deportation of aliens under this act. *U. S. v. Uhl*, (C. C. A. 2d Cir. 1920) 266 Fed. 34.

Irrelevant matter in record.—The fact that irrelevant matter is injected into the record is not material it being very improbable that the judgment of the Secretary of Labor was controlled in any degree thereby. Thus, bad faith or improper conduct will not be imputed to executive officers because they examined the records or acquainted themselves with former official action as shown by the inclusion in the record, correspondence and memoranda from officials of the department. *Chin Shee v. White*, (C. C. A. 9th Cir. 1921) 273 Fed. 801. The court said: "The second specification of error here presented is to the effect that the petitioner was not given a fair trial, in that letters, memoranda, statements, etc., from officials and inspectors of the department and witnesses were considered

by the Commissioner of Immigration and the Assistant Secretary of Labor, without appraising petitioner of the same, or giving her the right to be heard concerning them.

"The letters and memoranda referred to consist of certain correspondence had between the Commissioner of Immigration at Seattle, Wash., and the immigrant inspector at Walla Walla, and between the Commissioner of Immigration and the Commissioner General at Washington, and certain statements and testimony of witnesses, accompanying the correspondence, which were taken before petitioner's arrest. These matters have been included in the record from Washington, and certified here, but they are really not a part of the record made upon the hearing before the inspector upon the charge preferred against applicant looking to her deportation if found amenable to the charge.

"While it is true that the Secretary of Labor might with propriety take cognizance of such correspondence and matter accompanying it, it would be extraordinary to impute bad faith or improper conduct to the executive officers because they examined the records or acquainted themselves with former official action."

1918 Supp., p. 232, sec. 20.

Hearings.—Hearings before administrative bodies, like the immigration authorities, are not subject to the rules governing judicial proceedings. The alien must be given a fair hearing, but the hearing may be summary. Hearsay evidence is admissible, and the findings of fact by the commissioners conclusive, if there is any evidence to support them. *Morrell v. Baker*, (C. C. A. 2d Cir. 1920) 270 Fed. 577.

The word "hearing" in the provision that the bond shall be conditioned that the alien shall be produced when required for a hearing or hearings includes any hearing whether preliminary or otherwise. *U. S. v. Uhl*, (S. D. N. Y. 1920) 266 Fed. 929.

Confinement of persons ordered deported as not illegal restraint.—Persons ordered deported are not illegally restrained of their liberty where because of their inability to give bail they are kept in confinement, though the Department of Labor is unable to promptly enforce its order of deportation. *In re Kocopud*, (N. D. Ohio 1920) 272 Fed. 330.

Duty to admit to bail—habeas corpus.—Where bail has been fixed the alien is entitled to bail on the presentation of a good and sufficient bond properly conditioned and for the sum required and where this right is denied habeas corpus will be granted. *U. S. v. Uhl*, (S. D. N. Y. 1920) 266 Fed. 929.

Review by Secretary of Labor.—Where the record of deportation proceedings was forwarded to the Secretary of Labor, before whom counsel for the alien filed a brief in his behalf resulting in an adverse decision by the Secretary and an order by him for the deportation of the alien, it was held that he

secured every substantial right that he could have secured by a purely formal appeal. *Shigezumi v. White*, (C. C. A. 9th Cir. 1920) 269 Fed. 258.

1918 Supp., p. 238, sec. 32.

Medical treatment of alien seamen—In general.—An alien seaman on an American vessel on arrival at the port of New York is entitled to medical treatment at the Marine Hospital if sick, and if it is not accorded him by the immigration officials the master is justified in sending him to the hospital, and while he is detained there the master and the ship are relieved from responsibility and cannot be charged with negligence under this section because of his release by the hospital authorities. *The Santa Elena*, (S. D. N. Y. 1920) 271 Fed. 347.

Expense of medical treatment.—There is nothing in this section which indicates an intention to make a vessel liable for the medical treatment of an alien employed on board who is excluded from admission into the United States. From the fact that a temporary landing for medical treatment is excepted from the prohibition of the landing of an excluded alien, it is not to be implied that such landing and treatment are subject to be made compulsory and at the expense of the vessel on board which such alien was employed. But payment by an American registered vessel of the expense of a seaman's medical treatment in a hospital, the payment not being made under legal compulsion or involuntarily, cannot be set up as a counterclaim against the seaman's demand for wages. *The Coniscliff*, (C. C. A. 5th Cir. 1921) 270 Fed. 206, *reversing* (D. C. Ala. 1920) 266 Fed. 959.

1918 Supp., p. 239, sec. 35.

Medical treatment of seaman at expense of vessel.—Under this provision "a finding that the vessel, or one acting in its behalf, was at fault in the respect stated when the excluded alien was shipped or engaged and taken on board is made a prerequisite to the enforced treatment in a hospital of such alien at the expense of the vessel. It is not thought that a statute which makes provision, in stated circumstances, for the medical treatment of an excluded alien at the expense of the vessel which brought such alien to this country, properly can be given the effect of authorizing immigration officials to subject a vessel to such an expense in a case not provided for by statute. The circumstance that the right to exercise the power granted was made subject to specified conditions indicates the absence of intention to confer the power unconditionally and without qualification, or in respect of a vessel not shown to be within the terms of section 35, to wit: 'Any vessel carrying passengers between a port of the United States and a port of a foreign country.'" *The Coniscliff*, (C. C. A. 5th Cir. 1921) 270 Fed. 206.

1918 Supp., p. 240, sec. 38.

Effect on right to deport.—The right to deport under section 19 of this act an alien who entered prior to its passage is not barred by this section. *Mon Singh v. White*, (C. C. A. 9th Cir. 1921) 274 Fed. 513.

1919 Supp., p. 71, sec. 1. [*Alien members, etc.*]

Construction.—Statutory restrictions on immigration should, if possible, be construed in accordance with the spirit as well as within the letter of the Constitution, including the First Amendment and its declaration for freedom of speech, press, and assemblage. Nor should it be overlooked that the words "overthrow the government of the United States by force or violence" are found in a context which indicates that Congress had in mind military insurrections of the ordinary kind, and bombing and assassination attacks on the government. *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

Advocating overthrow of government.—In *U. S. v. Uhl*, (C. C. A. 2d Cir. 1921) 271 Fed. 676, it was said: "Mere personal abstention from violence, or even from violent language, does not secure immunity, if the result of the gentlest and most guarded speech is to advocate or teach that which the statute condemns. The 'philosophic' anarchist is an anarchist nevertheless. *Lopez v. Howe*, 259 Fed. 401, 170 C. C. A. 377. Since in this or in any similar case we cannot be concerned with the weight of the evidence, but only with the existence thereof, it is not useful to state or comment upon what Georgian was proved to have done, what he admitted having done, or what he himself said of his own teachings, advocacy, or opinions.

"We express no opinion as to the result upon our minds of the evidence adduced at the deportation hearing, beyond this, viz., there was evidence, indeed it was admitted,

that though he did not and does not believe in the immediate overthrow of the government of the United States that position is not the result of any affection for the same or approval of this republic, nor of any objection to force and violence per se, but only results from an opinion that the time is not ripe. Ripeness is to be attained by teaching, and by the dissemination of the style of literature which it is his business to circulate; when the time is ripe, it is to be hoped that force and violence will not be necessary, but they will be appropriate as soon as they are likely to prevail.

"However fantastic the above-outlined social program may seem, it is impossible to say that a professed and avowed effort to hasten its consummation is not evidence of that which the statute forbids."

"Force" as including general strikes.—Congress did not intend by the use of the word "force" in this section to condemn the general strike when advocated as a political weapon by aliens. *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

1919 Supp., p. 72, sec. 2.

Procedure under act.—This act "contemplates a summary investigation, and not a judicial trial. The formalities of procedure and the rules which govern the admissibility of evidence in a judicial trial are not controlling in such proceedings. A series of decisions in the Supreme Court has settled it that hearings, like the one in question here, and tried before executive officers, are conclusive when fairly conducted. To successfully attack them before the courts, it must appear that the proceedings were manifestly unfair, that the executive officers acted in such manner as prevented a fair investigation, or it must be shown that there was a manifest abuse of discretion. In other cases the order of the executive officer within the authority of the statute is final." *U. S. v. Uhl*, (C. C. A. 2d Cir. 1920) 266 Fed. 646.

IMPORTS AND EXPORTS

Vol. III, p. 712, sec. 27. [First ed., vol. X, p. 115.]

Purpose of section.—This "section was in the nature of a customs regulation, to prevent the American public from being deceived by simulated name. In other words, simulated trade-marks were to be excluded from importation, so as to safeguard the American public; but there is nothing in that section which was intended to or purported to pass upon the question as to whether any given trade-mark was valid as matter of law as between contending parties." *Bourjois v. Katzel*, (S. D. N. Y. 1920) 274 Fed. 856.

What may be excluded.—Under this section, the customs authorities may only exclude an article "of imported merchandise which shall copy or simulate the name of any domestic manufacture. * * *" Thus, if an article is genuine, in the sense of defendant's box, it may be imported into this country, and cannot be stopped at the door of the custom house; but whether or not the article may be marketed here under a particular trade-mark is a question to be determined in ascertaining the rights of parties, quite irrespective of this section. *Bourjois v. Katzel*, (S. D. N. Y. 1920) 274 Fed. 856.

Vol. III, p. 725, sec. 2. [First ed., 1916 Supp., p. 62.]

"The statute raises a presumption of fact. It is the presumption of one fact based upon another proven fact; that is, the presumption of importation arising from the proven fact of possession. The majority of the court are of the opinion that the jurisdiction of the court over the subject matter may be established by such proof and presumption thus created. We think that Con-

gress had power to create the presumption under the power accorded to it by the Constitution to regulate foreign commerce." *Toy v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 326.

Indictments.—An indictment charging the concealment of smoking opium in violation of this section may be properly consolidated and tried with an indictment charging the manufacture of smoking opium in violation of section 1 of the Act of Dec. 17, 1914 (4 Fed. Stat. Ann. (2d ed.) p. 173). *Toy v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 326.

INDIANS**Vol. III, p. 760, sec. 2078.** [First ed., vol. III, p. 356.]

Extent of prohibition of interest.—The prohibition of this section against any interest or concern in any trade with Indians, except for and on account of the United States, on the part of any person employed in Indian affairs, is not confined to transactions involving lands or other property in respect to which the government has an interest or control. *U. S. v. Hutto*, (1921) 236 U. S. —, 41 S. Ct. 541, 65 U. S. (L. ed.) —.

An attorney at law appointed as a special assistant to the Attorney General to assist in the institution and prosecution of suits to set aside deeds made to certain allotments in an Indian agency, comes within the purview of this section and may not purchase land from the heirs of a deceased Indian allottee. *Bluejacket v. Ewert*, (C. C. A. 8th Cir. 1920) 265 Fed. 823, wherein it was said: "The facts in the present case do not disclose the direct exertion of any influence over the Indians. It is not shown that the defendant ever saw or communicated with any of the plaintiffs or that the Indians were conscious that defendant was employed in Indian affairs. The presumption is that the rules established by the Secretary of the Interior governing sales of inherited Indian lands were followed by the officials in charge of that sale; that defendant's bid for these lands was delivered to the Indian agent and by him transmitted to the Secretary, together with all the proceedings and the report of the agent, and with a showing that there was no agreement or understanding between defendant and plaintiffs. So far as appears the defendant was but a passive recipient of a conveyance from the Indians. Exercising its undoubted authority, the government offered the property for sale, advertised it, made the appraisal, received the bids, decided upon approval of its acceptance by the Indians, approved the deed, and controlled the receipt and disposition of the purchase price.

"The defendant therefore claims that he was not engaged in any trade with the In-

dians, but that his dealing was with the United States. This view ignores the fact that the plaintiffs in deciding whether to refuse or accept defendant's bid, and in executing the deed to defendant as grantee may have signed it because of confidence in his official position and his relation to the Indians. One purpose of the statute is to prevent the possible play of official influence over the mind of the Indian in his consideration of any proposed trade with him. Another purpose is to preserve loyalty, or at least disinterestedness toward the Indian's interests by those employed in Indian affairs. If it were held that the statute did not apply to a trade between an official of the Indian department and the Indian except where the Indian was conscious that he was dealing with such an employé the way would be open for employes and officers of the Indian department to take advantage of their knowledge of the Indians' affairs and of their needs, to make purchases or sales for their own benefit through third persons, agents and corporations. Similarly, officers and employes of the Indian department at Washington or at any agency could trade with Indians living at a distance if they were not acquainted with their official positions. The statute is not confined in terms to trade with the Indians, when the Indian is conscious of the position of the official, nor when an effect upon the trade by the use of his official position is demonstrated, and such a construction would be contrary to the practical interpretation that has been placed upon the statute by the Indian department ever since its enactment. The conclusion is that the statute applied to the taking of the deed by the defendant."

Vol. III, p. 794, sec. 2116. [First ed., vol. III, p. 373.]

Alienation by individual Indians.—To same effect is original annotation, see *U. S. v. Boylan*, (C. C. A. 2d Cir. 1920) 265 Fed. 165, affirming (*N. D. N. Y.* 1919) 256 Fed. 468.

Vol. III, p. 795, sec. 2117. [First ed., vol. III, p. 374.]

Where a grazing lease of tribal lands expressly limits the number of cattle which may be grazed on the leased premises, an agreement to pay for any excess of cattle grazing thereon is not invalid as being an agreement to pay for violating the statute by placing cattle on the reservation without the consent of the tribe. *Kirby v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 391.

Vol. III, p. 819, sec. 15. [First ed., vol. III, p. 490.]

The finding of the Land Department is conclusive that an Indian admitted to the benefits of the Homestead Law under this section has abandoned his tribal relations. *In re Wo-gin-up's Estate*, (Utah 1920) 192 Pac. 267.

Vol. III, p. 830, sec. 6. [First ed., 1909 Supp., p. 204.]

Right to vote.—Trust patent Indians holding allotted lands under the federal act of May 8, 1906 (Burke Act), amending Dawes Act, who have become civilized persons of Indian descent, and who have severed their tribal relations for two years next preceding an election, may be qualified electors at such election, under article 2, § 121, Const. N. D. as amended. *Swift v. Leach* (N. D. 1920) 178 N. W. 437.

Conclusiveness of determination of commission.—The adjudication of the commission as to who should be enrolled as citizens and as to what land should be allotted to them, has been held conclusive and impervious to collateral attack. *U. S. v. Atkins*, (C. C. A. 8th Cir. 1920) 268 Fed. 923.

Finding of secretary conclusive.—By authority of the provisions of this section, as amended by act of May 8, 1906 (34 Stat. 182, 183), and the act of June 25, 1910 (36 Stat. 855), which was made applicable to Oklahoma by the act of the Congress of February 14, 1913, the Secretary of the Interior was vested with authority to ascertain the legal heirs of deceased Indians and caused to be issued to said heirs, in their name, a patent in fee simple for the lands being held in trust by the United States for the original allottee, and the action of the Secretary of the Interior in determining the legal heirs of such deceased Indians in accordance with the authority granted is conclusive and final. *Maz-He v. Jefferson Trust Co.*, (Okla. 1921) 198 Pac. 319.

Certiorari will not lie for the purpose of reviewing an administrative order made by the Secretary of the Interior under this section. *Mickadiet v. Payne*, (App. Cas. D. C. 1920) 266 Fed. 194.

Vol. III, p. 837, sec. 3. [First ed., vol. III, p. 500.]

Grazing lease construed and rights thereunder determined, see *Kirby v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 391.

Vol. III, p. 846, sec. 7. [First ed., vol. III, p. 505.]

Necessity of confirmation of sale of minor heirs' interests.—A confirmation by the county court of the report of a guardians' sale of the interests of minor heirs in land, is not necessary under this section. *Blue-jacket v. Ewert*, (C. C. A. 8th Cir. 1920) 265 Fed. 823.

Vol. III, p. 850. [*Noncompetent Indians, etc.*] [First ed., 1909 Supp., p. 228.]

Meaning of "noncompetent."—As to the meaning of the word "noncompetent" as used in this section, the court, in *U. S. v. Nez Perce County*, (D. C. Idaho 1917) 267 Fed. 495, said: "In passing upon the original motion, the meaning of the term 'noncompetent,' as here used, was not discussed, and I accepted it as being the equivalent of 'incompetent,' and as implying legal incapacity, due to nonage, imbecility, or insanity. But upon further consideration I am persuaded that such restriction is too narrow. While undoubtedly the 'competency' of an Indian is generally understood to imply a mental capacity, it is to be inferred, from expressions in both the acts of Congress and in reported judicial decisions, that there is in the legislative and judicial mind a close connection between the mental status of the Indian and his power or right to alienate his land, and that therefore in practice the legal power to alienate implies mental competency, and, upon the other hand, the absence of such power or right implies incompetency."

* * * The view seems to be unavoidable that Congress intended to use the term 'noncompetent' as descriptive of an Indian holding only a trust patent or other patent containing restrictions against alienation, or, what is perhaps the equivalent, an Indian to whom, even though he may be actually competent, a certificate of competency has not been issued by the Secretary of the Interior, and that therefore the description 'noncompetent Indian' is inclusive of all Indians who are without full power to alienate their property."

Presumption as continuance of incompetency.—There is a presumption, conclusive upon the courts, that until the restriction against alienation is removed in the manner provided by law, either through the lapse of time or the positive action of the Secretary of the Interior, the allottee continues to be an "incompetent" Indian, at least in so far as

concerns the land to which the restriction relates. *U. S. v. Nez Perce County*, (D. C. Idaho 1917) 267 Fed. 495.

Vol. III, p. 851, sec. 1. [First ed., 1909 Supp., p. 237.]

Exemption from taxation.—Where the allottees died before the expiration of the trust period and the proceeds received from a sale of the lands as authorized by this section were invested in other lands it has been held that the lands so acquired are exempt from taxation during the trust period by the state and its municipal subdivisions. *U. S. v. Yakima County*, (E. D. Wash. 1921) 274 Fed. 115.

Vol. III, p. 853, sec. 1. [*Indian trust allotments, etc.*] [First ed., 1912 Supp., p. 96.]

Constitutionality.—"The question of the validity and effect of that act, and of the jurisdiction of the Secretary of the Interior to hear, ascertain and decide who were the parties entitled by descent to the allotments of deceased Indians described therein, has been repeatedly considered and conclusively determined by the Supreme Court and by other federal courts, and they have uniformly sustained the act, the power of the Congress to enact it, the jurisdiction of the Secretary to decide the questions of heirship, and the finality of his decisions." *Dixon v. Cox*, (C. C. A. 8th Cir. 1920) 268 Fed. 285.

Power and jurisdiction of Secretary of the Interior.—The fact that the Secretary of the Interior has decided that a certain person is not the sole heir of a certain deceased Indian does not exhaust his power so as to preclude him from subsequently determining who are the heirs. *Dixon v. Cox*, (C. C. A. 8th Cir. 1920) 268 Fed. 285.

Restricted allotments covered by section.—Restricted as well as trust allotments must be held to be comprehended by the provisions of this section, that "when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive," in view of the legislative and departmental construction of that section as authorizing a determination of the heirs of both classes of deceased allottees. *U. S. v. Bowling*, (1921) 256 U. S. —, 41 S. Ct. 561, 65 U. S. (L. ed.)—

The certification of the competency of the grantee under a restricted patent inso facto operates to revise the patent. *U. S. v. Nez*

Perce County, (D. C. Idaho 1917) 267 Fed. 495.

Deposit of Indian moneys in bank.—The provision in this section as to the deposit of Indian moneys in bank is said to be permissive and not mandatory. *U. S. v. Nez Perce County*, (D. C. Idaho 1917) 267 Fed. 495.

Conclusiveness of decision of Secretary of the Interior.—The Secretary of the Interior has jurisdiction to determine the question of heirship and his finding is final and conclusive. *Chase v. U. S.*, (C. C. A. 8th Cir. 1921) 272 Fed. 684. To same effect, see *Maz-He v. Jefferson Trust Co.*, (Okla. 1921) 198 Pac. 319.

But the Secretary's decision on the question of heirship like the decision of the Land Department, of the Dawes Commission, and of other quasi judicial tribunals, may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a material issue of fact which controlled the result. *Dixon v. Cox*, (C. C. A. 8th Cir. 1920) 268 Fed. 285.

Remedies of United States.—"For the protection of the United States in the execution of its trust powers, the performance of its duties to its Indian wards, and the exercise of the exclusive jurisdiction of the Secretary of the Interior in respect of the approval of leases during the restricted period against obstruction and trespass, the United States is not remitted to the ordinary legal remedies of ejectment and wrongful detainer," but may invoke the equity power of the court to grant injunctive relief. *Chase v. U. S.*, (C. C. A. 8th Cir. 1921) 272 Fed. 684.

Pleading and proof in attack on decision.—"If one would attack the finding of facts of a quasi judicial tribunal like the Secretary or the Land Department, upon the ground that there was no substantial evidence to support it, he must allege and prove, not only that there was a mistake in the finding or findings, but the evidence before that tribunal or Secretary from which the alleged mistake resulted, before any court can enter upon the consideration or decision of any issue of fact determined at the hearing by such tribunal or Secretary." *Dixon v. Cox*, (C. C. A. 8th Cir. 1920) 268 Fed. 285.

Vol. III, p. 855, sec. 2. [First ed., 1914 Supp., p. 170.]

Effect of state laws of descent on wills executed under this section.—The prohibition of Oklahoma Code, § 8341, against the bequest by a married man or woman of more than two thirds of his or her property away from the other spouse, cannot be invoked to defeat the will of an Indian married woman,

the allottee of restricted lands, who died before the expiration of the trust or restrictive period, by which she devised to her children and grandchildren such lands and all trust funds held by the United States to her use and benefit, in view of the provisions of this section, that one having an interest in any allotment held under trust, or other patent containing restrictions on alienation, shall have the right, prior to the expiration of the trust or restrictive period, and before the issuance of a fee-simple patent, or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior, who may approve or disapprove the will, either before or after the death of the testator, and that neither circumstance shall operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause a patent in fee to be issued to the devisee or devisees. *Blanset v. Cardin*, (1921) 256 U. S. —, 41 S. Ct. 519, 65 U. S. (L. ed.), *affirming* (C. C. A. 8th Cir. 1919) 261 Fed. 309

Vol. III, p. 866, sec. 9. [First ed., 1909 Supp., p. 194.]

Constitutionality.—Congress acted clearly within its authority in constituting the governor of the Choctaw Nation the representative of the defendants, upon whom notice of the suit, contemplated by this act, and the Act of May 28, 1908, § 27, for the recovery for services rendered and expenses incurred in securing Mississippi Choctaw Indians rights of citizenship in the Choctaw Nation, was to be served in their behalf, and in designating the Attorney General of the United States as their attorney to appear and defend the suit, the government's trusteeship of the funds of these Indians, and its guardianship over their interests in the allotted lands, not making it necessary that the United States be a party to the proceeding. Indians were not deprived of their property without due process of law by the provisions of this act, and the Act of May 29, 1908, § 27, authorizing the court of claims to hear, consider, and adjudicate the claims against the Mississippi Choctaws of certain persons for services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of quantum meruit in such amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States, and declaring that the lands allotted to the Mississippi Choctaws are subject to a lien to the extent of any judgment so rendered, and constituting the governor of the Choctaw Nation the representative of the defendants, upon whom notice of the suit was

to be served in their behalf, and designating the Attorney General of the United States as their attorney to appear and defend the suit. *Winton v. Amos*, (1921) 255 U. S. 373, 41 S. Ct. 342, 65 U. S. (L. ed.)—. See 51 Ct. Cl. 284; 52 Ct. Cl. 90.

Equitable suit against class.—The jurisdictional Acts of April 26, 1906, § 9, and May 29, 1908, § 27, authorizing the court of claims to hear, consider, and adjudicate the claims against the Mississippi Choctaws of certain persons for services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of quantum meruit in such amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States, and declaring that the lands allotted to the Mississippi Choctaws are subject to a lien to the extent of any judgment so rendered, contemplate, not an action in personam to establish a personal liability against individual Indians or a group of Indians, but a suit of an equitable nature against that class of Mississippi Choctaws who, through successful assertion of the right of citizenship in the Choctaw Nation, acquired allotments of lands in what formerly was the tribal domain, and a participation in funds held in trust by the United States; a suit having the object of imposing an equitable charge upon their funds and lands for a reasonable and proportionate contribution toward the value of services rendered and expenses incurred by the claimants in securing for said class of Indians a beneficial participation in the trust estate. *Winton v. Amos*, (1921) 255 U. S. 373, 41 S. Ct. 342, 65 U. S. (L. ed.)—. See 51 Ct. Cl. 284; 52 Ct. Cl. 90.

Recovery for professional services to Indians before congressional committees.—Professional services before Congress and its committees, individual representatives and Senators, the Dawes Commission, etc., intended to establish the right of the Mississippi Choctaws to participation in the material benefits of citizenship in the Choctaw Nation, and to secure such legislation by Congress as might be needed for the practical attainment of the object sought, though rendered under particular contracts of employment by many individual Mississippi Choctaws, but with the object, incidentally, of benefiting the Mississippi Choctaws as a class, will, whether such contracts be valid or not, support the suit authorized by this Act of April 26, 1906, § 9, and the Act of May 29, 1908, § 27, to be brought in the court of claims to impose an equitable charge for reimbursement and compensation on the basis of quantum meruit upon the interest of those beneficiaries who received the benefit, provided that the services rendered were sub-

stantially instrumental in producing a result beneficial to the class of cestuis que trustent upon whose interests the charge is to be imposed. *Winton v. Amos*, (1921) 255 U. S. 373, 41 S. Ct. 342, 65 U. S. (L. ed.)—. See 51 Ct. Cl. 284; 52 Ct. Cl. 90.

Vol. III, p. 872, sec. 19. [First ed., 1909 Supp., p. 199.]

Act of alienation as within prohibition of section.—"An act of alienation might be clearly within the prohibition of the language of the statute contemplating the reimposing of restrictions removed by legislative act, and yet not be within the prohibition when it relates to the removal of restrictions as to the alienation of surplus allotment of a full-blood member of the Five Civilized Tribes by an act of the Secretary of the Interior, which was preceded by a quasi judicial investigation." *U. S. v. Smith*, (E. D. Okla. 1920) 266 Fed. 740.

Deed in execution of contract made before act.—This section is not retroactive, but it does render invalid any deed made by a Choctaw Indian after the passage of such act if said deed was made in carrying out a contract for the sale of his restricted lands, entered into before the passage of such act. *Johnston v. Burnett*, (Okla. 1921) 198 Pac. 489.

Alienation by will.—A will of a Cherokee citizen of the half blood, before his allotment had been selected, was ineffectual to convey said allotment. A member of the Cherokee Tribe of Indians had power to make a will prior to the enactment of this section, but prior to said time he had no right to alienate his allotment by will. *Reece v. Bengé*, (Okla. 1921) 198 Pac. 493.

Lands purchased with the proceeds of restricted lands are not exempted from taxation by this section nor the provisions of section 4 of the Act of May 27, 1908 (3 Fed. Stat. Ann. (2d ed.) 887), *U. S. v. McIntosh County*, (E. D. Okla. 1921) 271 Fed. 747.

Taxation.—This act together with section 4 of the Act of May 27, 1908 (3 Fed. Stat. Ann. (2d ed.) 887) providing that all lands from which restrictions have been removed shall be subject to taxation, except that allotted lands shall not be subjected or held liable to any form of personal claim against the allottees arising before the restrictions were removed, did not have the effect of extending the exemption from taxation to inherited allotted tribal lands. *U. S. v. McIntosh County*, (E. D. Okla. 1921) 271 Fed. 747.

Vol. III, p. 874, sec. 22. [First ed., 1909 Supp., p. 200.]

Approval by Secretary of Interior.—The power of the Secretary of the Interior under this section, to examine and approve or dis-

approve conveyances by heirs of a Creek allottee who are full-blood Indians, was not taken away as to conveyances already made by the provisions of the Act of May 27, 1908, § 9, [3 Fed. Stat. Ann. (2d ed.) 890] that no conveyance of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee; and the lapse of two and one-half years between the execution of the conveyance and its approval is not material, there being no lawful intervening disposal. *Harris v. Bell*, (1920) 254 U. S. 163, 41 S. Ct. 49, 65 U. S. (L. ed.)—, *affirming* (C. C. A. 8th Cir. 1918) 250 Fed. 209, 162 C. C. A. 345.

Lands allotted in the right of a deceased enrolled member of the Creek Nation, conformably to the Acts of March 1, 1901, June 30, 1902, and the act of which this section is a part were received by his heirs as an inheritance, and not as a direct allotment to them, and such heirs are therefore not governed by restrictions on alienation applicable to living allottees. *Harris v. Bell*, (1920) 254 U. S. 163, 41 S. Ct. 49, 65 U. S. (L. ed.)—, *affirming* (C. C. A. 8th Cir. 1918) 250 Fed. 209, 162 C. C. A. 345.

Sale by guardian of homestead allotment.—In an action for the recovery of land commenced by W. and S. against B. and B., the evidence disclosed substantially the following facts: The land in controversy consisted of both the homestead and surplus allotments of S., a duly enrolled Chickasaw Indian of less than full blood, who died on or about the 28th day of September, 1905, after receiving her allotment, leaving surviving her H. S., her husband, and W. and S., her infant son and daughter, respectively. After the death of the allottee and the passage of this act, H. S. made a separate conveyance of his curtesy right to H. and thereafter died before the commencement of the action. Some time after the execution of the conveyance by H. S., a guardian was appointed for W. and S. in the United States Court for the Southern District of Indian Territory sitting at Purcell, and thereafter a petition was filed, praying for permission to sell at guardian's sale the interest of S. and W. in said inherited land. Thereafter an order was made, directing the guardian to sell said land at guardian's sale, which was done. Whereupon a guardian's deed was duly executed, conveying the land to H. It was through this guardian's sale to H. that B. and B. deeded their title, and it is conceded that if the interest of the minors in the land passed to H. by virtue of this sale the cause should be reversed; otherwise it should be affirmed. The trial court held that this section provided the only means whereby a minor of any degree of Indian blood might be divested of the title to his inherited lands, and that, inasmuch as the minor heirs did not join in the sale by H. S., the separate sale of the minor heirs was invalid as to both the homestead and surplus allotments.

The appellate court held that this ruling was erroneous in so far as it affected the sale of the homestead allotment. *Burtschi v. Wolfe*, (Okla. 1921) 198 Pac. 306.

Vol. III, p. 881, sec. 1. [First ed., 1909 Supp., p. 232.]

Previous acts repealed.—This act is a revising act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of Act Cong. April 26, 1906, c. 1876, 34 Stat. 137 [3 Fed. Stat. Ann. (2d ed.) 861], and previous congressional enactments in conflict therewith on the same subject. *Stewart v. Burrows*, (1920) 80 Okla. 23, 193 Pac. 881.

Control of Indian lands vested in Congress.—The Enabling Act under which the state of Oklahoma was admitted into the Union provides: "That nothing contained in said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such right shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

The constitutional convention by resolution accepting the Enabling Act provided: "That said constitutional convention do, by this ordinance irrevocable, accept the terms and conditions of an act of the Congress of the United States entitled 'An act to enable the people of Oklahoma and the Indian Territory to form a Constitution and state government and be admitted into the Union on an equal footing with the original states.'" Under these provisions of the Enabling Act and of the said resolution accepting the terms of same, the right and power to regulate and control the sale of Indian lands in the state of Oklahoma remain vested exclusively with the Congress. *Molone v. Wamsley*, (1921) 80 Okla. 181, 195 Pac. 484.

Vol. III, p. 883, sec. 2. [First ed., 1909 Supp., p. 233.]

Death of allottee.—See annotation under sec. 9 of this act, *infra*, p. 469.

Execution of conveyance.—A conveyance of the family homestead must first comply with the requirements of the state or local law as a matter preliminary to the approval by the federal agency. *Chisholm v. Creek, etc., Development Co.*, (E. D. Okla. 1921) 273 Fed. 589, so holding in the case of the modification, extension or renewal of a lease.

Vol. III, p. 887, sec. 4. [First ed., 1909 Supp., p. 233.]

Constitutionality.—This section should not be construed so as to bring about a conflict

with section 6 of article 10 of the Oklahoma constitution exempting only lands then exempt under existing laws, if as reasonable construction can otherwise be reached. *U. S. v. McIntosh County*, (E. D. Okla. 1921) 271 Fed. 747.

Inherited lands.—Lands inherited by a half-blood Choctaw Indian minor from a half-blood Choctaw allottee are not "restricted lands" within the purview of the proviso of section 6 of this act and are subject to taxation under and by virtue of this section. *Stewart v. Burrows*, (1920) 80 Okla. 23, 193 Pac. 881.

On the death of a half-blood allottee and descent of lands to heirs of less than half Indian blood, the lands became subject to taxation prior to their sale through the Oklahoma probate court; the provisions as to minority not changing the matter. *Grady County v. Lenochen*, (1921) 80 Okla. 169, 195 Pac. 116.

Vol. III, p. 887, sec. 5. [First ed., 1909 Supp., p. 234.]

Validity of lease made by guardian of Indian minors.—A lease made by a guardian of Creek minors of their inherited lands in July, 1917, for agricultural purposes for the year 1918, and approved by the county court, is not void as an overlapping lease, when it is not disclosed that the land had been leased for 1917, and nothing in the record to disclose that the lease executed in July, 1917, was not executed at the usual and customary time for leasing lands for agricultural purposes in that vicinity for the year 1918. *Armstrong v. Phillips*, (Okla. 1921) 198 Pac. 499.

Vol. III, p. 887, sec. 6. [First ed., 1909 Supp., p. 234.]

Conveyance by minor heirs.—Lands inherited from a deceased Indian allottee were not included in or affected by the provision in this section, that no restricted lands of living minors shall be sold or encumbered except by leases authorized by law, by order of the court, or otherwise. *Harris v. Bell*, (1920) 254 U. S. 103, 41 S. Ct. 49, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1918) 250 Fed. 209, 162 C. C. A. 345.

Authority of guardian to lease.—This section conferred upon the county courts of this state jurisdiction over the person and property of minor allottees of the five civilized tribes, and the guardian of said minors appointed by the county court, have authority to lease for agricultural purposes the homestead allotment of the mother inherited by said minors, said minors being born since March 4, 1906, and the county court had authority to approve the agricultural lease for one year executed by the guardian. *Taylor v. Callahan*, (Okla. 1921) 198 Pac. 487.

Liability to taxation.—Lands inherited by a half-blood Choctaw Indian minor from a

half-blood Choctaw allottee are not "restricted lands" within the purview of the proviso of this section, and are subject to taxation under and by virtue of section 4 of this act. *Stewart v. Burrows*, (1920) 80 Okla. 23, 193 Pac. 881.

Vol. III, p. 890, sec. 9. [First ed., 1909 Supp., p. 235.]

Necessity for approval by Secretary of the Interior.—The authority of the Secretary of the Interior to approve and thereby confirm oil and gas mining leases made by full-blood Creek allottees upon their allotments, derived from section 2 [3 Fed. Stat. Ann. (2d ed.) 883], did not cease at the death of the allottee by reason of the provision of this section that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." Such approval might be given at any time, either before or after the death of the allottee, so far as the rights of her heirs and those claiming under them with notice were concerned, and the approval, when given, related back and took effect as of the execution of the lease by the parties named therein. *Anchor Oil Co. v. Gray*, (1921) 256 U. S. —, 41 S. Ct. 544, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1919) 257 Fed. 277, 168 C. C. A. 361.

Approval by the court.—Adult heirs only must be regarded as comprehended by the proviso in this section, that no conveyance of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of a deceased allottee, in view of the provision of section 6, subjecting the persons and property of minor Indians to the jurisdiction of the Oklahoma probate courts, and hence a guardian's conveyance for minor heirs of a deceased allottee, directed and approved by the court having control of the guardianship, need not also be approved by the court having jurisdiction of the deceased allottee's estate. *Harris v. Bell*, (1920) 254 U. S. 103, 41 S. Ct. 49, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1918) 250 Fed. 209, 162 C. C. A. 345.

Following Supreme Court rules.—The failure of the county court to follow the procedure provided for in former rule 10 of the Supreme Court, in approving conveyance of full-blood Indian heirs, as provided for in this section, does not render said conveyance void for that reason. *Haddock v. Johnson*, (1920) 80 Okla. 250, 194 Pac. 1077.

Appeal.—The action of a county court of Oklahoma in approving a conveyance of a full-blood Indian heir to lands inherited by such Indian from a member of the tribe, which conveyance was required by this sec-

tion, to be approved by the county court, is not judicial in its nature, nor the exercise of any judicial function, and an appeal will not lie from an action of the county court in approving or disapproving a conveyance. *Haddock v. Johnson*, (1920) 80 Okla. 250, 194 Pac. 1077, holding further that certiorari will not lie to review the action of the county court.

State law as governing descent of unrestricted lands.—"Congress, in section 9 of the act of May 27, 1908, supra, recognized that the law of Oklahoma of descent and distribution unqualifiedly governed the devolution of estates of unrestricted Indians, and in plain and unambiguous language expressly says that the lands of allottees of one-half or more Indian blood shall descend under the laws of descent and distribution of the state of Oklahoma. There is no escape from the language of the proviso of section 9 of said act putting in force the laws of Oklahoma and specifically applying the same to the descent and distribution of the estates of allottees of the half-blood, or more; and in said case, supra, the court based its decision upon the proposition that the lands in controversy were restricted lands, and that was the very class of lands that the proviso of section 9 of the act of May 27, 1908, supra, in plain and unmistakable language, provided that the laws of Oklahoma of descent and distribution shall govern the devolution of the same. It is very obvious that the Congress recognized that Indian lands located within the state of Oklahoma from which restrictions had been removed were subject to the operation of the state laws, and by section 4 of said act provided that said lands should be subject to the laws of the state.

"Upon the admission of the state of Oklahoma into the Union the same came into the Union with all the powers and sovereignty of any other state, and upon the removal of restrictions against alienation and the granting of full citizenship to Indians the federal government ceased to have any further power or control over the tribal citizens with respect to unrestricted lands, and all laws passed by Congress prior to statehood, either general or special, ceased with the admission of Oklahoma as a state to have force or effect in so far as unrestricted lands of tribal citizens are concerned, and the Supreme Court of the United States has forever settled the question that Indian lands within a state or territory that has a local form of government are subject to the laws of the state or territory." *In re Pigeon*, (Okla. 1921) 198 Pac. 309.

Power of state to regulate procedure.—A state legislature has no power to enact a statute that affects the validity of conveyances by full-blood Indian heirs. This right and power being vested exclusively in the Congress, an act of a legislature providing that "all petitions for the approval of deeds to lands inherited by full-blood Indian heirs shall be verified by one or more of the gran-

tors, and shall contain the following information," etc., is directory and not mandatory, and the failure of the approving federal agency to comply with the terms of same, or to require the vendor or vendee in such conveyance to comply with same, does not invalidate such conveyance. *Molone v. Wamsley*, (1921) 80 Okla. 181, 195 Pac. 484.

County judge federal agent.—This provision constitutes the county court, having jurisdiction of the estate of a deceased Indian allottee, a federal agent, vested with the power to approve conveyances of the interest of full-blood heirs in such inherited lands, and the act of the county court in approving the conveyance of such full-blood Indian is a ministerial and not a judicial act. *Molone v. Wamsley*, (1921) 80 Okla. 181, 195 Pac. 484.

Cancellation of conveyance by heirs of Creek Indian in suit of United States.—The United States, suing in its own interest to cancel conveyances made by heirs of a Creek Indian, of land allotted to him as a homestead out of the Creek tribal lands, is in no wise concluded by any matter, whether of fact or law, that may have been adjudged in a former suit (to which it was not a party) between the heirs and one claiming under such conveyances. *Privett v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 455, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1919) 261 Fed. 351.

Vol. III, p. 913, sec. 2139. [First ed., vol. III, p. 382.]

Variance between allegation and proof.—On a prosecution for introducing liquor into that part of the state of Oklahoma that was formerly Indian Territory the fact that the indictment charged that the liquors were introduced into Washington county while the proof showed that they were introduced into Nowata county was held to be immaterial

where both counties were in that part of the state that was formerly Indian Territory. *Flack v. U. S.*, (C. C. A. 8th Cir. 1921) 272 Fed. 680.

Vol. III, p. 919, sec. 1. [First ed., vol. III, p. 384.]

"Indian country."—The term "Indian country," as used in this section, includes any Indian allotment while the title thereto is held in trust by the government. Thus, a public highway is Indian country where the Indians owning allotments adjacent thereto, are also the owners of the land on which the road runs, subject only to the public easement. *Townsend v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 519.

1918 Supp., p. 260, sec. 1.

Application of section.—This section applies to an introduction or to an attempt to introduce intoxicants into the part of Oklahoma which was formerly the Indian Territory, and is not limited to an introduction or attempted introduction into the Indian country. *Prosser v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 252.

Evidence held insufficient to support a forfeiture under this section. see *Townsend v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 519.

1918 Supp., p. 264, sec. 1.

Constitutionality.—This section is valid as an exercise of the power of Congress to prescribe and enforce prohibition in Indian country. *Brown v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 623.

1918 Supp., p. 267, sec. 1.

Construction.—See *McDougal v. Black Panther Oil & Gas Co.*, (C. C. A. 8th Cir. 1921) 276 Fed. 113.

INTERIOR DEPARTMENT

Vol. III, p. 947, sec. 441. [First ed., vol. III, p. 537.]

Power of secretary final and conclusive.—Where the Secretary of the Interior acts within his jurisdiction the question whether there is error in his ruling is immaterial unless he acted arbitrarily. *U. S. v. Lane*, (App. Cas. D. C. 1920) 269 Fed. 202. So where there is more than one reasonable construction open to the Secretary he is free to take the one that appeals most strongly to him, and his action in that regard is not

subject to the review of the courts until the matter has passed beyond his administrative sphere. *Shanks v. Lane*, (App. Cas. D. C. 1920) 269 Fed. 206. Likewise, a decision that the land is not vacant is within the discretion of the Secretary of the Interior and not subject to review by the courts. *Payne v. U. S.*, (App. Cas. D. C. 1920) 269 Fed. 198. And certiorari will not lie for the purpose of reviewing an administrative order made by the Secretary of the Interior. *Mickadiet v. Payne*, (App. Cas. D. C. 1920) 269 Fed. 194.

INTERNAL REVENUE

Vol. III, p. 979, sec. 3142. [First ed., vol. III, p. 558.]

The duties of the Collector of Internal Revenue are purely ministerial and he is vested with no discretion once an assessment is placed in his hand. *Accardo v. Fontenot*, (E. D. La. 1920) 269 Fed. 447.

Vol. III, p. 993, sec. 12. [First ed., vol. III, p. 562.]

Right to recover taxes paid to deputy.—A collector is not responsible for taxes illegally collected by a deputy who was not authorized to collect them. *Hurst v. Lederer*, (C. C. A. 3d Cir. 1921) 273 Fed. 174.

Vol. III, p. 1002, sec. 3172. [First ed., vol. III, p. 576.]

The taxes and penalties prescribed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. § 35, p. 216) are not subject to the application of this and the following sections of this chapter. *Accardo v. Fontenot*, (E. D. La. 1920) 269 Fed. 447.

Vol. III, p. 1006, sec. 3176. [First ed., vol. III, p. 580.]

The 25 per cent. or 50 per cent. added under this section, is a penalty, rather than a tax, and this has been so held even when the principal amount to which the 25 per cent. or 50 per cent. was added was itself clearly a tax. *Thome v. Lynch*, (D. C. Minn. 1921) 269 Fed. 995.

Vol. III, p. 1028, sec. 3220. [First ed., vol. III, p. 597.]

Interest.—Where the penalty, when repaid, was accepted without any agreement or reservation that its acceptance should not affect the question of the payment of interest or the right to demand the same, the recovery of interest on the penalty repaid must be denied. *Dayton Brass Castings Co. v. Gilligan*, (S. D. Ohio 1920) 267 Fed. 872.

Vol. III, p. 1032, sec. 3224. [First ed., vol. III, p. 600.]

Suits in state courts.—See annotation under Vol. III, p. 1034, sec. 3226, *infra*, p. 472.

Purpose and application in general.—“This is a statute having in view the orderly and uninterrupted collection of the revenues of the government, which are necessary to meet its current expenses and public obligations. But in order to make this statute applicable, a tax which is to be collected must be lawful; it must be founded upon some proper subject of taxation, must be assessed in a proper

way, and collected in a legal manner.” *Ledbetter v. Bailey*, (W. D. N. C. 1921) 274 Fed. 375.

The reason underlying this section is that the government shall not be delayed or interfered with in the collection of its revenues. *Thome v. Lynch*, (D. C. Minn. 1921) 269 Fed. 995.

Inhibition of section as including collection of tax.—Unless it appears clear beyond doubt that the property seized or about to be seized is not liable for such assessment, the court will not interfere, since the statute includes the collection of the tax as well as the assessment in its inhibitive mandate. *Markle v. Kirkendall*, (M. D. Pa. 1920) 267 Fed. 498.

Ownership of property.—Whatever may be the ultimate conclusion as to whether, in proceedings to collect an income and excess profits tax by distraint and sale of real and personal property, the property is owned and the business conducted by a corporation or copartnership, the court will not interfere by injunction where it is evident that the collector is proceeding against a person within his jurisdiction and that the property is held by such person either as a corporation or an individual. *Markle v. Kirkendall*, (M. D. Pa. 1920) 267 Fed. 498.

Illegal tax.—This section does not prevent the granting of an injunction against the collection of a tax imposed by an unconstitutional act. *George v. Bailey*, (W. D. N. C. 1921) 274 Fed. 639.

Income and excess profits tax.—This section applies in the case of a suit to restrain the collection of income and excess profits taxes. *Markle v. Kirkendall*, (M. D. Pa. 1920) 267 Fed. 498.

Taxes and penalties under National Prohibition Act.—The collection of taxes and penalties assessed under section 35 of the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 216), will not be enjoined. *Kelly v. Lewellyn*, (W. S. Pa. 1921) 274 Fed. 108; *Regal Drug Corp. v. Wardell*, (C. C. A. 9th Cir. 1921) 273 Fed. 182; *Kausch v. Moore*, (E. D. Mo. 1920) 268 Fed. 668. See also *Accardo v. Fontenot*, (E. D. La. 1920) 269 Fed. 447, wherein it was held that the taxes and penalties prescribed by the National Prohibition Act were not taxes within the meaning of this section.

But in *Connelly v. Gardner*, (E. D. N. Y. 1921) 272 Fed. 911, it was held that this section did not preclude the granting of an injunction to restrain officers from using the process of distraint to collect the penalties imposed by section 35 of the National Prohibition Act. *Connelly v. Gardner*, (E. D. N. Y. 1921) 272 Fed. 911.

Tax on manufacturer of distilled spirits.—This section prevents the granting of an in-

junction to restrain the collection of the tax imposed by R. S. section 3251 (4 Fed. Stat. Ann. (2d ed.) 19) on the manufacturer of distilled spirits, even though such section has been repealed by the National Prohibition Act. *Violette v. Walsh*, (D. C. Mont. 1921) 272 Fed. 1014.

Vol. III, p. 1034, sec. 3226. [First ed., vol. III, p. 601.]

This section was not repealed by section 14a of the act of September 8, 1916 (1918 Supp. Fed. Stat. Ann. p. 335). *Public Service Corp. v. Herold*, (D. C. N. J. 1921) 273 Fed. 282.

Purpose.—The object of the statute requiring a party to exhaust his remedies in the Internal Revenue Department before he shall bring suit is to give the department an opportunity to decide whether in its judgment the tax is legal or illegal, and thus save the delay and expense of litigation. *Loomis v. Wattles*, (C. C. A. 8th Cir. 1920) 266 Fed. 876.

Suits in state courts.—To same effect as original annotation, see *Application of Willman*, (1921) 112 Atl. 806, wherein it was held that a state court had no jurisdiction to pass upon the legality of the assessment of internal revenue taxes or to issue a restraining order relating thereto, because of this section and R. S. sec. 3224 (3 Fed. Stat. Ann. (2d ed.) 1932). See also *Shirk v. Oak St. Permanent Bldg., etc., Assoc.*, (1920) 137 Md. 314, 112 Atl. 808.

When suit may be brought.—To same effect as original annotation, see *Kahn v. U. S.*, (1920) 55 Ct. Cl. 271.

Appeal as condition precedent.—The appeal to the Commissioner of Internal Revenue for the repayment of a tax illegally assessed, which is made by this section a condition precedent to a suit for the recovery back of such tax, may not be neglected as being an idle formality, merely because the Commissioner had, before payment of the tax, rejected a claim for its abatement. *Rock Island, etc., R. Co. v. U. S.*, (1920) 254 U. S. 141, 41 S. Ct. 55, 65 U. S. (L. ed.)—, (affirming (1918) 54 Ct. Cl. 22), wherein the court said: "By Rev. Stat. § 3220, 3 Fed. Stat. Ann. 2d ed. p. 1028, the Commissioner of Internal Revenue is authorized 'on appeal to him made, to remit, refund, and pay back' taxes illegally assessed. It is urged that the 'appeal' to him to remit made a second appeal to him to refund an idle act, and satisfied the requirement of § 3226. Decisions to that effect in suits against a collector are cited, the latest being *Loomis v. Wattles*, — C. C. A. —, 266 Fed. 876. But the words 'on appeal to him made' mean, of course, on appeal in respect of the relief sought on appeal, to refund if refunding is what he is asked to do. The words of § 3226 also must be taken to mean an appeal after

payment, especially in view of § 3228, requiring claims of this sort to be presented to the Commissioner within two years after the cause of action accrued. So that the question is of reading an implied exception into the rule as expressed, when substantially the same objection to the assessment has been urged at an earlier stage.

"Men must turn square corners when they deal with the government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with. *Lex non præcipit inutilia* (Co. Litt. 127b) expresses rather an ideal than an accomplished fact. But in this case we cannot pronounce the second appeal a mere form. On appeal a judge sometimes concurs in a reversal of his decision below. It is possible, as suggested by the Court of Claims, that the second appeal may be heard by a different person. At all events, the words are there in the statute and the regulations, and the court is of opinion that they mark the conditions of the claimant's right. See *Kings County Sav. Inst. v. Blair*, 116 U. S. 200, 29 L. ed. 657, 6 Sup. Ct. Rep. 353. It is unnecessary to consider other objections that the claimant would have to meet before it could recover upon this claim."

A second appeal to the Commissioner of Internal Revenue after payment of the tax is unnecessary where an appeal was taken before the tax was paid and after the ruling of the Commissioner it was paid under protest. *Loomis v. Wattles*, (C. C. A. 8th Cir. 1920) 266 Fed. 876.

Liability of collector.—A collector is not responsible for taxes illegally collected by a deputy who had no authority to collect them. *Hurst v. Lederer*, (C. C. A. 3d Cir. 1921) 273 Fed. 174.

Parties.—Where claims for the refund of inheritance taxes have been filed by the trustees under a will, the executors under the will cannot maintain an action for their recovery. *Kahn v. U. S.*, (1920) 55 Ct. Cl. 271.

Presumptions and burden of proof.—In an action to recover taxes paid under protest it has been declared that the assessment made by the commissioner is presumed prima facie to be accurate and proper but that this presumption is not conclusive and is open to being overcome by adequate testimony. In such a situation the burden is held to be on the plaintiff. *Bernheim Distilling Co. v. Mayes*, (W. D. Ky. 1920) 268 Fed. 629.

In a suit to recover taxes illegally collected the burden of showing payment rests on the plaintiff. *Hurst v. Lederer*, (C. C. A. 3d Cir. 1921) 273 Fed. 174.

Objections on appeal.—An objection that a demand for a refund of the tax after its payment was not made as required by this section cannot be made for the first time on appeal in a suit for recovery of taxes.

Walker v. Gulf, etc., R. Co., (C. C. A. 5th Cir. 1921) 269 Fed. 885.

Vol. III, p. 1037, sec. 3227. [First ed., vol. III, p. 602.]

This section was not repealed by section 14a of the Act of September 8, 1916 (1918 Supp. Fed. Stat. Ann. 835). Public Service Corp. v. Herold, (D. C. N. J. 1921) 273 Fed. 282.

Vol. III, p. 1038, sec. 3229. [First ed., vol. III, p. 604.]

Effect of compromise.—Under this section a compromise once effected, whether before or after prosecution, is as complete a discharge of the defendant as a verdict of acquittal by a jury. *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 544.

Mode of obtaining consent or approval.—“The statute does not expressly state how the consent or approval of these officers is to be obtained. It is evidently contemplated, however, that the advice and consent of the Secretary of the Treasury and the recommendation of the Attorney-General should be sought and obtained by the Commissioner of Internal Revenue, who himself finally passes upon the matter, and who is the party charged with direct dealing with the defendant, and it is to be presumed that, when he finally accepts an offer of compromise of a defendant, he has previously discharged his duty of communicating with the other officers. To hold otherwise would bring the acts of the officers of the government under inquiry and frequently under a suspicion which ought not to be allowed to arise. It is of the highest importance that citizens, who deal with an officer of the government charged with an official duty, shall have the right to presume, in every instance, in the absence of positive proof to the contrary, that such officer did his duty.” *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 544.

Evidence to show compromise.—Evidence showing that money offered in compromise to the proper officer of the government was accepted and retained by him is competent as tending to show that a compromise was effected. *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 544.

Vol. III, p. 1044, sec. 3242. [First ed., vol. III, p. 608.]

This section was not repealed by the National Prohibition Act [1919 Supp. Fed. Stat. Ann. 202] as to an offense committed before the act went into effect. *Tisch v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 208. It has been held, however, that the provisions of this section relating to carrying on the business of a retail liquor dealer without payment of a special tax were repealed by

the National Prohibition Act (1919 Supp. Fed. Stat. Ann. 2d ed. p. 216, sec. 35). *Ketchum v. U. S.*, (C. C. A. 8th Cir. 1921) 270 Fed. 416.

Vol. III, p. 1045, sec. 3244. [First ed., vol. III, p. 613.]

This section was repealed by the National Prohibition Act. *Ravitz v. Hamilton*, (W. D. Ky. 1921) 272 Fed. 721.

What constitutes rectification — Filtration.—The filtration, preparatory to bottling, of whiskey removed from a bonded warehouse by a wholesale liquor dealer, does not constitute rectification within the meaning of this section. *Jones v. Mayes*, (W. D. Ky. 1920) 265 Fed. 365.

Vol. III, p. 1053, sec. 16. [First ed., vol. III, p. 609.]

Section repealed.—It has been held that this section is repealed by implication by the provisions of the National Prohibition Act (1919 Supp. Fed. Stat. Ann. (2d ed.) p. 202 et seq.). *Farley v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 721.

Intent.—Criminal intent is not necessary to constitute a violation of this section. Thus, one who furnishes liquor to another with knowledge that the latter is engaged in retailing liquor without having paid the special tax, becomes an associate and participant with him in the retail business in violation of this section, even though his purpose in furnishing him with the liquor is to entrap for a violation of a state prohibition law. *Clendennin v. U. S.*, (C. C. A. 4th Cir. 1920) 265 Fed. 412. The court said: “The defendant testified that his sole purpose in turning over the six-gallon lot to Nutter was to entrap him and convict him of violating the prohibition law of West Virginia; that to this end he had an understanding with Nutter that he should come to his room at about two o'clock in the morning and get the whisky; that Nutter paid nothing for it; that he did this with the full understanding that Nutter was an illicit retail liquor dealer, and would sell or offer the liquor for sale in violation of the state and federal laws. He testified, further, that he had an arrangement with the owners of certain places where he expected Nutter to sell the whisky that he would be informed when Nutter appeared to sell it, so that he could have him arrested under a warrant charging violation of the West Virginia statute. It does not appear from his testimony that he made any explanation to Nutter of his reasons for giving him the whisky. It is evident that, if the jury believed Nutter's testimony that he had not only bought six gallons of whisky on this occasion from the defendant, but on other occasions in the same summer had bought as small quantities as a case or two, they would necessarily infer that defendant was

guilty of retailing. On the other hand, if the jury rejected the entire testimony offered on the part of the government, and accepted the testimony on the part of the defendant, they would necessarily infer that the defendant was guilty of participating in the business of a retail liquor dealer without a license. If he delivered to Nutter six gallons of whisky, knowing, as he says he did, that Nutter was engaged in retailing liquor without having paid the special tax, with the expectation and design, which he said he had, that Nutter was to use it in the prosecution of that business, he became an associate and participant with Nutter in the retail business, in violation of the federal law. Criminal intent was not necessary. *United States v. Barnhardt*, 24 Fed. Cas. No. 14,526; *United States v. Rectifying Establishment*, 27 Fed. Cas. No. 16,131; *State v. Downs*, 116 N. C. 1064, 21 S. E. 689. Co-operation with Nutter made the defendant equally guilty with him. *Wortham v. State*, 80 Miss. 205, 32 So. 50. He could not escape the penalty of the federal law on the ground that his intention in the transaction was to promote the enforcement of the state laws. Even if he had acted under express official authority from the state of West Virginia, he could not deal in liquor, directly or indirectly, either alone or in conjunction with Nutter, without paying the special tax required by the federal statute. So it was expressly decided in *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. ed. 281, 4 Ann. Cas. 737. We know of no principle of the law of entrapment, and we can find no authority, which sustains the position that the judicial power extends to granting immunity to a state police officer who, without the sanction of federal authority, sells liquor to a dealer or participates in the dealer's business, for the purpose of convicting him of violating a state law. Such an unlawful practice would be productive of great abuse, and add to the difficulties of enforcing the federal revenue law."

Who are "dealers."—One or two sales of liquor are not sufficient to convict of carrying on the business of a retail liquor dealer without having paid the special tax when made by one having none of the appliances or surroundings of retail liquor dealers, to an intimate acquaintance or friend out of the seller's private stock not held for or offered to purchasers who should apply for it. *McNutt v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 670. And one who carries on the business of selling other liquors than distilled spirits, wines or malt liquors, is not a retail liquor dealer within the terms of the statute. *McNutt v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 670.

Vol. III, p. 1068. [*Brokers.*] [First ed., 1916 Supp., p. 86.]

Sufficiency of affidavit of defense.—In *Self v. Pennsylvania Steel Export Co.*, (Pa.

1921) 113 Atl. 412, the plaintiffs sued to recover brokerage commissions alleged to be due them for selling certain goods for the defendants. The affidavit of defense denied liability on the ground, among others, that the plaintiffs had failed to pay the tax imposed upon brokers by subdivision 4 of this section, and was held sufficient on a rule for judgment for insufficiency.

Vol. IV, p. 19, sec. 3251. [First ed., vol. III, p. 631.]

Section not repealed by National Prohibition Act.—This section "imposes a tax on the manufacturer of distilled spirits, regardless of their purpose. To manufacture such spirits is yet lawful. The tax, not being inconsistent with the act (the National Prohibition Act) is law today, which by virtue of section 35 (of the National Prohibition Act) it is the duty of defendant (collector of internal revenue) to execute. The tax is on the mere manufacture, which the law does not forbid. That the manufacture is in violation of regulations and for beverage purposes, which the law does forbid, does not avoid the tax.

"The tax is on a lawful occupation, and is none the less legal because the occupation is pursued by unlawful means to unlawful ends. A defendant will not be heard to say he was manufacturing for beverage purposes. It is no defense to one crime that defendant intended or committed another. As well might an auto owner resist his license tax because he devoted his car exclusively to unlawful whisky running. A defendant cannot plead his own wrong to excuse another charged. That plaintiff is indicted for illicit manufacture and may be acquitted is not material. The indictment does not absolve defendant of his duty to collect (see *Harding v. Woodcock*, 137 U. S. 47, 11 Sup. Ct. 6, 34 L. ed. 580), and an acquittal would not relieve plaintiff of his obligation to pay; for the taxes are not penalties, fines, or forfeitures, in the sense understood in criminal law." *Violette v. Walsh*, (D. C. Mont. 1921) 272 Fed. 1014.

Vol. IV, p. 23, sec. 3257. [First ed., vol. III, p. 634.]

Section repealed.—This section was repealed by the National Prohibition Act of October 28, 1919, (Fed. Stat. Ann. 1919 Supp. 197). *U. S. v. Yuginovich*, (1921) 256 U. S. —, 41 Sup. Ct. 561, 65 U. S. (L. ed.) —; *Ketchum v. U. S.*, (C. C. A. 8th Cir. 1921) 270 Fed. 416.

Vol. IV, p. 24, sec. 3258. [First ed., vol. III, p. 635.]

Section repealed.—The decisions are in conflict as to whether this section was repealed by the National Prohibition Act (1919 Fed. Stat. Ann. 202). Some of the

courts hold that it was repealed. *Sanford v. U. S.*, (C. C. A. 8th Cir. 1921) 274 Fed. 369; *Ketchum v. U. S.*, (C. C. A. 8th Cir. 1921) 270 Fed. 416; *U. S. v. Stafoff*, (E. D. Mo. 1920) 268 Fed. 417. Others that it was not repealed. *U. S. v. Phillips*, (S. D. N. Y. 1920) 270 Fed. 281; *U. S. v. De Large*, (D. C. Neb. 1921) 269 Fed. 820; *U. S. v. Sacein Rouhana Farhat*, (S. D. Ohio 1920) 269 Fed. 33. See also *Ex p. Lawrence*, (D. C. Mont. 1921) 273 Fed. 876, distinguishing the *Yuginovich Case*, 256 U. S. —, 41 Sup. Ct. 551, 65 U. S. (L. ed.), wherein it was held that this section was not repealed by the National Prohibition Act in so far as the offense did not involve distillation for beverage purposes.

Forfeiture of money or checks.—Where money or a check is found in such relation to contraband articles and apparatus that a clear inference can be made to justify the conclusion that it is the proceeds of the illegal enterprise and used in the operation and carrying on of such business, the right to forfeit such property is clearly contemplated. *U. S. v. One Machine, etc.*, (W. D. Wash. 1920) 267 Fed. 501.

Vol. IV, p. 26, sec. 3260. [First ed., vol. III, p. 638.]

Section repealed.—This section is not inconsistent with the provisions of the National Prohibition Act and is therefore not repealed by that Act. *U. S. v. Sacein Rouhana Farhat*, (S. D. Ohio 1920) 269 Fed. 33. But it has been held that this section is repealed by the National Prohibition Act. (1919 Supp. Fed. Stat. Ann. 2d ed. p. 216, sec. 35.) *Ketchum v. U. S.*, (C. C. A. 8th Cir. 1921) 270 Fed. 416.

Vol. IV, p. 40, sec. 3279.

Section repealed.—This section was repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. 202). *U. S. v. Yuginovich*, (1921) 256 U. S. —, 41 Sup. Ct. 551, 65 U. S. (L. ed.) —; *Sanford v. U. S.*, (C. C. A. 8th Cir. 1921) 274 Fed. 369. And it has been held that the provision in this section relating to persons working in or carrying distilled spirits from, and raw materials to, a distillery are repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 216, sec. 35). *Ketchum v. U. S.*, (C. C. A. 8th Cir. 1921) 270 Fed. 416.

Vol. IV, p. 41, sec. 3281. [First ed., vol. III, p. 651.]

Section repealed.—There is conflict as to whether this section was repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. 202). Some of the courts express the opinion that it was repealed. *U. S. v. Yuginovich*, (1921) 256 U. S. —, 41 Sup. Ct. 551, 65 U. S. (L. ed.) —; *Sanford v. U. S.*,

(C. C. A. 8th Cir. 1921) 274 Fed. 369. Others hold that it was not repealed. *U. S. v. Phillips*, (S. D. N. Y. 1920) 270 Fed. 281; *Ex p. Lawrence*, (D. C. Mont. 1921) 273 Fed. 876, distinguishing the *Yuginovich case*, 256 U. S. —, 41 Sup. Ct. 551, 65 U. S. (L. ed.) —, the latter case holding that this section was not repealed by the National Prohibition Act in so far as the offense did not involve distillation for beverage purposes.

Possession of illicit still as creating presumption of guilt.—In a prosecution for a violation of R. S. secs. 3258, 3279 and this section, the possession of an illicit still by the defendants creates a prima facie presumption of their guilt. Such presumption, however, may be rebutted, either by circumstances, or by the direct testimony of the parties charged, or of others. Whether such presumption is, on consideration of all the testimony, sufficient to convict the defendants beyond a reasonable doubt, is a question for the jury. *Barton v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 174.

Forfeiture of money or checks.—Where money or a check is found in such relation to contraband articles and apparatus that a clear inference can be made to justify the conclusion that it is the proceeds of the illegal enterprise and used in the operation and carrying on of such business, the right to forfeit such property is clearly contemplated. *U. S. v. One Machine, etc.*, (W. D. Wash. 1920) 267 Fed. 501.

Enforcing forfeiture after conviction.—It is held that a proceeding to enforce a forfeiture of the property seized may be maintained although the person against whom it is sought to enforce it has been convicted under an indictment involving the same acts. *U. S. v. One Machine, etc.*, (W. D. Wash. 1920) 267 Fed. 501, wherein the court said:

"It is now contended in the argument presented that the defendant, having been convicted under an indictment involving the very same acts and evidence involved herein, that the court is without authority to condemn or forfeit the property involved, and that it would be invoking a double penalty, or punishing the defendant twice for the same offense, and that the property sought to be condemned is not included within the scope of the statute. As to the double penalty, suffice it to say that this is a proceeding in rem, and is comprehended within the penalty fixed by statute."

Vol. IV, p. 44, sec. 3282. [First ed., vol. III, p. 654.]

Section repealed.—The courts differ as to whether this section was repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. 202, 1919 Supp. 197). Thus, in *U. S. v. Yuginovich*, (1921) 256 U. S. —, 41 Sup. Ct. 551, 65 U. S. (L. ed.) —; *U. S. v. Stafoff*, (E. D. Mo. 1920) 268 Fed. 417, it was held that it was repealed, while

in *U. S. v. De Large*, (D. C. Neb. 1921) 269 Fed. 820; *U. S. v. Phillips*, (S. D. N. Y. 1920) 270 Fed. 281, and *Ex p. Lawrence*, (D. C. Mont. 1921) 273 Fed. 876 (distinguishing *U. S. v. Yuginovich, supra*), it was held that it was not repealed.

An acquittal on counts charging a violation of sections 3281 and 3259 of the Revised Statutes, relating to the business of a distiller, is not in effect an acquittal under a count charging a violation of the provision of this section that "no mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law." *Doan v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 982.

Vol. IV, p. 51, sec. 3293. [First ed., vol. III, p. 659.]

Stolen whisky.—Where whisky, which was in a bonded warehouse at the time the Eighteenth Amendment took effect and in the exclusive control, custody and care of the United States, is stolen the owner is not subject to the payment of the tax thereon. *Kentucky Distilleries, etc., Co. v. Hamilton*, (W. D. Ky. 1921) 274 Fed. 209. The court said:

"The Eighteenth Amendment was of course a radical change in respect to distilled spirits, which had been previously made lawfully and properly. No compensation was offered by the people for the property, the value of which was thus probably largely destroyed, unless in course of time the spirits could be sold under the law. Meantime, however, as we have seen, the United States altogether controlled the custody thereof.

"This situation presents in bald form the question whether the plaintiff shall be held responsible for the acts of the criminals who took the spirits from the custody of the government officials, when the owner could not control the situation, nor prevent the criminal acts, and in fact had no opportunity to do so. To exact taxes under such circumstances would seem to be unjust and oppressive, and until the question is settled by final authority we are not willing to say that the government can exact taxation under such conditions, especially as the property can never be restored to the owner—a situation in which the plaintiff without fault on its part would lose both property and the taxes paid.

"In our opinion the government is not under present conditions entitled to the taxes on spirits in warehouses until, in some way, they are removed therefrom by the owner. The taxation would then be due whether the owner removed them lawfully or unlawfully. The rights of the owner cannot justly be interfered with by the wrongful acts of others, of which he knew nothing, which he could not control, and which the government ought to have prevented, if it claims taxation."

Vol. IV, p. 56, sec. 3296. [First ed., vol. III, p. 671.]

Repeal of section by National Prohibition Act.—This section was not repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. 202 *et seq.*). *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188; *U. S. v. Turner*, (W. D. Va. 1920) 266 Fed. 248. But in *Reed v. Thurmond*, (C. C. A. 4th Cir. 1920) 269 Fed. 252, the court said regarding the effect of the National Prohibition Act on this section:

"It goes without saying that this amendment and the act passed by its authority effected a radical change in the legislative policy and attitude of the country respecting alcoholic beverages. Instead of encouraging, or at least recognizing as legitimate, the production and use of such beverages, and deriving a very large revenue therefrom, the manufacture and sale of any sort of beverage containing one-half of 1 per centum of alcohol or more is now wholly and strictly forbidden. This being so, it would seem necessarily to follow, under the most familiar rules of statutory construction, that if the Volstead Act is inconsistent with the provisions of section 3296 and also covers the same subject-matter, it supercedes and by implication repeals that section. And to our minds the Volstead Act, in its entire scope and purpose, is plainly inconsistent with the scheme of revenue protection embodied in the Revised Statutes and in the section under review." *Reed v. Thurmond*, (C. C. A. 4th Cir. 1920) 269 Fed. 252.

Application.—This section and section 6 of the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 207) may in some cases apply both to the same transaction. "There is no constitutional objection to making one act or one transaction a violation of two statutes, although both emanate from the same sovereignty, if each offense embraces an element not embraced in the other." *U. S. v. Turner*, (W. D. Va. 1920) 266 Fed. 248.

No permit authorized to be given under the National Prohibition Act justifies the removal of distilled spirits from a government warehouse without paying the tax imposed on such liquor—the crime denounced by this section. *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

Evidence.—In a prosecution under this section an element of the offense is that the liquor was untaxed which must be proved by the government. *U. S. v. Turner*, (W. D. Va. 1920) 266 Fed. 248.

Vol. IV, p. 71, sec. 3318. [First ed., vol. III, p. 685.]

Seizure of books and papers.—It has been held that when the books required under this section are not kept or are kept insufficiently, all documents showing transactions which

should be so recorded may be seized on search warrant under the pertinent provisions of the Espionage Act. *U. S. v. Kraus*, (S. D. N. Y.) 1921) 270 Fed. 578.

Vol. IV, p. 107, sec. 51. [First ed., vol. III, p. 663.]

This section was not repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 202). *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

Vol. IV, p. 110, sec. 59. [First ed., vol. III, p. 666.]

This section was not repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 202). *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

No permit under the National Prohibition Act would justify the removal of liquors from a warehouse in the absence of the storekeeper. *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

Removal from warehouse and transportation distinguished.—"Failure to pay the tax on the liquor before removing it from the bonded warehouse, or to remove it during the absence of the storekeeper or without his knowledge, which are denounced by the earlier act, are a different class of offenses from those of transporting liquor without a permit, or without complying with the other requirements of the Enforcement Act, relative to transportation. And a conviction or acquittal on any or all of one class would not exempt the defendant from prosecution or conviction on any or all of the other class." *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

Vol. IV, p. 173, sec. 1. [First ed., 1916 Supp., p. 71.]

Consolidation of indictments.—An indictment charging the manufacture of smoking opium in violation of this section may be properly consolidated and tried with an indictment charging the concealment of smoking opium in violation of section 2 of the Act of Feb. 9, 1909, as amended by the Act of Jan. 17, 1914 (3 Fed. Stat. Ann. (2d ed.) 725). *Toy v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 326.

Evidence held to show manufacture of smoking opium, see *Toy v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 326.

Vol. IV, p. 176, sec. 5. [First ed., 1916 Supp., p. 72.]

Fines.—There cannot be an imposition of two fines for violating the same section in two different ways. *Toy v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 326.

Vol. IV, p. 177, sec. 1. [First ed., 1916 Supp., p. 101.]

Constitutionality.—This act is constitutional. *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 U. S. 544.

Validity of state law on same subject.—There is no such conflict between this act and Minn. Laws 1915, chap. 260, regulating traffic in habit-forming narcotic drugs, as invalidates the state statute, although the prohibitory measures of the Federal statute do not apply to the disposition and dispensation of drugs by physicians registered under the act, in the regular course of professional practice, provided records are kept for official inspection, while, under the state law, physicians can only furnish prescriptions to addicts, and may not dispense the drugs to such persons at pleasure from stocks of their own. *Minnesota v. Martinson*, (1921) 256 U. S. 41, 41 S. Ct. 425, 65 U. S. (L. ed.) —, *affirming* (1919) 144 Minn. 206, 174 N. W. 823.

Purpose of section.—It has been held no error to instruct the jury regarding this section: "Now, the purposes of the act of Congress are, first, to obtain a license tax for the government as a part of its revenue; incidentally, its purpose is to prevent sales being made to those who are opium addicts, or administering to opium addicts." *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 544.

U. S. Supreme Court decisions as controlling.—Where the United States Supreme Court has determined the meaning of this act conflicting rulings by the Treasury Department are to be disregarded. *Rothman v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 31.

Vol. IV, p. 178, sec. 2. [First ed., 1916 Supp., p. 102.]

What constitutes violation.—An offense against the United States by violation of this section arises where it appears that for a consideration the defendant issued an order or "prescription" for opium, not in the regular course of his professional practice, but to an "addict," for a prohibited use, and that thereupon, as was intended, the addict presented the prescription to and had it filled by a dealer, who had no reason to believe that it had been wrongfully issued. *U. S. v. Keidanz*, (S. D. N. Y. 1921) 270 Fed. 586, the court said:

"The act makes it unlawful for any one to 'sell, barter, exchange or give away' opium, except in a case, among others, where it is dispensed or prescribed by a physician 'in the course of his professional practice only,' and admittedly, under the construction recently placed upon these provisions by the Supreme Court in *Jin Fuey Moy*, (No. 44, December 6, 1920) 254 U. S. —, 41 Sup. Ct. 98, 65 L. Ed. —, the physician as well

as the dealer may be convicted, where both have the requisite criminal intent."

Necessity of proof that United States was defrauded.—In order to sustain a conviction under this section it is not necessary to show that the government has been defrauded. *Hoyt v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 792.

Issuance of prescription by physicians—

In general.—A physician may be found guilty of participating as a principal in the prohibited sale of an opium derivative belonging to another person, where he unlawfully issued a prescription therefor to the would-be purchaser, in view of the provision of this section, making it unlawful for any person to sell, barter, exchange, or give away any such drug except in pursuance of a written order, on a form to be issued in blank for that purpose, by the Commissioner of Internal Revenue, with exceptions in favor of registered physicians dispensing or distributing any such drug to patients in the course of their professional practice only, and of the sale, dispensing, or distribution of the drugs by a dealer upon prescriptions issued by registered physicians. *Jim Fuey Moy v. U. S.*, (1920) 254 U. S. 189, 41 S. Ct. 98, 65 U. S. (L. ed.) —, (*affirming* (W. D. Pa. 1918) 253 Fed. 213) wherein the court said: "It is objected that the act of selling or giving away a drug and the act of issuing a prescription are so essentially different that to allege that defendant sold the drug by issuing a prescription for it amounts to a contradiction of terms, and the repugnance renders the indictment fatally defective. The government suggests that the clause as to issuing the prescription may be rejected as surplusage; but we are inclined to think it enters so intimately into the description of the offense intended to be charged that it cannot be eliminated, and that unless defendant could 'sell' in a criminal sense, by issuing a prescription, the indictment is bad. If 'selling' must be confined to a parting with one's own property, there might be difficulty. But by § 332 of the Criminal Code, 7 Fed. Stat. Anno. 2d ed. p. 984, 'whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.' Taking this together with the clauses quoted from § 2 of the Anti-narcotic Act, it is easy to see, and the evidence in this case demonstrates, that one may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription to the would-be purchaser. Hence there is no necessary repugnance between prescribing and selling, and the indictment must be sustained. . . . In each case where defendant was found guilty the evidence fully warranted the jury in finding that he aided, abetted, and procured a sale

of morphine sulphate without written order upon a blank form issued by the Commissioner of Internal Revenue; and that he did this by means of prescription issued not to a patient, and not in the course of his professional practice, contrary to the prohibition of § 2 of the act. Manifestly, the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it, nor the dealer who knowingly accepts and fills it. *Webb v. United States*, 249 U. S. 96, 63 L. ed. 497, 39 Sup. Ct. Rep. 217."

Good faith of physician in prescribing.—

When a physician is charged with unlawfully selling or prescribing drugs under the Harrison Act, the case turns largely upon his good faith in prescribing drugs to his regular patients, for maladies requiring the administration of the drug, or whether he prescribed for persons seeking his professional aid merely to procure the drug. *Barbot v. U. S.*, (C. C. A. 4th Cir. 1921) 273 Fed. 919.

Necessity of taking written order.—Under this act a registered physician is not required to take a written order, or to keep a record of morphine administered by him to a patient as an element of a good-faith medical treatment; but, although registered and taxed as a physician, and only as a physician, he cannot lawfully sell, bargain, or give away morphine without at least taking a written order therefor. *Loewenthal v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 563.

Aiding and abetting by physician.—A physician who issues a prescription which is illegal under the act because not issued in the attempted cure of the habit, knowing it is to be filled by a druggist who knows of its illegality, aids and abets the druggist in violating the act and in so doing commits the substantive crime. *Harris v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 785.

Entrapment of defendant.—In *Butts v. U. S.*, (C. C. A. 8th Cir. 1921) 273 Fed. 35, the court in reversing a judgment of conviction for selling morphine on the ground that defendant was entrapped into committing the offense, said:

"When the entire evidence in this record is considered, it conclusively proved (1) that the defendant was not and never had been engaged in dealing in morphine, and that he never sold any of it to any one before the transaction here in issue; and (2) that the conception of and the intention to do the

acts which the defendant did in this matter did not originate in his mind or with him, but were the products of the fertile brains of the officers of the government, which they instilled into the mind of the defendant, and by deceitful representations and importunities lured him to put into effect.

"It is not denied that in cases where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes no defense to such a prosecution. *Price v. United States*, 165 U. S. 311, 315, 17 Sup. Ct. 366, 41 L. ed. 727; *Grimm v. United States*, 156 U. S. 604, 610, 15 Sup. Ct. 470, 39 L. ed. 550; *Goode v. United States*, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297; *Andrews v. United States*, 162 U. S. 420, 423, 16 Sup. Ct. 798, 40 L. Ed. 1023; *Fiunkin v. United States*, (C. C. A.) 265 Fed. 1. But when the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never conceived any intention of committing the offense prosecuted, or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefor, is and ought to be fatal to the prosecution, and to entitle the accused to a verdict of not guilty. *Peterson v. United States*, 256 Fed. 433, 166 C. C. A. 509; *United States v. Echols*, (D. C.) 253 Fed. 862; *Sam Yick v. United States*, 240 Fed. 60, 65, 67, 153 C. C. A. 96; *Voves v. United States*, 249 Fed. 191, 192, 161 C. C. A. 227; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106, 1108; *Woo Wai et al. v. United States*, 223 Fed. 412, 414, 137 C. C. A. 604. There was ample, if not conclusive, evidence in this case to sustain a finding of the jury that this case fell under the latter rule. The defendant had never committed any such offense as the officers of the government arrested and prosecuted him for prior to the time when they induced him to do the acts disclosed by this testimony. There is no evidence that he had ever contemplated, much less intended to sell any morphine. He had never done so—he had none to sell. The officers, through their agent, Rudolph, incited, lured, and persuaded him by false representations to go to a third person and get the morphine for his acquaintance, the officer's agent, and to consent either to sell it or to act as the agent of the party from whom he received it in the sale the officers betrayed him into.

"The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and pun-

ishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it. It was fatal error to refuse to instruct the jury as requested, and it is unnecessary to discuss the other alleged errors at the trial, because, if they existed, they will probably not be committed again."

In *Fiunkin v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 1, it was contended that government officers had caused the defendant to violate the provisions of this Act by sending a drug addict to his store to purchase morphine and cocaine. Answering this contention, the court said: "It is argued that the defendant was induced, through the machinations and instigation of the government officers, to commit the offense, or, in other words, that he was entrapped by such contrivance of the officers to do the thing which the law condemns. The evidence fails to show, however, that such was the case. The officers had nothing to do with the defendant's having the drugs in his possession. They had nothing to do with his willingness to sell the same for a consideration. They had nothing whatever to do with the conditions that prevailed prior to the time they sent the addict to the store to make the purchase, nor with the defendant's state of mind or purpose of action, should opportunity present itself, of dealing with the drug as a commodity for sale to those who were willing to buy. Nor did they offer any inducement to the defendant to sell, except that they did, through Collins, offer to buy, and proffered the amount of money that defendant fixed as the price he was willing to take. Nothing beyond this appears in the testimony. It is true that the defendant was entrapped by what was done to sell the drug to the government officers, and to put himself in a position of yielding up evidence of his commission of the offense. But this does not signify that the government officers lured him, or incited or induced him, to do what he would otherwise have done, if any other addict had applied to him to purchase the drug."

Indictment—Sufficiency.—An indictment charging the offense substantially in the language of the statute is sufficient. *Di Preta v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 73. The indictment need not negative the exception of the statute in favor of physicians. *Di Preta v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 73.

An indictment for the unlawful sale of morphine which, in addition to the other

usual allegations, charges that the accused at various times between certain specified dates, sold, bartered, and gave away morphine to divers persons, both the exact quantities and the names of the recipients being, as the indictment alleged, to the grand jurors unknown, is sufficient as against demurrer and a motion to quash, on the ground that it failed to state the times and places at which or the persons to whom the drug was furnished. *Gregory v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 119.

Charging accessory with acts of principal.—The acts of the principal become the acts of the accessory or aider, and such accessory may be charged as having done the act himself, and be indicted and punished accordingly. *Di Preta v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 73.

Duplicity.—Counts in an indictment under this section are not duplicitous because they leave it uncertain whether defendant, a physician, is being charged with being a dealer generally or with making a single sale only without registering, as in either case the offense is the same. *Loewenthal v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 563.

Examination of talesmen.—In a prosecution under this section the refusal of the court to permit defendant's counsel to ascertain whether or not any of the jurors had preconceived ideas as to the treatment of drug addicts, is not error. *Hoyt v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 792.

Evidence—Other offenses.—On a prosecution under this act for making unlawful sales evidence is not confined to proof of the particular sales alleged, the principle applying that if intent or motive be one of the elements of the crime charged evidence of other like conduct by the defendant at as near the time charged is admissible. *Harris v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 785.

Evidence showing the issuance of prescriptions to numerous other persons than those named in the indictment is admissible. *Dysart v. U. S.*, (C. C. A. 5th Cir. 1921) 270 Fed. 77. The court said:

"Over objection, evidence was admitted to the effect that plaintiff in error had issued prescriptions to a large number of persons other than those described in the indictment. In his charge to the jury, the court limited the effect of such evidence to the intent with which the prescriptions for persons named in the indictment were issued, and distinctly charged the jury that conviction could not be based upon prescriptions for persons not so named. As so limited and explained, the evidence was admissible. It threw light upon the intent of plaintiff in error in respect to the vital question in the case of whether he was lawfully dispensing drugs in the course of his practice, or was using his profession of physician as a cloak to cover up a violation of the law."

Amount of drugs purchased by defendant.—Evidence as to the amount of drugs pur-

chased by the defendant, a physician, is admissible where the question is involved whether the defendant was practicing his profession in good faith in an attempt to cure the addicts to whom defendant dispensed the drugs, or whether he was engaged in handling the prohibited drugs as merchandise. In determining that question the jury is entitled to have before it information as to the quantity of the drugs purchased. *Hoyt v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 792.

Compliance with state law as to registration of addicts.—In a case where it was argued that the court committed an error in not permitting counsel for defendant to bring out facts and the law in relation to the registration under the New York state law of certain of the addicts named in the indictment, and as to the possession by those addicts of state registration cards permitting them to obtain certain quantities of narcotics, and it was contended that the defendant should have been permitted to show that he dispensed the drugs only to persons holding such cards it was said: "We do not see that it was at all material whether the addicts had or had not complied with the state law, or whether the defendant had refused to treat any addicts who had not obtained such cards. The defendant was not being tried for any offense against the New York state law, but for the violation of a federal act." *Hoyt v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 792.

Requiring production of record of sales.—Where a defendant who is accused of selling drugs in violation of this act sets up in defense that the sale was made in connection with a treatment for the cure of persons addicted to the drug habit it is proper to require him on cross-examination to exhibit the record of his disposition of narcotics. The court said: "This was the record required by law to be kept. Whatever the weight of this testimony, its competency is clear on the issues both of good faith and of the character of business conducted by Sims." *Sims v. U. S.*, (C. C. A. 8th Cir. 1920) 268 Fed. 234.

Sufficiency.—Evidence was held sufficient to sustain conviction of a physician in *Hoyt v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 792.

Variance.—There is not a fatal variance where the indictment charges a physician with making unlawful sales of morphine sulphate and the evidence shows the issuance of prescriptions and not the sale. *Dysart v. U. S.*, (C. C. A. 5th Cir. 1921) 270 Fed. 77.

Question for jury.—"It may be true that a physician's method of treatment of drug addiction is a question to be determined by the physician himself, and not by a jury; but it can only be true so long as the physician is pursuing his method in his honest endeavor to effect a cure. If that is not his purpose, and he is dispensing the drug to keep the addict comfortable, he is violating the law, and whether he is doing

the one thing or the other is a question the jury must decide." *Hoyt v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 792.

Effect of acquittal—On one count.—An acquittal of a physician on a charge of purchasing drugs for the purposes of sale as a dealer is not an acquittal on a charge of later selling some of the drugs without the use of the order form or without registering. *Loewenthal v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 563.

On conspiracy charge.—An acquittal on the charge of a conspiracy to violate this act does not prevent a conviction for committing the substantive offense. *Harris v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 785.

Judgment on conviction on several counts.—Where a judgment on conviction is unitary, and covers conviction under each and all of the several counts, and the punishment imposed was less than might have been imposed under any one of the counts, the judgment is not subject to reversal, if any of the counts on which conviction was had is good and sufficient to support the judgment. *Loewenthal v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 563.

Objections on appeal.—Where officers were permitted to testify as to what drugs were found on the defendant's premises, in a prosecution under this act, an objection on appeal to the admission of such testimony on the ground that the search was unlawful comes too late to affect the admissibility of the testimony when not made at the trial. *Sims v. U. S.*, (C. C. A. 8th Cir. 1920) 268 Fed. 234.

Vol. IV, p. 183, sec. 6. [First ed., 1916 Supp., p. 106.]

Basis of exception.—The exception provided for in this section was based on humanitarian grounds. *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 544.

Vol. IV, p. 187, sec. 8. [First ed., 1916 Supp., p. 106.]

The second proviso in this section applies to all the exceptions in the act and not merely to those found in this section. *Rothman v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 31.

Possession of prohibited drugs as violation.—This section makes the possession or control of the prohibited drugs not only presumptive evidence of a violation of its provisions, but also a violation of section 1 of the Act. *Fiunkin v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 1.

Indictment—Averments negating exceptions.—To the same effect as the annotation in 1919 Supplement, see *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 544.

The words "any of the aforesaid drugs" do not permit a count to be based on each drug found in the possession of the defendant at the same time and place and a separate

conviction cannot be had on each count. *Braden v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 441.

Burden of proof.—Where, in a prosecution under this Act, the evidence discloses possession by the defendant of the prohibited drugs, the burden is cast upon him to show that he has paid the tax. *Fiunkin v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 1.

The burden of proving an exemption contained in section 6 of this Act (4 Fed. Stat. 1269) is upon the defendant. *Oliver v. U. S.*, (C. C. A. 4th Cir. 1920) 267 Fed. 544.

Evidence—Sale or dealing in prohibited drugs.—It being necessary to show that defendant was one of the classes of persons required to register under section one of this act, evidence is admissible to show that he sold or dealt in the prohibited drugs although he is charged with having them in his possession. *Braden v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 441.

Proof of overt acts in case of conspiracy.—If a conspiracy is proved to have existed between the defendants, it is not necessary to prove that all of the defendants did the overt acts which they are alleged to have done. All that is necessary is that one or more of such parties did an act to effect the object of the conspiracy. *Rothman v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 31, holding that an acquittal as to one of the substantive offenses will not prevent a conviction for conspiracy.

Vol. IV, p. 228, sec. 8. [First ed., vol. III, p. 784.]

Under the Act of June 13, 1898, ch. 448, sec. 29—*Recovery back of tax.*—"Taxes paid upon certain legacies conformably to a return made by executors in accordance with the War Revenue Act of June 13, 1898, and the regulations of the Internal Revenue Department, may not be recovered back for want of a formal assessment made before the repeal of such act by the Act of April 12, 1902, since such tax must be deemed to have been "imposed" within the meaning of the saving clause in the repealing act, preserving all taxes imposed prior to the taking effect of such act, there being no basis for the claim that the amount of the tax was uncertain, except the possibility that, the estate not having been settled, the legacies might be called upon to pay debts. *Cochran v. U. S.*, (1921) 264 U. S. 387, 41 Sup. Ct. 166, 65 U. S. (L. ed.) —, *affirming* (1919) 54 Ct. Cl. 219.

Vol. IV, p. 232, sec. 3. [First ed., vol. III, p. 787.]

Laches.—Where suit is brought on December 31, 1919, under this section for the refund of inheritance taxes assessed and collected on June 18, 1902, under the Act of June 13, 1898, ch. 448, sec. 29 [4 Fed. Stat.

Ann. (2d ed.) 230], and application has been made to the Treasury Department February 18, 1916, and rejected April 19, 1916, the plaintiff is barred by laches and cannot recover. *Clowes v. U. S.*, (1920) 55 Ct. Cl. 446, wherein it was said: "If the plaintiff's theory be correct, there would be absolutely no limit to the time within which claims for the refunding of taxes under the Act of June 27, 1902, might be presented. In this particular case it appears that the claim was not presented for about fourteen years after the passage of that Act. If no specific statute is to be invoked as limiting the time within which such claim must be presented, if the Act of July 27, 1912, has no application thereto and the right rests solely upon the Act of June 27, 1902, it seems to us that under that act it must be held that claims must be presented within a reasonable time, and the period of two years provided by section 3228, Revised Statutes, might even, by analogy, be regarded as reasonable, and that one who allows a claim of that sort to rest for a period of fourteen years has been guilty of laches such as should bar a recovery. If a claim of this nature may lie dormant fourteen years, it may lie dormant an indefinite time, and we cannot conceive that such a rule may properly be invoked."

Vol. IV, p. 236, sec. 1.

Laches.—Where a banking company files its application for refund on October 6, 1913, under this section and the application is rejected by the Commissioner of Internal Revenue on April 13, 1917, and suit is brought July 25, 1918, the plaintiff is barred by laches and cannot recover. *Union Trust Co. v. U. S.*, (1920) 55 Ct. Cl. 424.

Vol. IV, p. 239, par. B. [First ed., 1914 Supp., p. 186.]

Dividends.—To same effect as first paragraph in 1918 Supplement annotation, see *Stoffregen v. Moore*, (E. D. Mo. 1920) 264 Fed. 232.

Losses "incurred in trade" have been construed as meaning in the actual business of the taxpayer as distinguished from isolated transactions. Thus, losses incurred in isolated transactions on an exchange and in no way connected with the regular business of the taxpayer are not to be deducted from his gross income as "losses incurred in trade." *Mente v. Eisner*, (C. C. A. 2d Cir. 1920) 266 Fed. 161, 11 A. L. R. 496. The court further said in this connection: "There is an inconsistency in making profits derived from such transactions a part of the taxpayer's gross income and, on the other hand, allowing him no deduction for losses; but tax laws are not required to be perfect, or even consistent. It must be determined from the facts in each case whether or not the losses claimed to be deducted have been incurred in a business."

State transfer tax.—In determining the amount of net income under the provisions of this paragraph, no deduction should be made for transfer taxes paid to a state upon an inheritance vesting within the year. *Prentiss v. Eisner*, (C. C. A. 2d Cir. 1920) 267 Fed. 16, *affirming* (S. D. N. Y. 1919) 260 Fed. 589.

Vol. IV, p. 246, par. G. [First ed., 1914 Supp., p. 161.]

"Net income."—The term "net income" as used in this paragraph means what has actually been received, and not that which, although due, has not been received, but is payment for some reason deferred or postponed. Such income cannot be enlarged by regulations of the Treasury Department. *U. S. v. Christine Oil, etc., Co.*, (W. D. La. 1920) 269 Fed. 458, wherein it was said: "The authority of the Treasury Department to make reasonable regulations for the execution of the law would not confer on that department the power to add to the income, subject to the tax, as defined by the law."

Deferred payments.—Where property has been sold although it appears that there was a profit on the transaction, deferred payments under the contract of sale which are not represented by notes or secured in any way are not income which is subject to taxation. *U. S. v. Christine Oil, etc., Co.*, (W. D. La. 1920) 269 Fed. 458.

Dividends.—The fact that the stock of a bankrupt corporation was owned by several manufacturers of moving picture films each of whom was under contract to lease its films to the bankrupt at a certain sum per foot plus an extra charge which was to come out of the net profits of the bankrupt after deducting a dividend on the preferred and common stock, does not render such payment a dividend instead of a payment of rent for the films leased. *In re General Film Corp.*, (C. C. A. 2d Cir. 1921) 274 Fed. 903. The court said:

"The common stock of the bankrupt was \$100,000 in 10,000 shares of \$10 each, and each of the ten manufacturers originally owned 1,000 shares. The government contends that this fact, together with the fact that the extra footage charge was to come out of the net profits after deducting 7 per cent dividend on the preferred and 12 per cent on the common stock, shows that the payment is really a declaration of a dividend to the manufacturers and not a payment of rent for the films leased from them. There is undoubtedly great force in this argument. On the other hand, the charge of nine cents a foot for the films was shown to be much below what they seem to have been worth, and the additional payment was not to be made to the manufacturers in proportion to the stock they held, but in proportion to the amount of film footage each had furnished the bankrupt during the year."

They furnished different amounts and were entitled to their proportion of the surplus without any reference to the amount of their stockholding or even if they held no stock at all. The question is one of intention, and we are not disposed to disturb the construction which the referee and the court below put upon the contract."

Vol. IV, p. 255, sec. 38. [First ed., 1909 Supp., p. 829.]

I. Subdivision first.

3. Nature of tax.
4. Corporations subject to tax.
5. "Carrying on," "engaged in" or "doing" business.
6. Income.

II. Subdivision second.

I. SUBDIVISION FIRST

3. Nature of Tax (p. 261)

Basis of taxation.—A fair interpretation of the statute is that income forms a basis for taxation only for the year in which it was received. *Fink v. Northwestern Mut. L. Ins. Co.*, (C. C. A. 7th Cir. 1920) 267 Fed. 968.

4. Corporations Subject to Tax (p. 261)

In General—Jewelers' Safety Fund Society.—In *Jewelers' Safe & Fund Soc. v. Lowe*, (C. C. A. 2d Cir. 1921) 274 Fed. 93, it appeared that the plaintiff was incorporated by special statute of the state of New York. It was not an insurance company under the laws of that state. The members were not liable to assessment until after each loss occurred, and were not liable to pay until after sixty days' notice of the assessment. For their own convenience, however, they deposited with the company an amount estimated by it to cover expenses and losses incurred during the year, which deposits it invested or carried in bank, and so earned interest. This interest belonged, not to the company, but to the depositors. The company had no right in the fund at all until a loss was ascertained, and the amount of its gross income was the sum which it collected from these deposits of the members for the purpose of paying operating expenses and losses. It was held that the plaintiff was an insurance company not falling within the classes exempted in each act, and therefore subject to taxation on its net income.

5. "Carrying on," "Engaged in" or "Doing" Business (p. 263)

What constitutes "carrying on," "engaged in" or "doing" business—Generally.—Where the owner of a mining lease subleased the land to a mining company and employed an engineer to superintend or inspect the mining operations carried on by

its lessee in order to see that it was carrying out the terms of the lease it was held that the owner of the lease was "doing business" and subject to a tax on the royalties received by it under its contract with the sublessee. *Chemung Iron Co. v. Lynch*, (C. C. A. 8th Cir. 1920) 269 Fed. 368.

6. Income (p. 267)

Rule stated—Dividends.—To the same effect as the first paragraph of the original annotation, see *Fink v. Northwestern Mut. L. Ins. Co.*, (C. C. A. 7th Cir. 1920) 267 Fed. 968.

Interest which has accrued but has not actually been collected does not constitute taxable income under this act. *Walker v. Gulf, etc., R. Co.*, (C. C. A. 5th Cir. 1921) 269 Fed. 885.

Insurance premiums and interest.—Premiums due and deferred, and interest due and accrued, but not actually collected in cash are not income within the meaning of the act. Thus, interest on policy loans which by the terms of the contract was added to the principal of the loan when it became due and remained unpaid by the policy holders, is not income within the meaning of the act. *Fink v. Northwestern Mut. L. Ins. Co.*, (C. C. A. 7th Cir. 1920) 267 Fed. 968.

II. SUBDIVISION SECOND (p. 270)

Deductions.—The term "paid-up capital stock" of a corporation, as used in subdivision 2 of this section, means such an amount received by the corporation as does not exceed the par value of the outstanding shares, plus the amount received for any part-paid stock. It does not mean the aggregate amount received by the corporation for the shares, the full-paid stock receipts, and part-paid stock receipts issued by it, even though said sum be in excess of the par value. *U. S. v. New York, etc., R. Co.*, (D. C. Conn. 1919) 265 Fed. 331.

As to what constitutes "paid-up capital stock" it is said in a case where this question was involved:

"The question presented is: What did Congress intend by the phrase 'paid-up capital stock outstanding at the close of the year'? The plaintiff in error contends Congress intended to include as part of the paid-up capital stock all the moneys paid by the stockholders for their stock, including the sums paid in excess of \$100 per share. The defendant in error claims the term 'paid-up capital stock' refers to the total par value; that is, \$100 for each share. The plaintiff in error treated the surplus above \$100 as a premium paid for; before 1909, in its books, it was accounted for in its 'profit and loss account.' After that, it was treated as in its 'premium account.' The excess paid in price is, in fact, a premium paid for the

stock; for when such shares of stock are at face value, they are at par, and when more is paid, they are above par or at a premium. The total of the par value has always been considered capital stock. The term 'capital stock' has thus been used, not only in banking and commerce, but in the corporation acts in the several states. Full force and effect must be given to the term 'paid-up' as used in the statute, and its use in connection with 'not exceeding.' We think the employment of these words made the intention of Congress clear as obviously meaning paid up to par value, and not exceeding that." New York, etc., R. Co. v. U. S., (C. C. A. 2d Cir. 1920) 269 Fed. 907.

Depreciation.—In Nashville, etc., R. Co. v. U. S., (C. C. A. 6th Cir. 1920) 269 Fed. 351, the judge's charge as to allowance for a depreciation of property which is substantially given in the following extract from the opinion was held to be correct:

"The substance of the charge otherwise was that the question of fact to be determined was merely whether the deductions made by defendant in its excise tax reports for the years 1909 and 1910, viz. \$249,024.54 for the former year, and \$239,229.70 for the latter year, were in whole or in part reasonable allowances for depreciation of roadway during those respective years; that if such allowances were reasonable the government is not entitled to recover; that if they were not reasonable the government was entitled to verdict for 1 per cent of the amounts improperly deducted. The jury was specifically instructed to consider, first, 'the depreciation, either physical or functional, in the value of those parts of the roadway which have not been repaired or renewed or replaced'; and, second, 'what has been the effect of the repairs, renewals, and replacements that have been made to other parts, and determine whether, after you strike a final balance at the end of the year, the roadway is of greater or less value, or of equal value, than or to that which it was at the beginning of the year,' and that if it should be found 'that the value of the roadway, its actual value, is as great at the end of the year, after these repairs and replacements have been made for which credit has been given as an expense deduction, then there is no depreciation in value of . . . the roadway, within the meaning of the statute,' but that 'if, after making such repairs, replacements, and renewals in the different units of the roadway, it should be found that some parts have been made more valuable by the putting in of new parts in place of wornout parts, yet the depreciation in the rest of the roadway, in the deterioration, obsolescence, etc., of other units which have not been changed, and so little done in repairing and replacing that at the end of the year, taking it as a whole, the depreciation in value has exceeded the

repairs, replacements, and renewals, so that it is worth less than it was, . . . to that extent the railway is entitled to a deduction of 1 per cent.'"

Decrease in value of assets because of premiums on bonds is said not to come within any definition of "depreciation" under this or similar acts and is therefore not deductible. *Fink v. Northwestern Mut. L. Ins. Co.*, (C. C. A. 7th Cir. 1920) 27 Fed. 968.

An addition to the reserve funds of a life insurance company because of liability on supplementary contracts not involving life contingencies and canceled policies on which a cash surrender value may be demanded is not deductible from gross income under this act. *Fink v. Northwestern Mut. L. Ins. Co.*, (C. C. A. 7th Cir. 1920) 267 Fed. 968.

Money advanced to subsidiary company.—It has been held that amounts advanced by a railway company to a terminal company organized by it but which is a separate and distinct entity cannot be properly charged by the railway company as a part of the ordinary and necessary expenses of maintenance and operation of its business and property. *Walker v. Gulf, etc., R. Co.*, (C. C. A. 5th Cir. 1921) 269 Fed. 886.

Salaries.—"The basis on which a salary may be allowed as a valid deduction is that it was in fact an 'ordinary and necessary expense (of the corporation) actually paid . . . in the maintenance and operation of its business.' To be a necessary expense it must have been paid for services actually rendered. *Jacobs & Davies, Inc. v. Anderson*, 228 Fed. 505, 506, 143 C. C. A. 87. Whether services were rendered and whether also they were commensurate with the salary paid are matters of judgment and discretion reposed by general law in the board of directors of the corporation. As the board of directors is charged with the duty and clothed with the discretion of fixing the salaries of the corporation's officers, the government has no right (until expressly granted by statute) to inquire into and determine whether the amounts thereof are proper, that is, whether they are too much or too little. But, while the amount of salary fixed by a board of directors is presumptively valid, it is not conclusively so, because the government may inquire whether the amount paid is salary or something else. Admittedly the government has a right to collect taxes on net income of a corporation based on profits after all ordinary and necessary expenses, including salaries, are paid. It has a right, therefore, to attack the action of a board of directors and show by evidence, not that a given salary is too much, but that, in the circumstances, the whole or some part of it is not salary at all but is profits diverted to a stockholding officer under the guise of salary and as such is subject to taxation." *U. S. v. Phila-*

delphia Knitting Mills Co., (C. C. A. 3d Cir. 1921) 273 Fed. 657.

Adding premiums from sale of stock to par value.—In *Boston, etc., R. Co. v. U. S.*, (C. C. A. 1st Cir. 1920) 265 Fed. 578, the railroad, in its tax return under this section for the year 1909, treated premiums (a sum considerably over \$5,000,000) received from the sale of stock, when the stock was selling above par, as part of its paid-up capital stock, and as something to be added to the par value, for the purpose of ascertaining the amount of deduction upon the ground of interest upon indebtedness, and by including the interest paid upon the sum representing the premiums thus received from the sale of stock it increased the deduction from the gross earnings considerably more than a million dollars, with the result of decreasing the tax in a very considerable measure below what would have accrued to the government if the return had been computed and the deduction made upon the basis of interest paid upon its outstanding capital stock at its par value. In holding that such deduction was invalid, the court said: "Judge Bingham, in the District Court, in passing upon this statutory provision, said:

'There is nothing in the language of the clause in question (section 38) that justifies one in concluding that Congress intended that premiums on stock sold by a corporation should be added to its outstanding paid-up capital stock in determining deductions to be made in assessing the tax under this law.'

"We think the logic of the case is even stronger than that, against the corporation. By this we mean that, beyond the view that there is nothing in the language of the act to justify such a conclusion, there is an express and unmistakable negative against it.

"The situation here is one in which the intention of Congress is not only plain, but imperatively plain. The language is:

"The amount of interest actually paid within the year on * * * indebtedness to an amount * * * not exceeding the paid-up capital stock.'

"Thus the language is not only unmistakably clear, but mandatory. This is so because the words 'not exceeding' are express words of limitation—words which control the term 'paid-up,' and fix the line beyond which the deduction cannot go.

"As commonly known, certificates of stock represent the shares. When the shares are at face value they are at par, and when worth more they are above par, or at a premium (Cent. Dict. vol. 4, p. 4271), but by such fluctuations the shares of stock do not lose their identity or character as such, but remain shares of stock; and the sum total of the shares, at par, constitute the capital stock in the sense in which the term is ordinarily used in banking and commerce.

"It is quite manifest that Congress used the term 'paid-up capital stock' in the par

value sense. This would be the common and ordinary understanding of the term; and it is perfectly plain that Congress did not intend a deduction, in this respect, beyond interest paid on indebtedness to the amount of outstanding capital stock, in the sense in which that expression is ordinarily accepted. And the term 'paid-up,' in the sense in which it was used in connection with the limitation of 'not exceeding,' obviously means paid up to par value, but not exceeding that.

"Premiums received from the sale of stock are not outstanding capital stock; and they are no more the capital stock of a railroad than is undivided surplus in a bank the capital stock of a bank.

"The provisions describing the deductions to be made, in order to ascertain the taxable net income, are addressed to the business public, and to corporations generally, and define the manner in which tax returns shall be made; and, in such circumstances, the rule would be that Congress used the term in the sense of its generally accepted meaning."

Vol. IV, p. 278, sec. 4. [First ed., 1916 Supp., p. 74.]

Names and addresses of seller and buyer.

—Bought and sold slips are admissible in evidence where although none of them give the addresses of both buyer and seller yet each of them with so few exceptions as to be immaterial gives the address of the party to be charged. This is especially true where there is testimony that at the same time that each bought slip was signed, a corresponding sold slip *mutatis mutandis* was signed by the party to be charged thereby, and that at the time that each sold slip was signed a corresponding bought slip *mutatis mutandis* was signed by the party to be charged, it being held that thus the presumption arose that the two corresponding slips which evidenced each contract set forth the addresses as well as the names of the seller and the buyer in each contract. *Gettys v. Newburger*, (C. C. A. 8th Cir. 1921) 272 Fed. 209.

Quantity and price.—In *Gettys v. Newburger*, (C. C. A. 8th Cir. 1921) 272 Fed. 209, an objection was made that none of the broker's slips stated the quantity or price of the cotton bought or sold. The court held that the contract was sufficiently clear when the telegram, broker's slip, rule of the stock exchange and other evidence were read together, and further said: "When one sends an order to a broker doing business in an established trade on one of the great public exchanges of the country to buy, sell, or make contracts on such an exchange, he confers upon such broker authority to deal in the terms and language understood and used there, and in accordance with the settled usage and the by-laws and rules of the exchange, even though he may not know their terms or effect."

Vol. IV, p. 284, sec. 5. [First ed., 1916 Supp., p. 89.]

Goods "removed for sale."—Chewing gum transported by the manufacturer from the place of preparation to one of its other factories or warehouses, as the state of the stock therein or the condition of the trade may demand, must be deemed subject to the stamp tax imposed by this section, upon gum and other specified articles "sold or removed for sale," although the amount of the tax is determined by the retail price or value of the article; especially in view of section 20 of this act, under which manufacturers of such articles are required to file monthly declarations that no such article has been removed from the premises of such manufacturer other than such as has been duly taken account of and charged with the stamp tax. *U. S. v. American Chiclé Co.*, (1921) 256 U. S. —, 41 S. Ct. 548, 65 U. S. (L. ed.) —.

Vol. IV, p. 290, sec. 11. [First ed., 1916 Supp., p. 91.]

Act of 1898 preserved.—The qualified repeal of the Stamp Act (1919 Supp. Fed. Stat. Ann. p. 1903, sec. 1400) left this provision so far in effect that unstamped proxies are invalid. *State v. Miller*, (Wis. 1920) 179 N. W. 815.

Construction of similar section of Act of June 13, 1898—*In general.*—In *Oviatt v. Wojcicky*, (1920) 95 Conn. 562, 111 Atl. 837, which was action to recover on a promissory note, it was informally disclosed upon the trial that the note in question was not duly stamped upon its execution and delivery as required by this section. The defendant thereupon asked the court to charge the jury in effect that its acceptance by the plaintiff in that condition not only subjected him to the penalty provided by the Federal law for its violation, but left the note worthless as the basis for any action by the plaintiff upon the debt which it evidences. In refusing to give this instruction, the court said: "No such issue was in the case, raised either by the pleadings or otherwise, and the defendant was in no position to take advantage of any claimed dereliction of the plaintiff as suggested. We have, moreover, in an earlier case involving a similar question under the federal Revenue Act of 1898, pointed out the somewhat limited effect of a mere failure to affix a stamp at the right time and place. *Garland v. Gaines*, 73 Conn. 662, 665, 49 Atl. 19, 84 Am. St. Rep. 182."

Vol. IV, p. 311, sec. 3450. [First ed., vol. III, p. 795.]

Section as repealed by National Prohibition Act.—This section was not repealed by the National Prohibition Act (1919 Fed. Stat. Ann. 2021). *U. S. v. One Cole Aero Eight Automobile*, (D. C. Mont. 1921) 273 Fed. 934; *U. S. v. One Essex Touring Automobile*,

(N. D. Ga. 1920) 266 Fed. 138. But compare *U. S. v. One Haynes Automobile*, (C. C. A. 5th Cir. 1921) 274 Fed. 926, affirming (*S. D. Fla.* 1920) 268 Fed. 1003, holding that the section was repealed by such act.

R. S. secs. 3460 and 3461 as modifying forfeiture provisions of this section.—The forfeiture provisions of this section, in case of the removal or deposit and concealment of goods or commodities upon which a tax has been imposed by the United States and has not been paid, are not modified by R. S. secs. 3460 and 3461 (4 Fed. Stat. Ann. (2d ed.) pp. 321, 322), so as to prevent the forfeiture of interests for which those sections offer protection. *J. W. Goldsmith, Jr.—Grant Co. v. U. S.*, (1921) 254 U. S. 505, 41 S. Ct. 189, 65 U. S. (L. ed.) —.

Constitutionality.—Construing this section as authorizing the forfeiture of an automobile used in the removal or the deposit and concealment of distilled spirits upon which a tax was imposed by the United States and had not been paid, notwithstanding the fact that the seller of such automobile, who had reserved title to it as security for unpaid purchase money, did not participate in or have knowledge of the illicit use by the purchaser, does not render such section invalid under U. S. Const., 14th Amend., as taking property without due process of law. *J. W. Goldsmith, Jr.—Grant Co. v. U. S.*, (1921) 254 U. S. 505, 41 S. Ct. 189, 65 U. S. (L. ed.) —, wherein the court said: "If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words, taken literally, forfeit property illicitly used, though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. It is, hence plausibly urged that such could not have been the intention of Congress; that Congress necessarily had in mind the facts and practices of the world, and that, in the conveniences of business and of life, property is often and sometimes necessarily put into the possession of another than its owner. And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner, who was without guilt."

"Regarded in this abstraction the argument is formidable; but there are other and militating considerations. Congress must have taken into account the necessities of the government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion, and the ways and means of violation or evasion. In breaches of revenue provisions some forms of property are facilities, and therefore it

may be said that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to a deodand, by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited. To the superstitious reason to which the rule was ascribed, Blackstone adds that 'that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punishable by such forfeiture.' And he observed: 'A like punishment is in like cases inflicted by the Mosical law: "If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten." And, among the Athenians, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic.' See also *The Blackheath* (United States v. Evans), 195 U. S. 361, 366, 367, 49 L. ed. 236-238, 25 Sup. Ct. Rep. 46; *Liverpool, B. & R. P. Steam Nav. Co. v. Brooklyn Eastern Dist. Terminal*, 251 U. S. 48, 53, 64 L. ed. 130, 132, 40 Sup. Ct. Rep. 66.

"But whether the reason for § 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced. *Dobbins Distillery v. United States*, 96 U. S. 395, 24 L. ed. 637, is an example of the rulings we have before made. It cites and reviews prior cases applying their doctrine and sustaining the constitutionality of such laws. It militates therefore against the view that § 3450 is not applicable to a property whose owner is without guilt. In other words, it is the ruling of that case, based on prior cases, that the thing is primarily considered the offender. And the principle and practice have examples in admiralty. *The Palmyra 12 Wheat. 1*, 6 L. ed. 531."

Purpose and scope of section.—"In the present case we have a long and involved single sentence to construe. The general purpose to suppress an intended fraud on the revenue by forfeiture on removal, deposit, or concealment, both of the articles taxed and certain things connected with them, is evident. The forfeitures described may be referred to as primary and secondary. The things primarily forfeited on the conditions named are those in the first clause and are (1) the taxed goods and commodities, and (2) materials, utensils, and vessels proper and intended for use in the making of the goods and commodities. As to the last named it is not necessary that any goods or commodities should have actually been produced from or with them. The next clause, being that specially for construction, provides the secondary forfeitures, that is, those consequent on the forfeitures previously declared. It begins 'and in every such case.' These words plainly mean that, whenever either goods and commodities or materials and

utensils are forfeited under the preceding clause the matter is not to end, but as consequences thereof (1) the vessels, casks, or packages containing the goods and commodities and (2) the vessels, boats, carts, carriages, etc., used in the removal, deposit, or concealment of the things previously forfeited are also to be forfeited." *U. S. v. One Bay Horse*, (N. D. Ga. 1921) 270 Fed. 590.

Forfeiture—In general.—In *U. S. v. One Bay Horse*, (N. D. Ga. 1921) 270 Fed. 590, a horse, a wagon and a set of harness were declared forfeited because used for the removal and deposit of a still and other distilling apparatus, proper and intended to be used for the making of distilled liquors on which a tax was imposed, with intent to defraud the United States of the tax. It was held, however, that a rifle was not subject to forfeiture. The court said: "Now the stilling apparatus, which was with fraudulent intent removed and deposited in the wagon, was forfeited under the first clause, and is not in question here. It is therefore one of the instances covered by the words 'in every such case,' and these words must be satisfied by something that follows them in the statute. They cannot be satisfied by the forfeiture of casks, vessels, and cases, for stills involve no such, and indeed these things are limited to such as contained the goods and commodities. The secondary forfeiture, following the forfeiture of utensils, must therefore relate only to the boats, carts, carriages, etc., used in deposit and removal, and the word 'thereof' following them must be held to refer to all the articles mentioned in the first clause as forfeited by fraudulent removal, deposit, or concealment. As to the wagon, horse, and harness, therefore, a cause of forfeiture is set forth."

"The rifle is not a thing that could naturally and ordinarily be used in the way alleged and no special use thereof is shown. The allegations as to it are insufficient."

Innocence of automobile owner.—The fact that the seller of an automobile, who had reserved title to it as security for unpaid purchase money, did not participate in or have knowledge of its illicit use by the purchaser in the removal or deposit and concealment of distilled spirits upon which a tax was imposed by the United States and had not been paid, will not prevent the forfeiture of his title to such automobile, under this section, which provides for the forfeiture of the contraband goods, and of every vessel, boat, cart, carriage, or other conveyance whatsoever, and all things used in the removal or for the deposit and concealment of such goods. *J. W. Goldsmith, Jr.—Grant Co. v. U. S.*, (1921) 254 U. S. 505, 41 S. Ct. 189, 65 U. S. (L. ed.) —.

Likewise, a vehicle used in furtherance of a fraud on the revenue laws is subject to condemnation and forfeiture under this section despite the innocence or want of knowledge of the owner. *U. S. v. One W. W. Shaw*

Automobile Taxi, etc., (N. D. Ohio 1921) 272 Fed. 491.

Vol. IV, p. 313, sec. 3453. [First ed., vol. III, p. 797.]

Scope of statute — Money or checks.—Where money or a check is found in such relation to contraband articles and apparatus, that a clear inference can be made to justify the conclusion that it is the proceeds of the illegal enterprise and used in the operation and carrying on of such business, the right to forfeit such property is clearly contemplated. *U. S. v. One Machine, etc.*, (W. D. Wash. 1920) 267 Fed. 501.

Vol. IV, p. 323, sec. 3462. [First ed., vol. III, p. 804.]

Conformity to state practice.—Proceedings for arrest which include search warrants should conform to state practice. Thus, the ascertainment of probable cause is a judicial function which must be exercised in conformity with the statutes of the state in which the warrant is issued. *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

Requirements for search warrants — In general.—“The requirements of section 3462 relating to the showing to be made as a basis for issuing the warrant do not meet the mandatory provisions of the Constitution. In the language of Attorney General Knox, the section ‘does not state all of that which must be stated in the application’ for the search warrant. 24 Op. Attys. Gen. 685, 688. In other words, the constitutional provision is paramount. The showing under oath essential upon which to predicate the issuance of the warrant should state pertinent facts from which the magistrate may determine the existence of probable cause, or there should be a hearing by him with that purpose in view. Probable cause is a legal conclusion, which is for the magistrate to deduce from the facts stated, and the mere assertion under oath that the affiant believed and does believe that a fraud upon the revenue has been or is being committed is entirely insufficient upon which to predicate the finding of probable cause.” *U. S. v. Pitotto*, (D. C. Ore. 1920) 267 Fed. 603.

Probable cause.—Since the Constitution plainly requires warrants, whether for arrest, or search and seizure, or both, to issue only upon probable cause supported by oath—the words “probable cause,” though used in a statute, are to be interpreted in harmony with the meaning assignable to them in the Fourth Amendment. Therefore there must be actual probable cause, not merely a bald, though verified, assertion of suspicion, and to that end the magistrate may inquire into the truth of the affidavit offered as a basis for warrant. On the question whether there was probable cause for search and seizure, much latitude as to evidence should be permitted; and if, at time of hearing, the magis-

trate is then of opinion that there existed probable cause when warrant issued, he should sustain the seizure. *U. S. v. Maresca*, (S. L. N. Y. 1920) 266 Fed. 713.

Powers and duties of commissioners.—The commissioner must obey the statutes in so far as they are constitutional. If any statute enlarges the power to arrest or search and seize, and it is alleged that such statute infringes constitutional guaranties, he is bound by repeated decisions to refer that matter to the higher courts, unless the constitutional question be extraordinarily plain. Yet if one construction of an act is plainly harmonious with the Constitution, and another with difficulty reconcilable thereto, he must incline to the former. *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

1918 Supp., p. 298, sec. 304.

Construction of section by government officers as conclusive.—Where government officers for a long period of time have construed the term “rectifier,” as used in this section and R. S. section 3244 (3 Fed. Stat. Ann. (2d ed.) 1045) in a certain manner, the government will be regarded as bound by such construction. Hence, where a wholesale liquor dealer filters whisky, which act did not constitute “rectifying” within the previous construction of this section by government officers, he cannot be held liable to pay the tax as a rectifier because of a new ruling thereafter by the Commissioner of Internal Revenue whereby filtration is regarded as rectifying. *Jones v. Mayes*, (W. D. Ky. 1920) 265 Fed. 365, wherein the court said: “The point which seems of great importance is that the contemporary and practical construction made by the officers of the government who executed the laws should be given great weight, especially in cases like this, where the question is a very doubtful one.”

“It would seem necessarily to follow that all persons directly interested may accept that construction and confidently act upon it. Furthermore, it would seem that this course has been made binding upon the government by the action of its own executive officers. In this case the practice was well known and long continued to construe it as the plaintiff contends, and Congress did not in the act of 1917 change that construction, but expressly provided in section 304 of the act then passed that it referred to section 3244, and left that section in full force as it had been previously construed by the executive officers. We think this ought to be regarded as binding in this instance as a contemporary interpretation by the executive officers, and we more than doubt the power of the executive officers to change the law as thus stated. Especially should we emphasize this where taxation was imposed under the statute. It may fairly be assumed that Congress intended under these circumstances that the previous construction should be binding

upon the officers of the United States. The only attempt to change that, as we have seen, was the ex post facto attempt made in 1919, after the plaintiff had acquired rights under the old construction."

In *Mayes v. Jones & Co.*, (C. C. A. 6th Cir. 1921) 270 Fed. 121, the court said regarding this question: "It has been repeatedly held by the Supreme Court of the United States that, where the meaning of a statute is doubtful, the construction given by the department charged with its execution should be given great weight. *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 328, 32 L. Ed. 269; *U. S. v. Healey*, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. Ed. 369. It has also been held by the Supreme Court that—

"The re-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction." *U. S. v. Hermanos*, 209 U. S. 337-339, 28 Sup. Ct. 532, 533 (52 L. ed. 821); *U. S. v. Falk*, 204 U. S. 143-152, 27 Sup. Ct. 191, 51 L. ed. 411.

"This rule of interpretation applies with full force to this case, for the reason that section 304 of the Revenue Act of October 3, 1917, provides that the tax shall be levied only upon distilled spirits and mixtures produced in such manner that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of section 3244, R. S.

"Congress is presumed to have known the long-continued executive construction given to paragraph 3 of section 3244, R. S., when it enacted this Revenue Act of October 3, 1917. It is also presumed to have known the rule of construction announced by the Supreme Court in *U. S. v. Hermanos* and *U. S. v. Falk*, *supra*. *Buckley v. Stephens*, 29 Ohio St. 620-622. The conclusion follows that it intended to adopt this construction as fully and completely as if it had written it into the act itself."

"Purifying" or "refining," as used in this section, undoubtedly means the removal, chemical change, or modification of objectionable soluble matter, held in solution in the distilled spirits, united therewith and forming a constituent and integral part thereof, so that its removal, chemical change, or modification will change or alter, in some degree, at least, the character or quality of the entire volume of the distilled spirits. *Mayes v. Jones*, (C. C. A. 6th Cir. 1921) 270 Fed. 121.

1918 Supp., p. 305, sec. 200.

Constitutionality.—The rights of the several states to regulate descent and distribution are not unconstitutionally interfered with by the tax imposed by this Act upon the transfer of the net estates of decedents. *New York Trust Co. v. Eisner*, (1921) 256 U. S. —, 41 Sup. Ct. 506, 65 U.

S. (L. ed.) —, (*affirming* (S. D. N. Y. 1920) 263 Fed. 620) wherein the court said:

"The statement of the constitutional objections urged imports on its face a distinction that, if correct, evidently hitherto has escaped this court. See *United States v. Field*, Feb. 28, 1921 [255 U. S. 257, 41 Sup. Ct. Rep. 256]. It is admitted, as since *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it has to be, that the United States has power to tax legacies, but it is said that this tax is cast upon a transfer while it is being effectuated by the state itself, and therefore is in intrusion upon its processes; whereas a legacy tax is not imposed until the process is complete. An analogy is sought in the difference between the attempt of a state to tax commerce among the states and its right after the goods have become mingled with the general stock in the state. A consideration of the parallel is enough to detect the fallacy. A tax that was directed solely against goods imported into the state, and that was determined by the fact of importation, would be no better after the goods were at rest in the state than before. It would be as much an interference with commerce in one case as in the other. *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347. Conversely, if a tax on the property distributed by the laws of a state, determined by the fact that distribution has been accomplished, is valid, a tax determined by the fact that distribution is about to begin is no greater interference and is equally good.

"*Knowlton v. Moore*, 178 U. S. 41, *supra*, dealt, it is true, with a legacy tax. But the tax was met with the same objection: that it usurped or interfered with the exercise of state powers, and the answer to the objection was based upon general considerations and treated the 'power to transmit or the transmission or receipt of property by death' as all standing on the same footing. 178 U. S. 57, 59. After the elaborate discussion that the subject received in that case, we think it unnecessary to dwell upon matters that in principle were disposed of there. The same may be said of the argument that the tax is direct, and therefore is void for want of apportionment. It is argued that when the tax is on the privilege of receiving the tax is indirect because it may be avoided; whereas here the tax is inevitable, and therefore direct. But that matter also is disposed of by *Knowlton v. Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use, — on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax, — 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81-83.

Upon this point a page of history is worth a volume of logic.

"The inequalities charged upon the statute, if there is an intestacy, are all inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions between real and personal estate, and of different numbers of recipients; or, if there is a will, affect legatees. As to the inequalities in case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes. As to intestate successors, the tax is not imposed upon them, but precedes them; and the fact that they may receive less or different sums because of the statute does not concern the United States."

As to the constitutionality of this act in construing it as applicable to a transfer made before the passage of the act where the transferor's death occurred after the act took effect, it has been said:

"In our opinion the act, if so construed, is not void as denying due process of law, or as violating the Fifth Amendment to the Constitution. *Billings v. United States*, 232 U. S. 261, 282, 283, 34 Sup. Ct. 421, 58 L. ed. 596; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 23 24, 36 Sup. Ct. 236, 60 L. ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. Nor do we think the tax is to be classified as a direct tax, and thus void as within the constitutional requirement of apportionment. It is clearly an excise or duty tax." Nor is the provision unconstitutional merely because it is retroactive. *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321.

An executor cannot raise the question of the constitutionality of this provision on the ground that it interferes with vested rights of the transferees, as the rule applies in such a case that one attacking a statute as unconstitutional, must show that the alleged unconstitutional feature injures him. *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321.

Nature of tax.—To same effect as 1920 Supplement annotation, see *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993; *Hazard v. Bliss*, (R. I. 1921) 113 Atl. 469.

"It is true that the tax purports to be assessed against the estate, but in truth and in fact it is not, but upon the transfer thereof to those whom the law or the decedent has given it. If it were upon the estate itself, the same would be a direct tax and the statute would be in conflict with the federal Constitution, requiring all direct taxes to be levied according to population." *Gheen's Succession*, (1921) 148 La. 1017, 88 So. 253.

"The federal tax under the act of 1916, on the other hand, is not a succession tax, but an estate tax, not a tax on what comes to the beneficiaries or heirs, but upon what is left by the decedent. In this respect it differs from the legacy tax imposed by the United States War Revenue Act of 1898 (30 Stat.

448). The act of 1916 entitles the tax an 'estate tax,' and in terms imposes it upon the net estate of the decedent as a unit. It is not apportioned among the various transferees, and bears no relation to the separate amounts which they are to receive. The distinction between a succession tax and an estate tax is a recognized distinction, and, so far as we are aware, it has been held without exception that the federal tax under the act of 1916 is of the latter character. It is not possible, in our judgment, to take any other reasonable view of it." *In re Miller*, (Cal. 1921) 195 Pac. 413.

Construction.—In construing this Act the rule has been applied that as all persons and property within the jurisdiction of a sovereignty are subject to taxation, and since the property cannot speak and the persons have no direct voice in wording the tax laws, it is a fundamental duty of the law-givers to make the scope of a tax law definite and its meaning clear; and therefore all doubts respecting scope and meaning are to be resolved in favor of the taxpayer. *First Trust, etc., Bank v. Smietanka*, (C. C. A. 7th Cir. 1920) 268 Fed. 230.

State laws as rules of decision.—The question as to what extent a widow's interest in her husband's estate is taxable, if at all, is to be determined by the statutes and rules of decision in the state where the decedent's property is located. *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993.

Deduction in computing state tax.—"Whatever amount has been paid to the tax collector of the United States is a matter between it and the heirs or succession representative, and cannot be considered in fixing the amount of inheritance tax due the state." *Gheen's Succession*, (1921) 148 La. 1017, 88 So. 253.

1918 Supp., p. 306, sec. 202.

Scope of section.—This section evidences an intent on the part of Congress that the tax should apply to all transfers in contemplation of death, whether made before or after the passage of the act, provided the transferor's death occur after the act took effect. The evident theory of this section is that transfers intended to take effect after the death of the grantor, as well as those made in contemplation of death, are equally testamentary in character. Such classification is within the power of Congress. The theory of taxation on account of transfers testamentary in character is that death is the generating source of the tax. *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321.

Retroactive operation.—This section has been construed as having a retroactive operation and as including transfers made prior to the passage of the act by one dying after its enactment. *Union Trust Co. v. Wardell*, (N. D. Cal. 1921) 273 Fed. 733.

State laws as rules of construction.—"From the form of the Federal Estate Tax

Act, it is evident the Congress intended that the act should operate not in opposition to but in harmony with the many different state acts with which, because of its very terms, it would come into contact. *Lederer v. Northern Trust Co.*, (C. C. A.) 262 Fed. 52. Therefore in creating an estate tax, the Congress very wisely leveled the tax at that property of decedents which is subject to distribution as part of their estates according to the laws of different states (section 202), after deducting therefrom such expenses, claims and charges against estates as are allowed by the laws of the states under which they are administered (section 203). Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states." *Lederer v. Pearce*, (C. C. A. 3d Cir. 1920) 266 Fed. 497.

Under the Internal Revenue Act of October 3, 1913, if a decedent's estate produced an increment which was payable only at times and to persons not determinable at the time, such increment during a tax year was not an income of that tax year which was assessable. *First Trust, etc., Bank v. Smietanka*, (C. C. A. 7th Cir. 1920) 268 Fed. 230.

"In contemplation of death."—In *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321, in the case of an absolute gift inter vivos claimed by the government to have been testamentary in character, the court said regarding the meaning of the phrase "in contemplation of death": "On principle, and without present reference to authority, the ultimate question concerns the motive which actuated the grantor; that is to say, whether or not a specific anticipation or expectation of her own death, immediate or near at hand (as distinguished from the general and universal expectation of death some time), was the immediately moving cause of the transfer."

Presumption as to transfers.—In holding that an instruction was not erroneous which stated that the presumption afforded by subdivision b of this section could be taken into account in determining the fact of "contemplation of death," the court said:

"The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. The presumption is merely a rule of evidence whose enactment is within the legislative competency." *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321.

Property passing under power of appointment.—Property passing by the execution of a power of appointment given in a will is not subject to taxation under this section. *Field v. U. S.*, (1921) 255 U. S. 257, 41

St. Ct. 256, 65 U. S. (L. ed.) —, *affirming* (1920) 55 Ct. Cl. 430; *Lederer v. Pearce*, (C. C. A. 3d Cir. 1920) 266 Fed. 497.

Community property.—In the case of community property the federal tax is imposed on the transfer of the net estate, and whether there is a transfer upon the death of the husband depends upon the statutes and rule of decision in the state where the parties reside and the property is situate. *Blum v. Wardell*, (N. D. Cal. 1920) 270 Fed. 309.

Life insurance policies.—A life insurance policy in which the insured reserved to himself the right to change the beneficiary remains a part of his estate and the proceeds thereof are subject to tax. And where the insured provided in making a transfer of an endowment policy that if he were living at its maturity the amount then becoming due under it should be paid to him, the proceeds of the policy are part of his estate and subject to tax. *Gaither v. Miles*, (D. C. Md. 1920) 268 Fed. 692.

Where life insurance policies which amounted to less than four per cent of the insured's estate were transferred two years before his death, it was held that they did not form such a material part of his estate as to throw on his executor the burden of proving that they were not parted with in contemplation of death. *Gaither v. Miles*, (D. C. Md. 1920) 268 Fed. 692.

1918 Supp., p. 307, sec. 203.

Deductibility of state inheritance and succession taxes in determining net value.—State inheritance and succession taxes on the rights of individual beneficiaries are not deductible from the value of the gross estate of a decedent when determining the net value of such estate for the purpose of the tax imposed by the Act of September 8, 1916, upon the transfer of the net estates of decedents, as charges against the estate that are allowed by the laws of the jurisdiction under which the estate is being administered. Such charges are those only which affect the estate as a whole. *New York Trust Co. v. Eisner*, (1921) 256 U. S. —, 41 S. Ct. 506, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1920) 263 Fed. 620.

A state transfer tax imposed on the estate of a decedent has been held to be a charge which may properly be deducted. In this connection it was said in a case involving the question whether such a tax imposed by the state of New York should be deducted: "The state of New York had the right to impose the tax it did impose on this estate, acting through its Surrogate's Court, which was and is the court of competent jurisdiction. When that tax was imposed, it became a charge upon and against the estate, and this fact is clearly recognized by the act of Congress above referred to. It was not the policy or purpose of Congress to impose a tax upon the amount of a tax already paid

from the estate of a decedent or to the state in which such estate is being administered. I think the tax paid the state of New York and imposed by the laws of that state, and approved and allowed by the Surrogate's Court, was and is one of 'such other charges against the estate as are allowed by the laws of the jurisdiction whether within or without the United States under which the estate is being administered,' and that it follows that the Commissioner and Collector of Internal Revenue in imposing the tax due the United States should have made the proper deduction for and on account of such payment to the state." *Sayre v. Brewster*, (N. D. N. Y. 1920) 268 Fed. 553.

Widow's homestead and dower rights under state statutes.—Where under the laws of the state the widow does not receive either her homestead, dower or year's support in succession to her husband or by transfer from him, but takes them under the statutory provisions vesting these rights in her independently of her husband and adversely to his estate, the property assigned to her as dower, homestead and year's support, not being transferred to her from her husband, is not part of his estate on which the tax is imposed by the Federal Estate Tax. *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993.

Widow's right to support.—Where under the laws of the state a widow's right to support is not limited to a case of actual dependency on the decedent a charge therefor should be deducted as a "charge against the estate" under the Federal Estate Tax Law. *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993. The court said:

"While it would apparently be true that in so far as the Federal Estate Tax itself is concerned, she would not be entitled to support during the administration of the estate—whatever the period—unless dependent upon the decedent, under the terms of clause a (1) of section 203, nevertheless her claim for a year's support should in any event be deducted as a charge against the estate allowed by the laws of Tennessee; there being nothing in the Tennessee statutes or decisions in reference to a year's support which limits the widow's right to a year's support to cases of actual dependency upon the decedent."

Deduction before determining state succession tax.—The tax imposed by this act is to be deducted before computing a state succession tax. *In re Miller*, (Cal. 1921) 195 Pac. 413.

1918 Supp., p. 308, sec. 204.

Payment.—The estate tax is made a charge on the estate, and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. It becomes due, not at the time of the decedent's death, but one year thereafter, as the statute plainly provides. It does not

segregate any part of the estate from the rest and keep it from passing to the administrator or executor for purposes of administration, but is made a general charge on the gross estate, and is to be paid in money out of any available funds, or, if there be none, by converting other property into money for the purpose. *U. S. Woodward*, (1921) 256 U. S. —, 41 S. Ct. 615, 65 U. S. (L. ed.) —.

1918 Supp., p. 309, sec. 209.

Scope of section.—This section pertains merely to the remedy for the collection of the tax. *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321.

Annuities.—The principle that the vendor of an annuity enters at once into the possession and enjoyment of the price paid for it which does not on the death of the annuitant figure as a part of his estate for taxation purposes has been applied in the case of a transfer of property by a father to his son, the latter guaranteeing the payment to the former of a certain per cent on the agreed value of the property during the life of the father. *Polk v. Miles*, (D. C. Md. 1920) 268 Fed. 175.

When resort to transferee permissible.—It is only when the estate proves insufficient for the purpose that resort may be had, under this section to the personal responsibility of the transferee or to the property transferred, and even then a right of action over is given to the transferee. *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321.

Pleading.—Where a complaint seeks to recover the entire amount of a tax paid to the government and groups several payments into one cause of action it is good as against a demurrer which alleges that no cause of action is set up in the complaint where the complainant is entitled to recover a part of the sum so paid. *Sayre v. Brewster*, (N. D. N. Y. 1920) 268 Fed. 553.

Transfer when not in contemplation of death.—*Polk v. Miles*, (D. C. Md. 1920) 268 Fed. 175.

1918 Supp., p. 312, sec. 1.

Persons subject to tax.—The tax is imposed on citizens of the United States regardless of their place of residence, or residents of the United States regardless of their citizenship, and upon the income of nonresident aliens from sources within the United States. *Lawrence v. Wardell*, (N. D. Cal. 1920) 270 Fed. 682.

1918 Supp., p. 313, sec. 2.

Power of Congress.—Congress has very ample authority to adjust its income taxes according to its discretion, and the rules it prescribes for the ascertainment of taxable income are binding upon the courts, unless they are palpably arbitrary and unjust. *Safe Deposit, etc., Co. v. Miles*, (D. C. Md. 1921) 273 Fed. 822.

Scope of tax generally.—What is taxable is the gain, profit or income derived from the sale or dealing in property, whether real or personal. The tax is to be levied on nothing else except gains, profits, and income, and upon them only when actually realized in money or in money's worth, and in determining what is included therein the courts will look through form to substance. *Safe Deposit, etc., Co. v. Miles*, (D. C. Md. 1921) 273 Fed. 822.

Meaning of "income" as affected by construction of word in other acts.—The word "income" must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Federal Corporation Excise Tax Act. *Merchants' Loan, etc., Co. v. Smietanka*, (1921) 255 U. S. 509, 41 S. Ct. 386, 65 U. S. (L. ed.) —.

Meaning of "income" as affected by language of will.—A testator cannot, by declaring in his will that accretions of selling values shall be considered principal, and not income, render such items nontaxable under Federal income tax legislation, if the terms of such legislation are broad enough to include them. *Merchants' Loan, etc. Co. v. Smietanka*, (1921) 255 U. S. 509, 41 Sup. Ct. 386, 65 U. S. (L. ed.) —.

Stock dividends as income.—To the same effect or the annotation under this catchline in 1920 Supplement, see *Walsh v. Brewster*, (1921) 255 U. S. 536, 41 Sup. Ct. 392, 65 U. S. (L. ed.) —, *reversing* in part and *affirming* in part (D. C. Conn. 1920) 268 Fed. 207.

Computing tax on stock sold where stock dividend declared.—As to the computation of the tax in such cases it has been said:

"The second point is raised by *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. ed. 521, 9 A. L. R. 1570, and must be ruled by its implications. Under the doctrine of that case a stock dividend is not regarded as new property at all. The old certificate represented precisely the same property as the old and new do thereafter. The old shares have proliferated, as it were, and although the right they represented has now suffered a cellular division into smaller units of greater number, that is all that has happened. In view of this, it seems to me difficult to avoid regarding the old and new shares together as anything more than the evidence of a right which has persisted unchanged through the declaration of the dividend. It might have been possible to look at the new shares as declared from the surplus, and the surplus as not included in the old shares (at least not in the same sense as the new shares comprise it); but all such notions were expressly repudiated in the prevailing opinion. If so, each of the new shares, whether contained in the old or the new certificate, represents a part of the original property purchased and in selling the first certificate the stockholder has not sold the whole of what he originally bought, and should not be credited with the

whole purchase price. Judge Rose, in *Safe Deposit, etc., Co. v. Miles*, (D. C.) 273 Fed. 822, has adopted the same theory of computing an income tax in a stronger case. There the plaintiff sold some 'rights' declared upon his stock, and Judge Rose computed his profit in substantially the same way as I suggest here.

"The plaintiff answers this argument by saying that, if so, all shares at any time held by a stockholder must be brought into hotchpot and averaged. I scarcely think that consistency requires me to go so far. The law may, and in fact does recognize an identity in every share, which can indeed be traced upon the books of the company, at least until certificates are consolidated, and later subdivided. The purchase of a number of shares can be earmarked by the certificate, and it is an enormous convenience to keep the purchases separate. Yet it is possible and consistent, when new shares are declared, to attribute them ratably in subdivisions of those already issued. They are not so entered on the books, it is true; but the books are not kept in accordance with the underlying doctrine of *Eisner v. Macomber*, *supra*, in any event. At least the earlier certificates need not lose their separate identity because new shares are filiated to them in proper proportion.

"An illustration will make clear what I mean. Suppose a man has certificate A, for 100 shares, bought at \$100, certificate B, for 100, bought at \$150, and certificate C, for 100, bought at \$200. Suppose, further, that a stock dividend of 50 per cent. is declared, and he gets one certificate D, for 150 shares, without paying anything. If he sells certificate A, he would be deemed to sell, not the whole of his first purchase, but only two-thirds of it, and he could credit himself with only \$6,666. If he sold certificate B, he would credit himself with \$10,000, and if certificate C with \$13,333. If he sold certificate D, he could credit himself with \$15,000, made up of \$3,333 from his first purchase, \$5,000 from his second and \$6,666 from his third. If, on the other hand, he sold only a part of certificate D, some arbitrary rule of apportionment must be adopted, allocating the shares sold among his purchases. The most natural analogy is with payment upon an open account, where the law has always allocated the earlier payments to the earlier debts, in the absence of a contrary intention. Accordingly, if all the new shares were not sold at once, I think the first sales should be attributed to the first purchases still remaining unsold when the stock dividend was declared. I do not see that this method will result in confusion in its application, and it carries into effect the underlying theory of *Eisner v. Macomber*, *supra*.

"The tax at bar was not computed quite in this way, because all the purchases before the declaration of the stock dividend were brought into hotch-pot. This I think was

inconsistent with the theory of the identity of the shares involved in each purchase. It must, therefore, be recalculated, which the parties have kindly consented to do, if they are told the rule. The credits will be computed as follows: Upon each certificate held on March 1, 1913, two-thirds its value on that day; i. e., \$230. Upon each certificate bought at \$100, \$66⅔. Upon each certificate for stock dividend shares, if issued against any specified earlier certificate, the same credit per share as the shares of that certificate. If the certificate of new shares is not so earmarked, or if but one certificate was issued for the new shares, then credit will be allowed of two-thirds the value of the shares on March 1, 1913, until half the number of shares have been sold, which the plaintiff held on March 1, 1913, and retained till the stock dividend." *Towne v. McElligott*, (S. D. N. Y. 1921) 274 Fed. 960.

Dividend from surplus.—"A dividend may be income to the stockholder, though declared out of property which has long since become a part of the economic capital of the corporation. *Peabody v. Eisner*, *supra*; *Lynch v. Hornby*, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. ed. 1149. True, it must not be a dividend in liquidation. *Lynch v. Turrish*, 247 U. S. 221, 38 Sup. Ct. 537, 62 L. ed. 1087. And perhaps it must on that account be from a corporate surplus, since otherwise it is hard to avoid regarding it as in liquidation. But it makes no difference that it distributes to the stockholder property which is not current profit, but the means of producing current profit. He must still pay an income tax upon it, though in his eyes it is a part of his capital." *New York Trust Co. v. Edwards*, (S. D. N. Y. 1921) 274 Fed. 952.

Sale of subscription right.—Where a stockholder sells his right to subscribe for shares in the corporation, the tax is not assessed on the entire amount received by him but on the gain or profit realized on the transaction. *Safe Deposit, etc., Co. v. Miles*, (D. C. Md. 1921) 273 Fed. 822.

Cost of bonds as including interest during time preceding allotment.—A purchaser of bonds through an underwriting agreement under which he did not receive any interest upon the amount paid prior to the allotment of the bonds to him, some years later, is not entitled to have interest for the time so elapsed added as a part of the cost to him of such bonds, when computing the taxable income under the Federal income tax legislation, arising out of the sale of such bonds at a profit. *Walsh v. Brewster*, (1921) 256 U. S. 536, 41 Sup. Ct. 392, 65 U. S. (L. ed.) —, reversing in part and affirming in part (D. C. Conn. 1920) 268 Fed. 207.

Debenture bonds voted from a surplus or undivided profits have been held subject to taxation as "income." *Doerschuck v. U. S.*, (E. D. N. Y. 1921) 274 Fed. 739.

Distribution of stock acquired in another corporation.—In *New York Trust Co. v.*

Edwards, (S. D. N. Y. 1921) 274 Fed. 952, a pipe line company offered to buy an oil company's pipe line assets for a specified sum and to give in payment its own shares to be directly distributed by the pipe line company pro rata among the oil company's stockholders. This offer the oil company accepted and the contract bound the buyer so to distribute the stock, which it did. The court held that the new shares were income under the law and taxable as such.

Gain derived from sale of property which has appreciated in value.—Taxable income under this section, as amended, includes the gain derived from the sale of personal property which has appreciated in value during a series of years over its market value on March 1, 1913, if acquired before that date. *Eldorado Coal, etc., Co. v. Mager*, (1921) 255 U. S. 522, 41 Sup. Ct. 390, 65 U. S. (L. ed.) —; *Goodrich v. Edwards*, (1921) 255 U. S. 527, 41 Sup. Ct. 390, 65 U. S. (L. ed.) —.

However it is only where, and to the extent that, a gain over the original investment is realized upon a sale of property acquired before March 1, 1913, and worth less on that date than when acquired, that there can be any taxable income arising out of such sale, assessable under this section, as amended, since this legislation plainly imposes the income tax on the proceeds of sales of personal property to the extent only that gains are derived therefrom by the vendor. In other words paragraph (C) is applicable only where a gain over the original capital investment has been realized after March 1, 1913, from a sale or after disposition of property. *Goodrich v. Edwards*, (1921) 255 U. S. 527, 41 Sup. Ct. 390, 65 U. S. (L. ed.) —; *Walsh v. Brewster*, (1921) 256 U. S. 536, 41 Sup. Ct. 392, 65 U. S. (L. ed.) —, reversing in part and affirming in part (D. C. Conn. 1920) 268 Fed. 207.

A gain or profit derived from the sale by a testamentary trustee of personal property of the estate which has appreciated in value over its market value on March 1, 1913, the testator having died prior to that date, and the property being among the assets which came to the trustee, is taxable under this section, as amended. *Merchants' Loan, etc., Co. v. Smietanka*, (1921) 255 U. S. 509, 41 Sup. Ct. 386, 65 U. S. (L. ed.) —.

Testamentary trustee as taxable person.—A testamentary trustee is, by the express provisions of the different income tax acts, a taxable person. *Merchants' Loan, etc., Co. v. Smietanka*, (1921) 255 U. S. 509, 41 Sup. Ct. 386, 65 U. S. (L. ed.) —.

1918 Supp., p. 325, sec. 10.

Effect of dissolution of corporation before enactment.—Where a corporation sold all its property, distributed the proceeds to stockholders, thereby became dissolved, reported its net income for 1916 and paid the federal excise tax of one per cent thereon,

all prior to the passage of this Act, which imposed a tax of two per cent on the net income for that year of all corporations, it was held that the stockholders were liable for the extra one per cent. *U. S. v. McHatton*, (D. C. Mont. 1920) 266 Fed. 602. The court said: "Where defendants took the corporation's property, there was right in plaintiff to thereafter impose further taxes. To pay any such taxes was then an obligation of the corporation. The right was in its nature inchoate; the obligation was contingent. Defendants took subject thereto. The contingency happened; the right vested. The act of September 8, 1916, to this extent taxes effect by relation as of the first of the year, and prior to distribution and dissolution."

1918 Supp., p. 327, sec. 11 (a).

Educational institution.—Although a corporation conducting a military school is operated exclusively for educational purposes and all the shareholders are officers, directors and teachers in the institution, it is not exempt from taxation under this section where a charge is made for the services rendered to the pupils and a dividend is declared from the earnings. *Kemper Military School v. Crutchley*, (W. D. Mo. 1921) 274 Fed. 125.

Income from funds loaned to and belonging to charitable devisee.—Where a testator left his residuary estate to one to hold temporarily as trustee for a hospital subject to the payment of certain annuities and the trustee invested the funds of the estate in the form of a loan to the hospital on which loan the charity paid an interest sufficient to take care of the administrative charges and the annuities, it was held that the income was not subject to taxation. The court said:

"As justification for assessing this tax, it contended, however, that as the act of 1916 forbids taxation on 'any income received by any . . . corporation . . . for . . . charitable . . . purposes,' that the income of this residuary estate was not exempt because it has not been 'received,' but remains in the hands of the trustee. But, apart from the fact that the corpus of the residuary estate has in fact already been 'received' by the hospital in the shape of a mortgage, and the hospital itself is pro forma paying to its own trustee the money which, pro forma, constitutes the income here taxed, the construction thus urged and the effect given to the word 'received' does not commend itself to our judgment. The sections in question in the acts of 1913 and 1916 are to be considered and construed jointly. They concern the same subject-matter, and that of 1916 was evidently meant to continue the broad and absolute purpose and provisions of the act of 1913 'that nothing in this section shall apply . . . to any corporation . . . operated exclusively for . . . charitable . . .

purposes.' Such being the case, the residuary estate which produced this income being the property solely of the hospital, no one but the hospital owning the income thereof, and the temporary holding of the income being by a trustee, who was the agent and representative solely of the hospital, it is clear that when substance and spirit, and not mere form and words, are the interpreters of the statute, the receipt of this income by the hospital's agent and representative was in truth and reality a receiving by the hospital, for he who acts by the hand of another himself acts." *Lederer v. Stockton*, (C. C. A. 3d Cir. 1920) 266 Fed. 676.

1918 Supp., p. 329, sec. 12.

Depletion defined.—As to what constitutes depletion it has been said: "We cannot conceive any substantial distinction as applied to a mine between that depreciation or allowance for capital assets consumed which was sought by mine owners under the earlier acts, and that depletion which was expressly allowed by the amendment of 1916. From every point of view, this kind of depreciation or allowance was depletion, and this allowed depletion is depreciation or diminution of capital, and when the question of right to the allowance arises as between fee owner and lessee, it can make no difference whether the claimed allowance is called by one name or by the other." *Weiss v. Mohawk Min. Co.*, (C. C. A. 6th Cir. 1920) 264 Fed. 502. In passing on the right of exemption in such a case for depletion, the court further said: "We think the substantial principles established by the decisions are that both the royalty received by the fee owner and the sums received by the operating lessee above the cost of operation are income; that the statutory reduction for 'depletion' cannot be twice credited, once to the fee owner, and once to the lessee; and that the exemption belongs of right to the fee owner."

Deduction for salaries paid.—On the question of a deduction by a corporation for salaries it has been said:

"The case is an easily imaginable one that those interested in what is called a close corporation, and which, in every respect, except its formal organization, is a partnership, might resort to the expedient of distributing profits by fixing a scale of salaries proportioned to the shares or interests of its officers in the corporation. To encourage and promote devotion to the interests of the employer, and to increase the efficiency of employees, the plan of giving employees a share in profits along with stockholders has become more or less common. In the case of a corporation taxpayer, the tax is measured by the profits which flow to the corporation from the business in which it is engaged, and this is not affected by what the corporation, through its managers or the action of its stockholders, may do with its profits after they have been received. When

the employee is only an employee, and not in any sense a stockholder, the argument is at least a plausible one that what he receives he receives as compensation for his services, and it is none the less compensation for services, whether it is received in the form of a fixed salary or on the sliding scale, controlled by commissions or measured by the profits which through his effort come to the corporation. When the stockholder is only a stockholder, and in no sense an employee, what he received, whatever it may be called, is clearly given to him as profits. When, however, the one to whom the payment is made is both employee and stockholder, the difficulty of characterizing the payments made to him is increased; but the essential difference between what is compensation for services and what is a distribution of profits has not changed.

"The position to which counsel for the United States returns, asserting the right of the United States to have a jury determine what is fair compensation for the services rendered, and that all beyond this sum is a distribution of profits, is, it seems to us, an untenable position, because it is clearly the right of the employer to fix and determine what he shall pay, assuming, of course, that the employee is willing to accept of what is thus fixed. He may be unduly, or indeed unwisely, liberal, but an error of judgment of this kind cannot affect his right. We say, the position is untenable not upon the ground that Congress could not limit what should be allowed for deductions by reason of executive salaries, but on the ground that Congress has not thus far, and by the tax acts in question, established any such limitation. Nothing short of the legislative strong hand could fix any such limitation. There is practically no guide to determine what should be paid, or measure of payment, other than the judgment of those whose money is being paid. To object to a salary, for illustration, of \$25,000, which a corporation might well deem it to be to its interest to pay to one man as its president, because other men might be found willing to accept the position for \$5,000, or even for \$1,000, would be recognized at once as an objection without weight. On the other hand, freedom to pay over the profits of a corporation to its stockholders under the guise of paying salaries is recognized to be fraught with danger of an evasion of the tax laws. In order to determine what may be done and what may not be done, recourse can be had only to the drawing of the line indicated. That line is drawn by an answer to the question how much, if any, of what is paid to a stockholder, is paid by way of a distribution of profits. This question can only be answered by a finding based upon evidence, and, if there is no evidence, there can be no finding. Whenever, in the wisdom of Congress, this protection to the United States is deemed inadequate to prevent escape from just taxation, Congress may by

a simple enactment limit the deductions which may be made on account of payments of salaries to stockholders." *U. S. v. Philadelphia Knitting Mills Co.*, (E. D. Pa. 1920) 268 Fed. 270.

Expenditures for improvements.—Where a corporation is conducting a military school for private pecuniary gain it is not entitled to a deduction from its gross income of expenditures for new buildings or for permanent improvements or betterments made to increase the value of the property or estate. *Kemper Military School v. Crutchley*, (W. D. Mo. 1921) 274 Fed. 125.

1918 Supp., p. 335, sec. 14.

Claim for refund.—This act removed the legal disability imposed by R. S. sec. 3228 [3 Fed. Stat. Ann. (2d ed.) 1037] which prevented the government from discharging its moral obligations but did not repeal R. S. secs. 3226 and 3227 [3 Fed. Stat. Ann. (2d ed.) 1034, 1037]. *Public Service Corp. v. Herold*, (D. C. N. J. 1921) 273 Fed. 282.

1918 Supp., p. 336, sec. 1.

Covenant by lessee as to payment of "taxes, duties, and assessments" as requiring payment of federal income tax.—See *Sharon R. Co. v. Erie R. Co.*, (1920) 268 Pa. St. 396, 112 Atl. 242.

1918 Supp., p. 341, sec. 200.

Recovery by corporation of dividends paid before enactment.—A corporation which declared a dividend before the enactment of the statute, and which is thereafter compelled to pay an excess profits tax for a portion of the period in which the dividend was earned, is not entitled to recover from the stockholders the part of the dividend which would not have been paid had the tax been deducted from the profits before declaring it. *Overland Sioux City Co. v. Clemens*, (Ia. 1920) 179 N. W. 954.

1918 Supp., p. 343, sec. 201.

Application.—The statute applies to all trades and businesses without regard to their class or character. *Cartier v. Doyle*, (W. D. Mich. 1920) 269 Fed. 647.

"As the 20 per cent paragraph is the only one in which the deduction is stated, and in the succeeding paragraph the tax is clearly placed upon the differences in the percentages of invested capital, it is apparent that it was the intention of Congress, by the repeated use of the words 'in excess of' and 'not in excess of,' to have the same meaning apply to those words where used in the first paragraph as where used in the subsequent paragraphs, thus imposing no tax upon the net income up to the amount of the deduction, but imposing the lowest rate of tax upon the difference between the deduction and 15 per cent of the invested capital,

imposing the next tax upon the difference between 15 and 20 per cent of the invested capital, and so on, until in the last percentage paragraph the highest rate of 60 per cent applies to all net income in excess of 33 per cent of invested capital." *Ehret Magnes Mfg. Co. v. Lederer*, (E. D. Pa. 1921) 273 Fed. 689.

"Invested capital."—The term "invested capital," as here used, includes all working capital consisting of money or property employed by a partnership in the business or for its benefit, and furnished or "paid in" by one or more of the partners. It does not include borrowed money. So in the case of a partnership money borrowed from banks or individuals other than members of the firm, and solely upon the credit of the firm, must be excluded and may not be considered. But where the evidence showed that, for every dollar of money borrowed from the bank, property of one of the members of the firm, exceeding in value the amount of the loans, was deposited with the bank and pledged as collateral security for the repayment of such borrowed money it was held that the property so furnished and pledged became a part of the working capital, and was used and employed in the business of the company to the same extent as if it had been paid directly into the firm treasury. *Cartier v. Doyle*, (W. D. Mich. 1920) 269 Fed. 647.

Where a partnership has invested capital, within the purview and meaning of that term as employed in the statute, more than nominal in amount, excess profits taxes upon its income cannot be assessed under the provisions of section 209 of the statute, and, if the amount of such invested capital cannot be satisfactorily determined, excess profits taxes must be assessed under sections 201 and 210 in accordance with the proper regulations prescribed by the Commissioner of Internal Revenue. If the partnership has invested capital more than nominal in amount, it is not in a position to complain of the regulations promulgated or of the method employed in determining the amount of the firm's invested capital, which forms the basis of the computation of the taxes, where, under the undisputed evidence, the arbitrary or suppositious invested capital fixed upon was larger in amount than the invested capital actually possessed and employed, and the taxes imposed were correspondingly diminished. These taxes are assessed upon percentages of income to invested capital. The larger the capital, the smaller the percentage and resulting tax. *Cartier v. Doyle*, (W. D. Mich. 1920) 269 Fed. 647.

"Single trade or business."—Where the principal business of a partnership was dealing in lumber it was held that in the assessment of excess profits taxes, the income derived from a single timberland deal should not be considered and treated by itself, and

separate and apart from other partnership income or profits, but should be included in its income for the purpose of taxation. *Cartier v. Doyle*, (W. D. Mich. 1920) 269 Fed. 647.

The deduction must first be allowed in determining net income to be taxed at rate of twenty per cent. *Greenport Basin, etc., Co. v. U. S.*, (E. D. N. Y. 1920) 269 Fed. 58.

Brokers.—Members of a partnership who buy and sell lumber, undertake and assume all the risks, and enjoy all the benefits of a merchandising business are not "brokers" as the term is used in this section. *Cartier v. Doyle*, (W. D. Mich. 1920) 269 Fed. 647.

Effect of departmental regulations.—While, in doubtful cases, departmental regulations may be an aid in construction and interpretation, they can neither add to nor subtract from plain congressional enactments." *Cartier v. Doyle*, (W. D. Mich. 1920) 269 Fed. 647.

1918 Supp., p. 347, sec. 207a.

Constitutionality.—Defining invested capital according to the original cost of the property, to the exclusion of present higher values, as is done by this subdivision for the purpose of computing the war excess profits tax imposed upon corporations, except that the tangible property paid in prior to January 1, 1914, may be taken at its actual cash value on that date, but in no case exceeding the prior value of the original stock or shares specifically issued for it, and provided that intangible property purchased bona fide prior to March 3, 1917, shall be included in invested capital at a value not to exceed the actual cash value at the time of purchase, does not make the act productive of such baseless and arbitrary discrimination as to render the tax invalid under the due process of law clause of the Fifth Amendment to the Federal Constitution. *LaBelle Iron Works v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 528, 65 U. S. (L. ed.) —.

Invested capital as applied to ore lands.—Neither the increased value of the ore lands of a corporation, though the result of an extensive exploration and development work, nor the surrender of old stock in the corporation in exchange for new issues, based on such increased values, can be regarded as within the provision of this subdivision by which invested capital is defined for the purpose of computing the war excess profits tax imposed by that act, as "actual cash paid in," or "the actual cash value of tangible property paid in, other than cash, for stock or shares in such corporation," or "paid-in or earned surplus and undivided profits." *LaBelle Iron Works v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 528, 65 U. S. (L. ed.) —.

Increase of value by appreciation.—Increase in the value of property by appreciation, first added to surplus on the books of

the company and then declared as a stock dividend, is not undivided profits, paid-in surplus, earned surplus, nor invested capital within the meaning of this section. *LaBelle Iron Works v. U. S.*, (1920) 55 Ct. Cl. 462.

Money expended in improving process.—When money has been earned and spent in improving a secret process, its increased value due only to that expenditure may figure as an asset in estimating under section 207 "earned surplus," if any, as an element of "invested capital." *Lincoln Chemical Co. v. Edwards*, (S. D. N. Y. 1921) 272 Fed. 142.

A secret process was held to be "intangible property" in *Lincoln Chemical Co. v. Edwards*, (S. D. N. Y. 1921) 272 Fed. 142.

Patents from which a corporation derives its sole revenue by way of royalties or licenses are held not to be "invested capital." *De Laski, etc., Circular Woven Tire Co. v. Iredell*, (D. C. N. J. 1920) 268 Fed. 377.

1918 Supp., p. 348, sec. 209.

"Capital" defined.—The word capital as here used is said to mean a situation where a man has laid out money or other form of property from which he receives a return without any personal participation on his part in the activities which in the end yield that return. It does not refer to a man's capacity for labor. *Porter v. Lederer*, (E. D. Pa. 1920) 267 Fed. 739.

The lesser rate of assessment is to be followed only in those cases in which money or property plays no part in the source of the income, or such small part as to be practically negligible. *Porter v. Lederer*, (E. D. Pa. 1920) 267 Fed. 739.

Profits not withdrawn.—The mere fact that the profits of a business having no capital are not wholly withdrawn, does not make of such undrawn profits a capital fund, where although they were allowed to accumulate they were not "used or employed in the business." *Porter v. Lederer*, (E. D. Pa. 1920) 267 Fed. 739.

Income from patents.—A corporation deriving its income solely from royalties or licenses from patents is said to be a corporation "having no invested capital or not more than a nominal capital" within the meaning of this section. *De Laski, etc., Circular Woven Tire Co. v. Iredell*, (D. C. N. J. 1920) 268 Fed. 377. The court said:

"It seems clear that patents do not fall within the term 'capital'; and it also seems to be clear that this is what was in mind when Congress made the distinction between 'invested capital,' which is defined under section 207 to include the actual cash value of patents paid for in stock or shares, and, also such other intangible property which had been paid for in money or stock, and also what was in mind when the word 'capital' is used alone in section 209, preceded by the word 'nominal'; that is, in the sense of something in name only em-

ployed in or available for production. The distinction is between those employing those stored-up concrete things, essential to productive labor, and those employing these things existing in name only. Patents were never capital in an economic sense. Congress included them within the term 'invested capital' to the extent only of the investment in them; if no investment in them, then they remain in the same class as that intangible something which makes for the wealth of the professional man, the broker, or others engaged in a personal service, which could never be 'capital,' except in name only.

"The decision of this case, however, need not depend solely upon the meaning of the word 'capital,' to be found in the distinction between 'invested capital' and 'nominal capital,' as used in the act. The patents which the plaintiff owned were the concrete embodiment of the skill which the plaintiff possessed in its field of activity. This skill or service it bartered for a consideration. Such skill or service is like the service a lawyer in large practice renders for an annual retainer, and is very nearly akin to the service which a commission house renders to those who buy and sell through it, or the service of a concern engaged in selling or leasing real estate, and in writing insurance. The plaintiff's source of income was that which certain persons were willing to pay it for the use of its skill and knowledge. It is true that skill and knowledge had been reduced to concrete form; but the payment was for the use of the skill and knowledge, and not for any part or parcel of the form to which the skill and knowledge had been reduced. Hence it would seem that in a very real sense the plaintiff was engaged in rendering a personal service, and was not employing 'capital,' and certainly no more than a 'nominal capital.'

Commissions received by executor.—Commissions received by an attorney for services rendered as an executor are not subject to the tax imposed by this section. *Lederer v. Cadwalader*, (C. C. A. 3d Cir. 1921) 274 Fed. 753. The court said:

"Taxes on income from a 'trade or business' clearly mean taxes on the trade, business, profession, or occupation of the taxpayer himself. This is the plain meaning of the statute, and any other construction distorts the simplicity of the language and requires that we read into the language something it does not contain. A single, isolated activity of the character of the executorship of the plaintiff does not constitute a trade, business, profession, or vocation under the facts of this case."

Commission business.—Where persons are engaged in a commission business it has been held that they are in a "trade or business having no invested capital or not more than a nominal capital" within the meaning of

that clause as used in this section. *Porter v. Lederer*, (E. D. Pa. 1920) 267 Fed. 739.

Effect of treasury rulings.—Treasury rulings indicating that the word "invested" was omitted in the act by oversight in the phrase "not more than a nominal (invested) capital" can neither modify nor add to the clearly expressed language of Congress. *De Laski, etc., Circular Woven Tire Co. v. Iredell*, (D. C. N. J. 1920) 268 Fed. 377.

Burden of proof in action for refund.—*Lincoln Chemical Co. v. Edwards*, (S. D. N. Y. 1921) 272 Fed. 142.

1918 Supp., p. 350, sec. 300.

The "taxable person" intended by this section is the person or corporation actually manufacturing the munitions, and hence does not include individuals who advanced money to a corporation to send an agent abroad to secure a munition contract but who had nothing to do with the actual manufacture of the munitions. *Traylor Engineering, etc., Co. v. Lederer*, (C. C. A. 3d Cir. 1921) 271 Fed. 399, *affirming* (E. D. Pa. 1920) 266 Fed. 583.

1918 Supp., p. 351, sec. 301.

"Sale and delivery."—It is held that considering the context of the act the words "sale and delivery" must be read "sale or delivery." *Dayton Brass Castings Co. v. Gilligan*, (S. D. Ohio 1920) 267 Fed. 872.

"Any part of."—Under a regulation of the Commissioner of Internal Revenue providing that "Any part thereof," as used in this section is any article *relatively complete* within itself and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which, without further treatment, cannot be used for any purposes other than that for which it was designed," it has been held that rough castings designed or manufactured for the special purpose of being used as a component part of a completed munition after further progressive treatment and which could not be used for any other purpose than that for which they were intended were "relatively complete." *Dayton Brass Castings Co. v. Gilligan*, (S. D. Ohio 1920) 267 Fed. 872.

Manufacturer.—If the application of labor to an article effects some transformation in the character of the article, and converts it into a new and different article, having a distinctive name, character, or use, such article is a manufactured article, and the person producing it is a manufacturer. *Dayton Brass Castings Co. v. Gilligan*, (S. D. Ohio 1920) 267 Fed. 872, holding a person to be a "manufacturer" where labor performed on metal changed its form into rough given shaped castings adapted to use after further treatment, as essential parts of fuses.

1918 Supp., p. 351, sec. 302.

Profits shared with others.—In computing the amount of net profits on which a munition manufacturer is taxed there can be no deductions made on account of payments made to third persons by the manufacturer under an agreement to share the profits of a contract in consideration of the aid given by the third persons in securing it. *Traylor Engineering, etc., Co. v. Lederer*, (C. C. A. 3d Cir. 1921) 271 Fed. 399, *affirming* (E. D. Pa. 1920) 266 Fed. 383.

Payments to persons engaged in a common venture made under a contract by which in substance they were to share in the profits which were ultimately yielded in proportion to each one's advancement are not to be deducted in computing the net profits. *Traylor Engineering, etc., Co. v. Lederer*, (E. D. Pa. 1920) 266 Fed. 583, wherein the court said: "Without any thought of escaping the payment of taxes, but to bring about what is believed to be a more just distribution of profits, it is not unusual to pay dividends, in the form of salaries, to executive officers of corporations. The illustration of wage bonus used in presenting the argument of counsel for plaintiff is one for which he is not responsible. Whether in strict principle even this, if measured by and dependent upon profits, is within the deductions allowed by the act of Congress, the distinction between an ordinary wage bonus and the case of what is really a division of profits is that the one bears a normal relation to the value of the service rendered; the purpose of the payment of the bonus being to stimulate the wage-earner to add to the productiveness of his labor, but the other has no such normal relation."

"Without prolonging the discussion by going into all the refinements of the argument, we rest the ruling now made upon the broad proposition (concretely stated with respect to the facts of this case) that it is not the meaning of the act of Congress that a corporation may pay out of its profits to those interested with it in a common venture \$1,000 for every dollar such persons have put into the venture, nor that it may pay them \$1,000,000 as a premium for going on a surety bond for that sum, and thereby reduce the measure of the excise tax which the corporation would otherwise have been called upon to pay. The reason is that obviously such payments are not made as compensation for moneys advanced or services rendered, but are made by way of distribution of profits among the joint ventures, and what is more to the point the act of Congress does not permit deductions to be made for such payments before finding what are the profits made within the meaning of the taxing law."

1918 Supp., p. 352, sec. 303.

"Disposes of."—It is said that these words as here used mean something more than the

word "sell" and must have a distinctive meaning beyond that word. They were intended to embrace every sort of transaction or device other than a sale. They are words of general use and not of legal technicality. Many shades of meaning have been assigned to them. That meaning should be given to them, if possible, which will consist with, and not defeat, the object of the act, or lead to injustice to manufacturers. To pass an article over into the control of another, to part with it, to relinquish it, to get rid of it, actually to remove it, is to dispose of it. *Dayton Brass Castings Co. v. Gilligan*, (S. D. Ohio 1920) 267 Fed. 872.

"Fair market price."—"To prevent avoidance of the tax on manufactured articles and parts of articles mentioned in section 301, Congress established a standard, by comparison with which the fair dealing of the manufacturers might be tested. An article or part of an article owned by a manufacturer, whether his ownership be entire or qualified, has a value. The standard of value set up by the statute is the 'fair market value.' If the manufacturer, enjoying the full ownership of an article, or a part of it, sold, or, having but a qualified ownership therein, disposed of, his entire interest for what that interest, whatever it might be, would fairly sell for on the market, he was taxable on the net profits only as the same were determined by section 302. If he sold or disposed of his interest for less than it would thus sell for on the market, his tax was to be computed for the taxable period on the gross amount received or accrued from the sale or disposition of such article, or part thereof. Such is the significance of the term 'the fair market price' occurring in section 303." *Dayton Brass Castings Co. v. Gilligan*, (S. D. Ohio 1920) 267 Fed. 872.

1918 Supp., p. 368, sec. 800.

Nature of section.—Statutes of this kind are not remedial laws, nor are they founded on any permanent public policy. They impose burdens upon the public and restrict the pursuit of occupations and the enjoyment of property. If a tax is to be sustained in any given case it must come clearly within the letter of the statute. *Edwards v. Wabash R. Co.*, (C. C. A. 2d Cir. 1920) 264 Fed. 610.

Temporary bonds issued before Act took effect.—Where temporary bonds which were issued before this Act took effect were to be exchanged at a later date for permanent bonds it was held that neither the temporary nor permanent bonds were subject to the tax. The court said: "The issuance of the temporary bond was for the purpose of security only. The plaintiff below entered the entire amount of the bond as an outstanding obligation. The book entry shows that the maker intended to pass title to the temporary bond of the Guaranty Trust Company, and intended that when it did so such bond

should be an obligation of the company, issued and outstanding. And when the underwriters and subscribers paid money on the faith of this security, and when receipts therefor in the form mentioned above were given a binding obligation to the extent of the money so advanced was created. The underwriters and subscribers, in so advancing the money, could rely implicitly upon the covenants and provisions of the trust agreement and the terms of the temporary bond, which was given as security. The temporary bond was properly issued and duly authenticated. The Guaranty Trust Company did not hold it as a mere agent. It was the bearer and holder of the bond. By the terms of the transaction, the authentication upon the bond was conclusive evidence that the bond had been issued, and that the Guaranty Trust Company was entitled to the benefit of the trust created by the trust agreement. The Guaranty Trust Company took as trustee for itself and its fellow underwriters and subscribers. This was an issue. The liability to a stamp duty, as well as the amount thereof, is determined by the terms found in the instrument. . . .

"It was never intended by the statute to impose the tax on the exchange of the permanent bonds for temporary bonds, or upon the exchange of registered or unregistered bonds, or vice versa, or for the substitution of several small bonds for one large one, and vice versa. For us to hold as contended for by the defendant below, would be to reach such a conclusion. No additional tax is required upon the issuance of a permanent or definite bond in substitution for a temporary bond which has been delivered. The term 'issued,' as used in the statutes, implies not merely delivery, but delivery of an instrument creating or renewing an obligation, and not merely furnishing a different expression of a pre-existing obligation." *Edwards v. Chile Copper Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 452.

Certificates in exchange for stock.—Certificates of stock issued in exchange for other stock are not subject to the tax not being evidence of an original issue of stock. The court said: "The question remains whether the documents upon which the tax has been imposed are the evidence of an original issue of stock. A stock certificate is a document which is the evidence of the number of shares of stock which the holder of it owns. And the tax is laid, not on each stock certificate that is issued, but on each original issue of certificate. The language is used to indicate the first issuance of the stock, and this is emphasized by the use of the words, in the same connection, 'whether on organization or reorganization.' When a corporation issues for the first time a certificate of the stock, that certificate is an original issue. The tax is placed on the original issue. The word 'original' is defined by Webster as 'pertaining to the origin or beginning; preceding all; first in order.' Plainly, then, it was not intended to tax the

plaintiff on each issue of certificates, but only on each original issue of certificates which preceded all other issues which might subsequently be made, when the original certificates were surrendered and new ones issued in their place, either to the original owner or to those to whom the original owners had transferred them." *Edwards v. Wabash R. Co.*, (C. C. A. 2d Cir. 1920) 264 Fed. 610.

Recovery of tax wrongfully exacted.—"One who denies the legality of the tax should have a color of certain remedy after payment under protest. He cannot interfere by injunction with the government's collection of its revenue, and the action at law to recover back what he has paid is the alternative left. . . . The citizen who is obligated to pay the tax which he deems illegal may do so, even though to his disadvantage, by paying under protest and later asserting his legal right of protest by the liberty of promptly bringing suit for its recovery. He has an equal right to do this, as he might have the legal right to interpose a defense for the collection of the tax." In such a case the collector is a proper party defendant. *Edwards v. Chile Copper Co.* (C. C. A. 2d Cir. 1921) 273 Fed. 452.

1918 Supp., p. 384, sec. 1004.

Amended return.—The fact that the false statement is made by an officer in an amended return will not excuse him from liability under this section. *Levy v. U. S.*, (C. C. A. 3d Cir. 1921) 271 Fed. 942, wherein it was said: "While amended or corrected income tax returns may not be prescribed by the statute, they are nevertheless allowed and received by the Treasury Department in the administration of the Income Tax Law, and on such returns taxes are assessed by the Commissioner of Internal Revenue. When so assessed, these are the taxes which under the law are charged against and collected from the taxable."

1919 Supp., p. 91, sec. 200.

"Income tax" defined.—An income tax is not upon any specific sum of money, but is a personal tax measured by sums of money received (or possibly accrued) to the person taxed during a certain period—i. e., the calendar year. *Pennsylvania Cement Co. v. Bradley Contracting Co.*, (S. D. N. Y. 1920) 274 Fed. 1003.

1919 Supp., p. 91, sec. 201.

Stock dividends as income.—See *Loomis v. Wattles*, (C. C. A. 8th Cir. 1920) 266 Fed. 876. See also annotation to 1918 Supp., p. 313, sec. 2, *supra*, 492.

1919 Supp., p. 94, sec. 210.

Persons subject to tax.—The tax is imposed on citizens of the United States regardless of their place of residence, or resi-

dents of the United States regardless of their citizenship, and upon the income of nonresident aliens from sources within the United States. Thus, a citizen of the United States who resided in the Philippine Islands during the entire year of 1918 is subject to the tax imposed by the revenue act of that year. *Lawrence v. Wardell*, (N. D. Cal. 1920) 270 Fed. 682.

Regulations issued by the Commissioner of Internal Revenue, which describe in detail the method of computing the excess profits tax have no binding force, if they alter, amend, or extend the statute. *Greenport Basin, etc., Co. v. U. S.*, (E. D. N. Y. 1920) 269 Fed. 58.

1919 Supp., p. 97, sec. 213a.

Compensation of receiver.—Although the services rendered by a receiver extend over a period of several years the compensation awarded him when given in one sum is taxable as of the year when it is received notwithstanding the fact that the court in making its order divides the compensation according to the services rendered in each year. *Jackson v. Simietanka*, (N. D. Ill. 1920) 267 Fed. 932, *affirmed* (C. C. A. 7th Cir. 1921) 272 Fed. 970.

1919 Supp., p. 99, sec. 214.

Estate taxes.—The amount of the federal estate tax laid by the Act of September 8, 1916, (1918 Supp. Fed. Stat. Ann., p. 305) which accrued and was paid during the year, may be deducted by executors from gross income when making their return of the income of the testator's estate for the taxable year, for the purpose of the income tax imposed by the Act of February 24, 1919, upon the net income received by estates of deceased persons during the period of administration or settlement, which statute, in this section, makes express provision for the deduction of taxes paid or accrued within the taxable year, imposed by the authority of the United States, except income, war profits, and excess profits taxes. *U. S. v. Woodward*, (1921) 256 U. S. —, 41 S. Ct. 615, 65 U. S. (L. ed.) —.

Profits embezzled.—A person may charge off as a loss, profits which were made on a sale of stocks but which were embezzled by his broker. *Black v. Bolen*, (W. D. Okla. 1920) 268 Fed. 427.

1919 Supp., p. 103, sec. 219.

Transfer of assets of joint stock company to trustee.—A dissolution of a joint stock company and the transfer of its assets to one as trustee of a trust estate has been sustained though the motive in so doing was to reduce the amount of future taxation. In such a case it was said: "Bearing in mind the rule of construction which the Supreme Court announced in the case of *Gould v.*

Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, and numerous other cases, to the effect that the provisions of the taxing statutes are not to be extended by implication beyond the clear import of the language used, and that they are to be construed most strongly against the government and in favor of the taxpayer, it is the opinion of this court that the right to change the status of an organization, or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future. The right so to do is an incidental right, inseparably connected with an individual's right to own and control his property. It is practically identical with the sale by a citizen of tax-burdened securities and the investment of the proceeds thereof in tax-exempt ones, for the purpose of reducing or avoiding taxation.

"It is not unnatural that any thoughtful business man take such steps. It is altogether different from tax dodging, the hiding of taxable property, or the doing of some unlawful or illegal thing in order to avoid taxation." *Weeks v. Sibley*, (N. D. Tex. 1920) 269 Fed. 155.

Restraining payment of tax by trustee.—An equitable proceeding may be maintained by a beneficiary of a trust to restrain the payment by the trustee of a tax in compliance with a ruling by the Bureau of Internal Revenue where it is claimed by the complainant that the tax is illegal. *Weeks v. Sibley*, (N. D. Tex. 1920) 269 Fed. 155.

1919 Supp., p. 106, sec. 222a.

Citizen of United States in Philippines.—A citizen of the United States residing in the Philippines may be allowed a credit for the amount of income taxes paid to the Island treasury. *Lawrence v. Wardell*, (C. C. A. 9th Cir. 1921) 273 Fed. 405.

1919 Supp., p. 118, sec. 252.

Refund as matter of right.—Under this section the refund is a matter of right without proof or duress or protest. *Greenport Basin, etc. Co. v. U. S.*, (E. D. N. Y. 1920) 269 Fed. 58.

Filing claim for refund as condition precedent to suit.—It is not necessary before commencing a suit to obtain a refund of a part of an income tax paid under protest that the plaintiff should file a claim for a refund. *Black v. Bolen*, (W. D. Okla. 1920) 268 Fed. 427.

1919 Supp., p. 118, sec. 253.

Sufficiency of indictment.—An indictment charging a conspiracy to defeat and evade the income tax imposed by the federal statutes and alleging as the only overt act the filing of a false return with the collector of internal revenue will be quashed where it appears that there had been a previous acquittal under an indictment charging a

conspiracy to defraud the United States and which charged the same overt act. *U. S. v. Rachmil*, (S. D. N. Y. 1921) 270 Fed. 869.

1919 Supp., p. 120, sec. 261.

A citizen of the United States residing in the Philippines is subject to the Income Tax Law under the act of 1918. *Lawrence v. Wardell*, (C. C. A. 9th Cir. 1921) 273 Fed. 405.

1919 Supp., p. 131, sec. 402.

Time of transfer.—The clause "whether such transfer is made or accrued before or after the passage of this act" was used in this section to elucidate without changing the law and to put at rest any controversy on the subject. *Shwab v. Doyle*, (C. C. A. 6th Cir. 1920) 269 Fed. 321.

1919 Supp., p. 140, sec. 600a.

This section was not repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 202 et seq.). *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

1919 Supp., p. 140, sec. 600b.

This section was not repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 202 et seq.). *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

1919 Supp., p. 143, sec. 604.

This section was not repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann. p. 202 et seq.). *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

1919 Supp., p. 153, sec. 628.

"Soft drinks."—Sweet cider is taxable under this section as a soft drink. *Monroe Cider Vinegar, etc., Co. v. Riordan*, (W. D. N. Y. 1921) 274 Fed. 736. The court said: "Sweet cider is commonly understood to be a soft drink, and as drinks of that description are specifically taxed, the assessment in question in my opinion, was in contemplation of the act. In enacting the law Congress had in mind the essential distinction between hard and soft cider, and the comprehensive term 'soft drinks' was used to include it and other soft drink beverages fairly and reasonably coming within that classification. It is not conceivable that the law-making power intended to exclude sweet cider, which has less than one-half of 1 per centum of alcohol, from taxation, and to tax other soft drinks which also have hardly any alcoholic content. In *Bradford v. Jones*, 142 Ky. 820, 135 S. W. 290, the words 'soft drinks' were held to mean nonintoxicating beverages, and the court took judicial notice of the fact that such beverages were sold in places where there were formerly sold intoxicating liquors. Such has become the common understanding and therefore, the lan-

guage of the statute must be taken in the sense in which it will be understood by the public. *U. S. v. Isham*, 17 Wall. 496, 21 L. Ed. 728; *Brown v. Piper*, 91 U. S. 42, 23 L. Ed. 200. Giving effect to the rules of construction enunciated in these adjudications requires me to hold that the words 'other soft drinks,' as used in the statute, clearly include for taxation the beverage sweet cider. There is no ambiguity in the term, and its meaning is plain, when we adhere to the common understanding. The doctrine of *nos cuitur a sociis* or *eiusdem generis*, urged by plaintiff, need not be called upon to assist in interpreting the statute, in view of the apparent intent with which the term was used in the statute."

Basis of computation of tax.—The basis for computing the amount of the tax on sweet cider sold in containers is held to be the price of the beverage and container. *Monroe Cider Vinegar, etc., Co. v. Riordan*, (W. D. N. Y. 1921) 274 Fed. 736.

1919 Supp., p. 160, sec. 900.

Games.—Ouija boards are games or implements with which games are played within the sense of the word "games" as used in this section and subject to tax. *Baltimore Talking Board Co. v. Miles*, (D. C. Md. 1921) 273 Fed. 531. The court said: "One of these boards is a thing which one or more people employ for their amusement or sport, and with which they think they are playing at a game. The use of it is all the more interesting, in that it gives results which the players may not always suppose to be foretellable. In this respect it resembles various games of solitaire, the telling of fortunes by cards, etc. It is quite clearly among the general class of things which Congress intended to tax, and it is sufficiently identified by the words it used."

"There is a subordinate question raised. The plaintiff says that the larger part of its sales were of small-sized boards, sold by it at a low price to merchants, who distributed them as advertisements. It claims that in any event they are not taxable, because they are children's toys or games, and as such are excepted by the act itself. It may be that there are some who think that those who use ouija boards are childish enough. That is a matter of opinion upon which courts need not take sides. They are not the sort of thing which would interest many who are children in years. The picture on the envelope in which the plaintiff distributes these diminutive boards show that those who are supposed to use them are, for the most part, adults."

"It follows that the tax was properly collected, and the defendant is entitled to a verdict."

1919 Supp., p. 170, sec. 1006.

Constitutionality.—This act is constitutional. "This provision, by confining purchases to the drugs in the packages, or from

the packages stamped, clearly tends to confine the purchases and dealings in such drugs to those which have paid the internal revenue tax levied. A compliance with this law by all purchasers would extend all transactions to such drugs as had paid the internal revenue tax." *Gilmore v. U. S.*, (C. C. A. 5th Cir. 1920) 266 Fed. 719.

Purpose.—The purpose of the statute is to prohibit the purchase, sale and distribution of narcotics. *Dean v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 694.

Sufficiency of indictment.—An indictment which charges that the defendant "did knowingly, unlawfully, and willfully sell, dispense, and distribute" derivatives of opium and derivatives of coca leaves, has been held sufficient to show that he was a person who was required to register under the Act of December 17, 1914, and the amendment of February 24, 1919. *Bacigalupi v. U. S.*, (C. C. A. 9th Cir. 1921) 274 Fed. 367. So an indictment under this section has been held sufficient which charged that the defendant did knowingly, etc., "purchase, sell, dispense, and distribute cocaine in and from a certain tin box, which said tin box was not then and there the original stamped package containing said cocaine," and that said defendant did have in his possession the said tin box containing cocaine, consisting of about one-half an ounce, and that the "said tin box then and there containing said cocaine did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the act of Congress approved December 17, 1914, known as the Harrison Narcotic Law." *Dean v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 695. And in *Dean v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 695, an indictment was held sufficient as against objection not raised in the court below.

In *Bierriero v. U. S.*, (C. C. A. 4th Cir. 1921) 271 Fed. 912; *Senick v. U. S.*, (C. C. A. 4th Cir. 1921) 271 Fed. 918, it was contended that to convict under this section it must be alleged and proved "that the accused is one of those persons required to register and pay the special tax," even if untaxed and unstamped drugs be found in his possession. The court said: "We are not of that opinion. The clause above quoted includes, not only those who purchase, but also those who sell and dispense, and the latter are specifically required to register and pay the special tax. Therefore an indictment in the language of the statute, charging that defendant 'did sell, dispense and distribute,' as in this case, alleges by necessary implication that he is within the class required to register. And if there be proof that unstamped drugs were found in his possession, the clause in question creates the presumption that he has violated the amended section. The burden is then upon him to show that he is not in the class required to register, and that his possession was not unlawful."

Evidence.—Under this section *prima facie*

proof is made of the violation of the statute by evidence that the accused had the possession of prohibited narcotics to which are not affixed appropriate tax paid stamps. In this respect the offense is not dissimilar to some other offenses against the United States, such as the offense of having in possession dies adaptable to counterfeiting or having possession of imported opium. *Dean v. U. S.*, (C. C. A. 9th Cir. 1920) 286 Fed. 694. Such provision of this section is permissible, for while the possession of drugs cannot of itself be made a crime, possession may be made *prima facie* evidence of some other offense. *Pierriero v. U. S.*, (C. C. A. 4th Cir. 1921) 271 Fed. 912; *Senick v. U. S.*, (C. C. A. 4th Cir. 1921) 271 Fed. 918.

An instruction in a prosecution under this section on possession as *prima facie* evidence of violation held not to be erroneous in *Pierriero v. U. S.*, (C. C. A. 4th Cir. 1921) 271 Fed. 912.

Sentence.—Where under this act a verdict of guilty is rendered upon several counts, and the sentence does not exceed that which might be properly imposed upon conviction on the counts which are good, the sentence must stand. *Bacigalupi v. U. S.*, (C. C. A. 9th Cir. 1921) 274 Fed. 367.

1919 Supp., p. 174, sec. 1100.

Note without stamps as evidence.—A promissory note is inadmissible as evidence where the required documentary stamps are not affixed thereto. *U. S. v. Masters*, (E. D. Mo. 1920) 264 Fed. 260.

1919 Supp., p. 177, sec. 1107, subd. 4.

"Right to subscribe for or to receive such shares."—In *Marconi Wireless Tel. Co. v. Duffy*, (D. C. N. J. 1921) 273 Fed. 197, the plaintiff, for the purpose of consolidating its property and business with certain properties and business of the General Electric Company, contracted to transfer its assets, with minor exceptions, to the Radio Corporation of America (hereinafter called Radio), in exchange for 2,000,000 shares each of Radio's preferred and common stock. Stock was issued with the revenue stamp required by law attached thereto. Subsequently plaintiff was required by defendant to pay an additional tax upon the shares so issued direct to plaintiff's stockholders, amounting to the sum of \$5,000, the stamps for which, upon the defendant's directions, were affixed to plaintiff's minute book, and canceled by the defendant despite the plaintiff's protest. The court said: "In considering the question at issue we must not ignore the substantial difference between a corporation and its stockholders. . . . The property sold to Radio was the plaintiff's property, and could be sold only by it. To effect the sale the consent of the stockholders was necessary; but it, and not

the stockholders, held the legal title, and it alone could vest such title in the purchaser. The stockholders eventually would share in the consideration of the sale, but this could be brought about only by means of dividends or similar methods of distribution. The stock issued by Radio to the plaintiff's stockholders was the consideration for the property sold to it by the plaintiff. Had the plaintiff received the stock as seemingly was originally contemplated, and disposed of it, whether to its stockholders or to other parties, a tax such as was here imposed would have had to be paid. Undoubtedly it was within the power of plaintiff, upon obtaining the necessary authority, to direct Radio to issue the stock to its (plaintiff's) stockholders. But this authority—resolution of the plaintiff's board of directors—was nothing less than a transfer of plaintiff's rights to such shares of stock, and is covered by one of the quoted methods of transferring shares or certificates of stock taxable under subdivision 4, viz., a transfer of 'rights to subscribe for or to receive such shares.' . . . Such transfers having been effected, the challenged tax was justified, and the stamps were properly affixed to the plaintiff's minute book, as it evidenced the transfer."

1919 Supp., p. 179, sec. 1200.

Constitutionality.—This section imposing a tax of ten per cent on an establishment using child labor contrary to its provisions is unconstitutional. *George v. Bailey*, (W. D. N. C. 1921) 274 Fed. 639. The court said: "It will be noted that this section is practically a reproduction of the material provisions of the Owen-Keating bill; the only difference being that under that bill, the product of an establishment using child labor, was forbidden transportation in interstate commerce, and in the present act an establishment using child labor contrary to its provisions is subject to a tax of ten per centum, upon the net income derived from its operations. The question which suggests itself in the outset is whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object. It is more reasonable to conclude that the purpose of the tax feature is to impose a penalty in order to deter the violation of the child labor provision. It would be a rather non-productive revenue system which imposed taxes, the effect of which would be to annihilate the subject of taxation, or to prohibit the exercise of the privilege for which the tax is levied.

"In the case of *Collins v. New Hampshire*, 171 U. S. 30, 33, 34, 18 Sup. Ct. 768, 769 (43 L. Ed. 60), the following is found:

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose

must be determined by its natural and reasonable effect.'

"This doctrine is reaffirmed in the Dagenhart Case, *supra*. In what are called the Pipe Line Cases, 234 U. S. 548-560, 34 Sup. Ct. 956, 958 (58 L. Ed. 459), the Supreme Court used this language which is quoted before in this opinion:

"The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution."

"If that principle applies to the authority of Congress in the regulation of commerce, there is no reason why it should not apply in raising revenue by taxation, for the power delegated to the United States to levy and collect taxes, is no more elastic than the power delegated by the commerce provision. As bearing upon this point the following is quoted from the opinion in *Veazie Bank v. Fenno*, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482, which was a case involving the right of the federal government to levy taxes upon state banks:

"There are, indeed, certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the states or if exercised for ends inconsistent with the limited grants of power in the Constitution."

"By the Constitution the federal government is invested with power by congressional legislation 'to lay and collect taxes, duties, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States.' But nowhere in the Constitution can be found authority to the national government to regulate labor within the states.

"Upon consideration of the prime question

in this case and the authorities bearing upon it, the conclusion seems to be irresistible that the national Legislature cannot do indirectly that which it is forbidden by the Constitution to do directly; and it being definitely determined by the highest court of the land that the right to regulate labor is inherent in the states, then Congress cannot intervene to control it, either by way of interstate commerce, efforts to levy taxes, or by any other method."

Power of Congress.—The right to regulate labor within a state is a state function and Congress is forbidden by the Constitution to interfere with it. *George v. Bailey*, (W. D. N. C. 1921) 274 Fed. 639.

Injunction against collection of tax.—This act being unconstitutional an injunction may be granted to restrain the collection of the tax imposed, as *R. S. sec. 3224* (3 Fed. Stat. Ann. (2d ed.) 1032) forbidding a suit to restrain the collection of any tax is inapplicable. *George v. Bailey*, (W. D. N. C. 1921) 274 Fed. 639.

1919 Supp., p. 192, sec. 1320.

Fees of clerk of court.—The clerk of the court is entitled to his fee "for receiving, keeping and paying out money" where Liberty Bonds are deposited as authorized by this section. *McGovern v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 262.

1919 Supp., p. 193, sec. 1400.

Invalidity of unstamped instruments not affected by repeal.—The limitation on the repeal of the Stamp Tax Act does not leave in force the provision of the Act of 1898 (4 Fed. Stat. Ann. (2d ed.) p. 291, note) invalidating unstamped proxies. *State v. Miller*, (Wis. 1921) 181 N. W. 745, *reversing on rehearing* (Wis. 1920) 179 N. W. 815.

INTERSTATE COMMERCE

Vol. IV, p. 337, sec. 1 [A]. [First ed., vol. III, p. 809.]

VI. Validity of state statutes.

3. Contracts.

VIII. Persons, etc., subject to act.

2. Telegraph companies.

X. Transportation within state or territory.

1. Transportation within state.

VI. VALIDITY OF STATE STATUTES

3. Contracts (p. 341)

Where coal mining companies had contracts to deliver coal outside the state and an order of a state commission requiring them to deliver their coal to parties within the state was made the court held that an interlocutory injunction should be issued, the

court saying: "That the operation of the statute, as indicated by the orders of the commission, is a direct interference with interstate commerce. When the coal is severed from the ground it becomes an article of commerce, and the owner of that commodity, under the commerce clause of the Federal Constitution (article 1, § 8, see Vol. X, p 410), which recognizes no state lines, has the right, so far as the state is concerned, to sell and to contract to sell his entire output to citizens of other states. The orders are also an interference with interstate commerce by reason of the showing in the bill that the output of three of the five mines that are being operated by the complainants had been contracted to the Pennsylvania Company, an interstate carrier, under a contract meeting the approval of the Interstate Commerce Commission, which approval carries an implied

finding of fact that the coal, so used, is directly consumed in, or in aid of, interstate commerce." *Vandalia Coal Co. v. Special Coal, etc., Commission*, (D. C. Ind. 1920) 268 Fed. 572.

VIII. PERSONS, ETC., SUBJECT TO ACT

2. *Telegraph Companies* (p. 343)

In general.—To the same effect as the original annotation, see *Western Union Tel. Co. v. Sims*, (Ind. 1921) 131 N. E. 520; *Western Union Tel. Co. v. Bushnell*, (Ind. App. 1920) 128 N. E. 49, wherein it was held that a telegraph company was subject to the provisions of this act although the point of origin and the point of destination of the message transmitted were within the same state.

X. TRANSPORTATION WITHIN STATE OR TERRITORY

1. *Transportation Within State* (p. 349)

Transportation of a passenger and baggage under an interstate ticket would be none the less interstate commerce because the transportation in question was only one stage of the journey, lying between two points in the same state. *Galveston, etc., R. Co. v. Woodbury*, (1920) 254 U. S. 357, 41 S. Ct. 114, 65 U. S. (L. ed.) —, *reversing* (Tex. 1919) 209 S. W. 432.

Vol. IV, p. 351, sec. 1 [B]. [First ed., 1912 Supp., p. 113.]

V. TRANSPORTATION AS INCLUDING WHAT

1. *In General* (p. 353)

Agreement to furnish car.—An agreement by an express company to furnish a car is not a separate and distinct contract, but is a part of the contract of transportation. The furnishing of the car was merely a part or an incident of the entire transaction. The stock could not have been transported, nor the carriage completed, except that a car was furnished for that purpose. Transportation means not only the physical instrumentalities, but all services in connection with the receipt, handling, and delivery of the property transported. *Cecil v. Southern Express Co.*, (1921) 191 Ky. 262, 229 S. W. 1041.

Vol. IV, p. 355, sec. 1 [C]. [First ed., 1912 Supp., p. 113.]

II. "Just and Reasonable" charges.

1. In general.
8. Telegraph messages.

II. "JUST AND REASONABLE" CHARGES

1. *In General* (p. 356)

Object of provisions as to just and reasonable charges.—In construing this provision and section 3, it has been said: "Obviously the legislative motive for the enactment of

those provisions was to protect parties procuring the services of the carriers mentioned from exactions by such carriers of unjust or unreasonable charges for such services, and from being made the victims of undue or unreasonable discriminations against such parties, and in favor of others having similar dealings with the carriers. It is not to be supposed that those provisions were intended to have the effect of enabling a carrier to escape liability for a breach of its undertaking to render a service in the line of the business in which it is engaged by showing that the party for whom that service was undertaken was, without the knowledge or fault of that party, charged less therefor than its reasonable value, or than was exacted of others for similar services, or otherwise was accorded undue preferential treatment. The provisions were intended for the benefit of parties unjustly discriminated against, and were not intended to enable a carrier to shield itself from the consequences of a breach of its obligation to a party who was an unconscious recipient of the carrier's preferential treatment." *Western Union Tel. Co. v. Esteve*, (C. C. A. 5th Cir. 1920) 268 Fed. 22.

8. *Telegraph Messages* (p. 358)

What constitutes interstate message.—A message sent to another point in the same state but relayed through a point outside the state is an interstate message. *Western Union Tel. Co. v. Speight*, (1920) 254 U. S. 17, 41 S. Ct. 11, 65 U. S. (L. ed.) —, *reversing* (1919) 178 N. C. 146, 100 S. E. 351; *Western Union Tel. Co. v. Beasley*, (Ala. 1921) 87 So. 858 (*overruling* *Western Union Tel. Co. v. Glover*, (1920) 17 Ala. App. 374, 86 So. 154); *Western Union Tel. Co. v. Brent*, (1921) 191 Ky. 503, 230 S. W. 921.

Limitation of liability.—Since the amendment of June 18, 1910, providing that telegraph and cable messages may be classified into day, night, repeated, unrepeatd, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates be charged for the different classes of messages, the sender of an unrepeatd cablegram from a foreign country is, without assent in fact, bound as a matter of law by the provision in the company's lawfully established tariff, limiting liability for mistake in transmission of unrepeatd cablegrams to the amount of the company's share of the tolls collected, where such tariff offers alternative rates for repeated and unrepeatd cable messages, since any deviation from the lawful rate would violate the statutory requirement of equality and uniformity of rates. *Western Union Tel. Co. v. Esteve*, (1921) 256 U. S. —, 41 S. Ct. 584, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 5th Cir. 1920) 268 Fed. 22. To the same effect, see *Western Union Tel. Co. v. Brent*, (1921) 191 Ky. 503, 230 S. W. 921.

Neither the fact that the message was telephoned in so that the sender did not know

of a rule printed on the blank as to unreported messages nor the fact that the telegraph company had not filed its rules with the Interstate Commerce Commission obviates the binding effect of the rule. *Grand Rapids Showcase Co. v. Postal Tel. Cable Co.*, (Mich. 1921) 183 N. W. 731.

A telegraph company is not liable for delay in the transmission of an interstate telegram, for an amount in excess of the price of the message, where the contract between the sender and the company, approved by the Interstate Commerce Commission, so provides. *Western Union Tel. Co. v. Thompson*, (1920) 123 Miss. 441, 86 So. 273.

The federal decisions being binding, a state court is bound to sustain the validity of a limitation of liability for mistake or non-delivery where the message is an interstate one. *Ryan v. Colorado Postal Tel. Co.*, (Colo. 1921) 195 Pac. 645. See further to the same effect, *Brewer v. Postal Tel. Co.*, (Mo. App. 1920) 223 S. W. 949.

Reasonableness of rules on telegraph blanks.—Where the telegraph blank on which the message involved was written is on file with the Interstate Commerce Commission, as are the rules governing unreported messages and like matters, questions of the reasonableness of the regulations on the back of the blank are primarily for the Interstate Commerce Commission to determine. *Czizek v. Western Union Tel. Co.*, (C. C. A. 9th Cir. 1921) 272 Fed. 223.

Mental anguish.—The transmission of a telegram between two points in the same state over a route passing out of the state is none the less interstate, so as to prevent the application of the rule of the local law permitting a suit to recover damages for mental anguish because of a mistake in delivery, although it would have been physically possible to send the message over a route lying wholly within the state, the course adopted being more convenient and less expensive for the telegraph company. *Western Union Tel. Co. v. Speight*, (1920) 254 U. S. 17, 41 Sup. Ct. 11, 65 U. S. (L. ed.) —, (reversing (1919) 178 N. C. 146, 100 S. E. 351) wherein it was further held that the burden rests upon the plaintiff in a suit against a telegraph company to recover for mental suffering due to a mistake in the transmission of a telegram to show the motive, if material, of the telegraph company in transmitting the message between two points in the same state over a route passing through another state. Also that, any liability to the addressee of a telegram which might arise because of the motive with which the telegraph company transmitted the message between two points in the same state over a route passing through another state would not be a liability for an intrastate transaction that never took place, but for the unwarranted conduct of the company and the resulting loss.

In an action for negligent delay in transmitting a telegram a state court must apply

the federal rule which forbids the recovery of damages for mental anguish, and this though the interstate character of the message was not pleaded by the defendant. *Nichols v. Western Union Tel. Co.*, (Nev. 1920) 191 Pas. 573.

Punitive damages.—Under Act Cong. June 18, 1910, c. 309 (36 Stat. 539), and the common law as accepted and enforced by the federal courts, a telegraph company is not liable for punitive damages for delay in the transmission of an interstate telegram, resulting from the willful disregard of the sender's rights on the part of the company's agent, unless the agent's wrongful act was authorized or approved by the company. *Western Union Tel. Co. v. Thompson*, (1920) 123 Miss. 441, 86 So. 273.

Vol. IV, p. 359, sec. 1 [D]. [First ed., 1912 Supp., p. 113.]

"Practice."—It is said that the word "practice" as used in this section covers a large field but that occasional and even common assertion of right do not make such a practice, its essence being uniformity. *Francesconi v. Baltimore, etc., R. Co.*, (S. D. N. Y. 1921) 274 Fed. 687.

Vol. IV, p. 359, sec. 1 [E]. [First ed., 1912 Supp., p. 114.]

I. Validity of state statutes.

VI. Acts constituting violation.

I. VALIDITY OF STATE STATUTES (p. 360)

Statute as to effect of stipulation in pais is not affected by this section. *Van Zant v. Kansas City Southern R. Co.*, (Mo. 1921) 232 S. W. 696, wherein the court said: "The plain and obvious import of that part of the Hepburn Act under consideration is to prohibit the issuance by an interstate carrier of interstate free passes to any persons, except those of certain designated classes, and to subject both the carrier issuing such a pass and the person using it, in violation of its prohibition, to certain penalties. With respect to the issuance of passes to persons coming within the exception, nothing is said: there is no reference whatever to the form or provisions of any such pass, or to the undertaking thereby assumed by the carrier issuing it, or to the liability, if any, that may be incurred in the transportation thereunder, for a failure on the part of the carrier to exercise care or otherwise. As evidenced by the language, the sole purpose of the enactment of these provisions was to prohibit the issuance of free transportation by interstate carriers. However, the issuance to certain classes of persons was excepted from the operation of the act. So far as the cases coming within the exception were concerned, the law remained unchanged. After the passage of the act, as to the persons named in the ex-

ception, the carrier could issue free interstate passes, on such conditions and under such stipulations as it saw fit, or it could refuse to issue them at all, just as it could and did do prior thereto. The only regulation of interstate free passes undertaken by the act was to prohibit their issuance and use, except with respect to the persons specifically excluded from its operation. . . . Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and that therefore these matters remain the subject of regulation by the several states."

VI. ACTS CONSTITUTING VIOLATION (p. 363)

Sufficiency of information.—An information charging a violation of this section need not negative the exceptions specified therein. *Krause v. U. S.* (C. C. A. 8th Cir. 1920) 267 Fed. 183.

Vol. IV, p. 363, sec. 1 [F]. [First ed., 1912 Supp., p. 115.]

VI. OWNERSHIP BY RAILROAD OF STOCK IN MINING COMPANY (p. 365)

A contract which an anthracite coal company, controlled by an interstate railway carrier through stock ownership and common officers, made with a sales company, the stockholders in which were practically identical with those in the railway company, whereby the coal company is to sell the coal mined by it to the sales company, the latter to pay therefor at 65 per cent of the New York prices, and to sell no other coal than that purchased from the coal company, there being further provisions that the coal company shall lease all its facilities, structures, and trestles to the sales company; that either party shall have the right to abrogate and cancel the contract upon giving six months' notice, and that the sales company shall not buy coal except from the coal company,—violates both the commodities clause of the Act of June 29, 1906, set out in the text, making it unlawful for any railway company to transport in interstate commerce any article which it may own or in which it may have any interest, and the Sherman Anti-trust Act of July 2, 1890 (see vol. IX, p. 644), prohibiting contracts in restraint of trade. *U. S. v. Lehigh Valley R. Co.*, (1920) 254 U. S. 255, 41 Sup. Ct. 104, 65 U. S. (L. ed.) —, (*reversing* (S. D. N. Y. 1914) 225 Fed. 399) wherein it was further held that the combination effected through intercorporate relations between the interstate railway carrier, the anthracite coal company, and the sales company, which was found to violate both the Sherman Anti-trust Act of July 2, 1890 (see Vol. 9, p. 644), and the

commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, and all contract relations between the coal company and the sales company which would serve in any manner to render the sales company not entirely free to extend its business of buying and selling where and from and to whom it chooses with entire freedom and independence must be enjoined, so that the sales company may in effect, as well as in form, become an independent dealer, free to act in competition with the coal company or railway company.

Distribution of assets on dissolution.—In *U. S. v. Reading Co.*, (1920) 253 U. S. 26, 40 Sup. Ct. 425, 64 U. S. (L. ed.) 760 (see 1920 Supp. 568) the Supreme Court ordered the District Court to enter a decree "dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey and the Lehigh & Wilkes-Barre Coal Company, existing and maintaining through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other of the Philadelphia & Reading Railroad Company, the Philadelphia & Reading Coal & Iron Company." As to a plan submitted the District Court (see *U. S. v. Reading Co.*, (E. D. Pa. 1921) 273 Fed. 848) said: "Seeing, then, that this stock is not an earning of the Reading Company to be distributed as a dividend, but is a part of its capital disposed of in this case to qualifying shareholders, in the manner provided for by the creation of this intermediate corporation, it will be apparent that this decree of equal right to all shareholders, preferred and common alike, to participate in the sale as ultimate purchasers, is based on the general equitable principle that equality is equity and on the corporate right of all shareholders in a Pennsylvania corporation to share equally on a disposition of its assets. We are therefore of opinion that the plan which embodies these equitable principles should be approved and that the claim of the common shareholders to take all of this stock to the exclusion of the preferred stockholders should be denied. And in approving such plan we note that in point of fact the equity of a common participation of all stockholders, preferred and common, has not only the approval of the government of the United States that has no interest in the controversy, save to see that equity is done to all; of the Reading Company which has no interest save an impartial stewardship for all its shareholders; and, lastly, the silently expressed approval of substantially two-thirds of the shares held by common stockholders. . . . Without entering upon a further discussion of the questions

involved, we are of opinion, after careful and matured consideration, that the plan as amended should be approved, and we therefore direct the preparation of a formal decree embodying its terms. We deem it proper to add that such decree shall provide for the creation of a new corporation, to which shall be sold the equities in the shares of the Philadelphia & Reading Coal & Iron Company held by the Reading Company. The rights to purchase the stock of this newly created company will be sold to the preferred and common stockholders of the Reading Company share and share alike. In the creation of such a corporation by this court's order, we follow a general course pursued in the case of *United States v. Du Pont et al.* (C. C.) 188 Fed. 127, and the wisdom of so doing will be seen by an examination of the opinion lately filed in that case, where the purpose of such procedure is fully explained. By the creation of this new corporation by the directions of this court, and by its retention of jurisdiction to enforce this decree as therein provided, the court can, if such contingency should arise, by its control of this newly formed corporation, control all of its stockholders, and prevent such stock from ever being used to thwart the decree made in pursuance of the plan." As to the stock of the Coal Company a plan was approved by which in substance the shareholders of the Reading Company both common and preferred were to share equally in the distribution. As to the stock of another railroad company held by the Reading Company the court said: "Reading Company contends that the spirit and the letter of section 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (40 Stat. 456), justifies its prayer that the value of this stock of the Central Railroad Company of New Jersey shall not be subjected to possible sacrifice by a sale until the Interstate Commerce Commission shall adopt a consolidation plan which will designate the several railroads of the East with which the Central Railroad Company of New Jersey may be consolidated, so that assurance may be given to a railroad company purchaser of this stock that the holding of it by such purchaser will not be objectionable.

"The Attorney-General has contended that the stock should be placed in the hands of a trustee or trustees under a decree of this court, which shall direct Reading Company to proceed with all due diligence to offer the same for sale within a definite period, and if at the expiration of such period a purchaser has not been found by Reading Company, then upon the application of the Attorney-General the court may decree a sale of this stock at public auction or in such manner as the court shall then provide.

"The court is of opinion that because of the provisions of the Transportation Act of 1920 there is presently no prospective purchaser of the Jersey Central stock at a fair

price, and so long as the control of the voting power of this stock is taken from Reading Company and lodged with a trustee or trustees, acting under the supervision of this court, there is full compliance with the mandate of the Supreme Court, which requires that there shall be established entire independence between these two companies, and we are also of opinion there is no good reason why the decree of this court shall now subject the stock to the possible sacrifice of a forced sale, to the detriment, not only of the Reading Company, but also to the almost equal number of other shareholders of the Jersey Central who are not parties to this record, who have no right to be heard, and yet who may be very seriously affected by a decree of this court ordering at the present time a forced sale of this majority stock.

"The final decree to be entered herein, therefore, will direct the transfer of the stock of the Central Railroad Company of New Jersey, owned by Reading Company, to such trustee or trustees, individual or corporate, as the court may name, and shall contain the terms of the trust, which in substance shall provide that the stock shall be voted by the trustee or trustees, so that at all times there shall be entire independence of directors and management between Reading Company, as it shall be hereafter merged with Reading Railway Company, and the Central Railroad Company of New Jersey, and that pending a sale of the stock all dividends received by the trustee or trustees upon the same shall be paid to Reading Company, or as it shall direct, and that the actual sale of the stock of the Central Railroad Company of New Jersey shall be deferred, in view of the possible grouping of railroads by the Interstate Commerce Commission under the Transportation Act of 1920, subject, however, to a provision in the decree that on motion of the United States or other party, or upon the court's own initiative, that, without awaiting such action by the Interstate Commerce Commission, an order may be entered hereafter for the sale of such stock, if and when it shall appear to the court that the facts require it, or the situation makes it possible."

Vol. IV, p. 371, sec. 2. [First ed., vol. III, p. 813.]

III. Unjust discrimination.

2. What constitutes.

6. Effect on contracts.

IV. Rebates.

V. Damages for violation.

III. UNJUST DISCRIMINATION

2. What Constitutes (p. 373)

Discrimination in switching charges.—The practice of railway carriers entering a certain city to absorb switching charges within the switching limits, where the line-haul carrier competes with the switching line,

and to refuse to absorb such charges when the switching line does not compete with the line-haul carrier, may be forbidden by the Interstate Commerce Commission as being unjustly discriminatory and unlawful, under this section, which prohibits any carrier from charging or receiving from any person a greater compensation than it receives from another person for doing for him a like and contemporaneous service under substantially similar circumstances and conditions. *Seaboard Air Line R. Co. v. U. S.*, (1920) 254 U. S. 57, 41 Sup. Ct. 24, 65 U. S. (L. ed.) —, *affirming* (E. D. Va. 1918) 249 Fed. 368.

Agreement to carry cattle without unloading.—A special agreement to carry cattle for 36 hours without unloading is invalid as a discrimination unless a rate is provided therefor. *Bradford v. Hines*, (1920) 206 Mo. App. 582, 227 S. W. 889.

Bill of lading issued without surrender of the old bill is void, even in the hands of an innocent purchaser. *Pioneer Trust Co. v. Nashville, etc., R. Co.*, (1920) 204 Mo. App. 328, 224 S. W. 109, wherein it was said:

"Defendant's tariff, rules, and regulations, filed with the Interstate Commerce Commission, covering conditions upon which a shipper would be permitted to divert or reassign a shipment in transit by exchanging bills of lading, provide that the original bill of lading must be surrendered before a new bill of lading is issued. That this is a service in connection with the transportation of property there is no question. *Detroit Traffic Ass'n v. Lake Shore & M. S. Ry. Co.*, 21 Interst. Com'n R. 257, 262; *In re Mileage Tickets*, 23 Interst. Com. Com'n R. 95; *Doran & Co. v. Nashville, C. & St. L. Ry. Co.*, 33 Interst. Com. Com'n R. 523, 527. To hold that defendant might lawfully issue exchange bills of lading without receipt of the originals would plainly be permitting a discrimination among shippers, which is prohibited by the Commerce Act. *Cicardi Bros. v. Pennsylvania Co.*, *supra*; *Banaka v. Mo. Pac. Ry. Co.*, 193 Mo. App. 345, 186 S. W. 7; *Cudahy Packing Co. v. Bixby*, 199 Mo. App. 589, 205 S. W. 865; *Hareison v. St. L. & S. F. R. Co.*, 191 S. W. 1068.

"It is apparent that, even if the agent who issued the exchange bills of lading without having the original ones in his possession was *pro hac vice*, the defendant corporation itself, such act under the federal statutes would be absolutely void. It is therefore immaterial as to what was the extent of the authority of defendant's agents who issued these exchange bills of lading involved in this case. Defendant, being forbidden to issue the bills of lading sued upon in the first place, of course, could not be rendered liable under any theory of estoppel."

6. Effect on Contracts (p. 378)

An agreement to establish a new rate on a certain class of shipments does not entitle

the shipper to that rate on shipments thereafter made where the new rate was not filed until after the shipments. The established rate at the time of shipment must be paid. *Oregon-Washington R., etc., Co. v. Cascade Contract Co.*, (Ore. 1921) 197 Pac. 1085, wherein the court said:

"In other words, the plaintiff seems to have neglected to file the amended rate, and the defendant, without waiting for its promulgation, shipped the rock, and hence became liable for the freight as computed under the schedule of tariff in force at the time the shipment moved. The defendant was bound to know the existing tariff. It was charged with knowledge that the plaintiff could not charge less or more than, or any rate different from that prescribed in, the current schedule. It is fair to say that in seeking to protect its promise, but, as it appears, when it was too late, the record shows that the plaintiff applied to the Interstate Commerce Commission for leave to refund to the defendant the difference of \$1,394.39, but was refused by the commission on the ground that this would constitute a preference not allowed by the Interstate Commerce Law or the tariff in force at the time. This is clearly within the policy of the law, for any other shipper of stone would have a right to rely upon the published tariff in force at the time, and ought not to be subject to the preference that would arise out of refunding to the defendant a portion of the freight which it paid under the existing tariff, although it relied upon the promise of the plaintiff to promulgate a lower rate. In other words, the defendant paid the rate in force at the time, and must be bound thereby."

Effect of invalid agreement on statute of limitations.—In *Nashville, etc., R. Co. v. Tennessee Mill Co.*, (1921) 143 Tenn. 237, 227 S. W. 443, it appeared that a large shipper, having many claims against the railroad company for overcharges on freight and damage to shipments, procured an arrangement with the railway company whereby credit was to be extended to him on this basis. The defendant, being a large shipper, at all times had on file with the railway company many claims for overcharge on freight, and for loss and damage to shipments. Instead of settling the railway's claims against him monthly, he got the railway company to agree that it would carry these claims against him to the amount of \$5,000 as long as his claims against the railway company ran between \$5,000 and \$10,000, and when defendant's claims against the railway exceeded \$10,000 it agreed to extend to him a credit of 50 per cent of the amount of said claims. The parties worked under this agreement for several years. It was held that while the agreement was void as an unlawful preference by the extending of in-

definite credits it prevented the running of limitations against the shipper's claims.

IV. REBATES (p. 378)

Right to set off claim against charges.—A claim of a shipper against the railroad company may be set off in an action for freight charges despite the possibility that such a set off may be made the cover for a rebate. *Nashville, etc., R. v. Tennessee Mill Co.*, (1921) 143 Tenn. 237, 227 S. W. 443.

V. DAMAGES FOR VIOLATION (p. 379)

Rebates.—It is held that the amount of a rebate alone, as in the case of an absorption of charges to competitors, is not as a matter of law sufficient evidence on which to assess damages which are the pecuniary loss inflicted as a result of the rebate paid. *Hillsborough Mills v. Boston, etc., R. R. Co.*, (D. C. Mass. 1921) 269 Fed. 816.

Vol. IV, p. 379, sec. 3. [First ed., vol. III, p. 816.]

II. Construction

III. Undue or unreasonable preference or advantage.

2. Similarity of circumstances and conditions.
3. Allotment of cars.
5. Rates and charges.

II. CONSTRUCTION (p. 381)

Object of provisions as to rates and charges.—In construing this section and section 1 [C] *supra*, it has been said:

"Obviously the legislative motive for the enactment of those provisions was to protect parties procuring the services of the carriers mentioned from exactions by such carriers of unjust or unreasonable charges for such services, and from being made the victims of undue or unreasonable discriminations against such parties, and in favor of others having similar dealings with the carriers. It is not to be supposed that those provisions were intended to have the effect of enabling a carrier to escape liability for a breach of its undertaking to render a service in the line of the business in which it is engaged by showing that the party for whom that service was undertaken was, without the knowledge or fault of that party, charged less therefor than its reasonable value, or than was exacted of others for similar services, or otherwise was accorded undue preferential treatment. The provisions were intended for the benefit of parties unjustly discriminated against, and were not intended to enable a carrier to shield itself from the consequences of a breach of its obligation to a party who was an unconscious recipient of the carrier's preferential treatment." *Western Union Tel. Co. v. Esteva*, (C. C. A. 5th Cir. 1920) 268 Fed. 22.

III. UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE

2. Similarity of Circumstances and Conditions (p. 383)

Milling in transit.—A milling in transit privilege extended to shippers at Seattle and Everett and at no other places in Western Washington was in State v. Public Service Commission, (1920) 112 Wash. 520, 192 Pac. 1075, held not to be discriminatory as to shippers at Tacoma, the conditions being dissimilar in that a much greater "back haul" would be required in case of Tacoma shipments if milling in transit was allowed. The court stated the situation as follows:

"The milling in transit privileges extended to shippers at Seattle on shipments received in Eastern Washington and milled at Seattle and reshipped to points north of Everett, involve a back haul of 34 miles; such a privilege extended to the complainant at Tacoma would require a back haul of 75 miles. The through rates on eastern shipments to Tacoma is the same as through rates on shipments to Seattle and Everett. The Northern Pacific and Chicago, Milwaukee & Puget Sound Railways accord milling in transit privileges at Tacoma and Seattle on eastern shipments milled at either point, the finished product to be reshipped to points north. On the Northern Pacific lines this involves a back haul of 18 miles, and on the Milwaukee a back haul of 26 miles. Both of these railroads operate lines into and through the territory north of Seattle, the Northern Pacific extending to the Canadian border, and the Milwaukee having lines through Tolt, Monroe, and Everett. East of Everett on the appellant's line there is no flour mill in Western Washington."

3. Allotment of Cars (p. 384)

Cars not owned by carrier—Detention by carrier.—A carrier is liable to a shipper for the unreasonable detention and use of tank cars belonging to the shipper in the absence of a regulation under the Interstate Commerce Act to the contrary. *Francesconi v. Baltimore, etc., R. Co.*, (S. D. N. Y. 1921) 274 Fed. 687.

Evidence held to show discrimination.—*Weber v. Pennsylvania R. Co.*, (E. D. Pa. 1920) 262 Fed. 945, cited in 1920 Supp. p. 568, affirmed *Pennsylvania R. Co. v. Weber*, (C. C. A. 3d Cir. 1920) 269 Fed. 111.

5. Rates and Charges (p. 387)

Negligent act precluding recovery of charges.—A railroad company is not precluded from recovering its charges by its negligence in presenting to the consignee a bill showing that charges had been paid, whereby the consignee is led to pay the amount of those charges to the consignee, since the policy of the statute forbids that a carrier should be estopped to collect its lawful and uniform rates. *Chicago, etc., R.*

Co. v. J. I. Case Plow Works, (Wis. 1920) 180 N. W. 846.

Vol. IV, p. 406, sec. 6 [A]. [First ed., 1909 Supp., p. 260.]

- I. In general.
- IV. Contents, construction and sufficiency of schedules.
 - 1. In general.
- V. Publication of schedules.
 - 1. Necessity.
- VI. Effect of published rates.
 - 1. In general.
 - 3. Contracts of transportation.

I. IN GENERAL (p. 407)

Telegraph companies though brought within the act of the statute of June 18, 1910 (see 4 Fed. Stat. Ann., p. 355) are not required to file schedules. *Brewer v. Postal Tel. Cable Co.*, (Mo. App. 1920) 223 S. W. 949.

IV. CONTENTS, CONSTRUCTION AND SUFFICIENCY OF SCHEDULES

1. In General (p. 409)

Classification as including exclusion.—Classification in carrier rate-making practice is grouping,—the associating in a designated list, commodities which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates. To exclude a commodity from all classes is classification of it in as real a sense and with as definite an effect as to include it in any one of the usual classes. *Director General of Railroads v. Viscose Co.*, (1921) 254 U. S. 498, 41

V. PUBLICATION OF SCHEDULES

1. Necessity (p. 413)

Publication not essential.—The fixing of a rate, followed by the filing of the same with, and the approval of, the Interstate Commerce Commission, constitutes the lawful and binding rate to be paid, irrespective of any question of the publication thereof. *Payne v. Clarke*, (S. D. Cal. 1921) 271 Fed. 525.

VI. EFFECT OF PUBLISHED RATES

1. In General (p. 415)

To the same effect as the first paragraph of the original annotation, see *Payne v. Clarke*, (S. D. Cal. 1921) 271 Fed. 525.

3. Contracts of Transportation (p. 416)

Generally.—To the same effect as the original annotation, see *Montpelier, etc., R. Co. v. Bianchi*, (Vt. 1921) 113 Atl. 534.

Vol. IV, p. 421, sec. 6 [G]. [First ed., 1909 Supp., p. 261.]

1. In General (p. 421)

Payment of less compensation than that fixed by tariff rates.—A commission merchant, the consignee of an interstate shipment, is, as a matter of law, liable to the carrier for the difference between the freight charges erroneously claimed by the carrier and paid by the consignee upon receipt of the goods, and the larger amount due under the applicable published tariffs, although the standard "straight" bills of lading, under which the goods were shipped, did not come into the consignee's possession, and it had no knowledge of their issuance or terms, and although the consignee accepted the shipment upon the understanding that the charges were as reported, and did not agree to pay more. *New York Cent., etc., R. Co. v. York, etc., Co.*, (1921) 256 U. S. —, 41 S. Ct. 509, 66 U. S. (L. ed.) —.

Vol. IV, p. 432, sec. 9. [First ed., vol. III, p. 833.]

- II. Exclusiveness of remedies.
- III. Jurisdiction of courts.

1. Federal.

- IV. Preliminary investigation by commission.

II. EXCLUSIVENESS OF REMEDIES (p. 433)

Discrimination in rates.—It has been held that an action to recover damages for a discrimination in rates which had been previously condemned by the Interstate Commerce Commission cannot be maintained where the plaintiff has not submitted its claim to the commission. *Hillsborough Mills v. Boston, etc., R. Co.*, (D. C. Mass. 1921) 269 Fed. 816.

III. JURISDICTION OF COURTS

1. Federal (p. 433)

Generally.—The mere fact that the enforcement of a rule of the commission comes incidentally in question does not divest a court of jurisdiction. The Supreme Court has several times enforced such rules or practices of the carriers without preliminary recourse to the commission. *Francesconi v. Baltimore, etc., R. Co.*, (S. D. N. Y. 1921) 274 Fed. 687.

IV. PRELIMINARY INVESTIGATION BY COMMISSION (p. 436)

Construction of terms of classifications and tariffs.—Where the question is one of pure construction of the terms of published classification and tariffs and there is no complexity, doubt or confusion as to the subject on which the tariff operates it is one for the courts. *Butler Motor Co. v. Atchison*,

etc., R. Co., (C. C. A. 8th Cir. 1921) 272 Fed. 683.

Action for rebating.—To the same effect as the original annotation, see *Dusenberry v. Lehigh Valley R. Co.*, (S. D. N. Y. 1920) 268 Fed. 1009.

Action for unfair distribution of cars.—In the case of an alleged discrimination by out making a preliminary application to the a carrier in the distribution of cars an action may be maintained against the carrier with- Interstate Commerce Commission. *Dusenberry v. Lehigh Valley R. Co.*, (S. D. N. Y. 1920) 268 Fed. 1009.

Recovery of overcharges.—Claims for the repayment of overcharges may be the subject of an original action in a federal court with- out first submitting them to the Interstate Commerce Commission. *Kansas City Southern R. Co. v. Wolf*, (C. C. A. 8th Cir. 1921) 272 Fed. 681.

Vol. IV, p. 441, sec. 10 [D]. [First ed., 1912 Supp., p. 118.]

IV. PARAGRAPH [D] (new)

Joinder of parties.—An action under this section may be maintained against the carrier and the person procuring such discrimination by his unlawful solicitation. And although the discrimination was in favor of a partnership one of whom is made defendant, all the members need not be joined where the liability of the one named as a defendant under this section is well laid. *Dusenberry v. Lehigh Valley R. Co.*, (S. D. N. Y. 1920) 268 Fed. 1009.

Vol. IV, p. 448, sec. 12. [First ed., vol. III, p. 838.]

II. POWERS AND DUTIES OF COMMISSION (p. 451)

In general.—An action for damages in the nature of the rental of a car for the period in which a railway company retained it beyond the time specified by contract is not within the jurisdiction of the Interstate Commerce Commission, but in that of the courts. *Empire Refineries v. Guaranty Trust Co.*, (C. C. A. 8th Cir. 1921) 271 Fed. 668.

Vol. IV, p. 457, sec. 14. [First ed., vol. III, p. 843.]

Report—Findings of fact.—Findings of fact by the Interstate Commerce Commission upon questions the determination of which is by law imposed upon the commission, can be disturbed by judicial decree only in cases where the commission's action is arbitrary, or transcends the legitimate bounds of its authority. *Seaboard Air Line R. Co. v. U. S.*, (1920) 254 U. S. 57, 41 S. Ct. 24, 65 U. S. (L. ed.) —, *affirming* (E. D. Va. 1918) 249 Fed. 368.

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Vol. IV, p. 458, sec. 15 [A]. [First ed., 1912 Supp., p. 119.]

II. Regulation of rates.

2. Power of courts.
5. Review.

II. REGULATION OF RATES

2. Power of Courts (p. 462)

State courts.—A state court has jurisdiction of an action to recover excessive charges paid under protest, there being no attack on the rates fixed by the commission. *Payne v. White House Lumber Co.*, (Tex. 1921) 231 S. W. 417, wherein it was said:

"The fourth and sixth assignments deny the jurisdiction of the district court to determine the claim with reference to demurrage and freight charges and assert that the jurisdiction is with the Interstate Commerce Commission. It is asserted that the petition on such claim involved a construction of the rules of the Interstate Commerce Commission and for that reason the district court had no jurisdiction. This is not a suit attacking the rule of the Interstate Commerce Commission fixing demurrage charges or the freight rate as being unreasonable, but is a suit to recover charges demanded and paid in violation of the rule. The petition might have been more specific, but it is apparent the rule or rate fixed by the Commission is not assailed, but it was the act of demanding and receiving demurrage and freight not authorized to be collected under the rules filed with the Interstate Commerce Commission. The initial jurisdiction, of course, is with the Commission to fix and establish rules and rates for terminal charges, or other transportation charges. The petition does not present an administrative question upon which the road's liability depends and does not involve a question of the reasonableness of a practice in interstate commerce, of which the Interstate Commerce Commission has the jurisdiction. We think in an action of this character the only question between the shipper and carrier is what was the legal right of the carrier under its rules and regulations to collect demurrage, and not what they should have been."

5. Review (p. 465)

In general.—A finding by the commission in interpreting an order made by it as to changes by top lines will not be reviewed by the court where it has only a portion of the evidence before it. *Louisiana, etc., R. Co. v. U. S.*, (W. D. Ark. 1921) 274 Fed. 372.

Findings have effect of statute.—Where the published rates of a carrier are found to be reasonable by the commission, they are to be treated as though they were embodied in a statute binding alike on all parties. *Keogh v. Chicago, etc., R. Co.*, (C. C. A. 7th Cir. 1921) 271 Fed. 444.

Vol. IV, p. 468, sec. 15 [B]. [First ed., 1912 Supp., p. 120.]

Change in classification by excluding certain commodity from shipment by freight.—The Interstate Commerce Commission must be deemed to have had initial jurisdiction, exclusive of the federal district courts, of a controversy presented by the contention of a shipper that an amendment or supplement to the appropriate freight tariff schedule, authorized by the Director General of Railroads, which became effective after the adoption of the Transportation Act of February 28, 1920, and by which the published classification and rates on silk were canceled and the freight classification rule amended so as to include silk among the articles that would not be accepted for shipment as freight, was invalid, in view of the provisions of sections 1, 3, 6, 13, and this section; as amended by the Acts of June 29, 1906, and June 18, 1910, which make it the duty of carriers to establish, observe, and enforce reasonable classifications of property. make it unlawful for any carrier to subject any particular description of traffic to any undue and unreasonable prejudice or disadvantage, require carriers to print and file with the Interstate Commerce Commission schedules showing freight classifications, and rules or regulations changing, affecting, or determining the value of the service rendered to the shipper, give to any person or corporation the right to apply to the commission for relief on account of anything done or omitted to be done by a carrier in contravention of the provisions of the act, and declare that whenever a new classification or regulation or practice is filed, the Commission shall have power to suspend the operation of the same pending investigation, and, if found to be unreasonable or otherwise in violation of the fact, the commission may find what will be just and reasonable, and require the carrier to conform to its finding. *Director General of Railroads v. Viscose Co.*, (1921) 254 U. S. 498, 41 S. Ct. 151, 65 U. S. (L. ed.) —.

Vol. IV, p. 473, sec. 15 [H]. [First ed., 1912 Supp., p. 122.]

Determination of commission as conclusive.—The determination by the commission of the maximum that may be allowed for services "connected with such transportation" is conclusive unless set aside on direct attack. *Finkbine Lumber Co. v. Gulf, etc.*, R. Co., (C. C. A. 5th Cir. 1920) 269 Fed. 933.

An order of the commission dismissing an application for an allowance for services rendered in connection with the transportation cannot be set aside in an action against the carrier to recover for such services. *Finkbine Lumber Co. v. Gulf, etc.*, R. Co., (C. C. A. 5th Cir. 1920) 269 Fed. 933.

Effect of dismissal by commission.—The dismissal of an application for an allowance

under this section is held to amount to a ruling against the asserted right of the shipper to be compensated by the carrier for the services in question. *Finkbine Lumber Co. v. Gulf, etc.*, R. Co., (C. C. A. 5th Cir. 1920) 269 Fed. 933.

Switching and weighing services rendered by a shipper and which the carrier would have had to do itself as incidents of the transportation, if they had not been done by the shipper are within the meaning of the words "any service connected with such transportation." *Finkbine Lumber Co. v. Gulf, etc.*, R. Co., (C. C. A. 5th Cir. 1920) 269 Fed. 933.

Vol. IV, p. 476, sec. 16 [B]. [First ed., 1912 Supp., p. 123.]**II. Enforcement of orders.****1. Jurisdiction.****V. Venue.****VII. Petition, complaint or declaration.****II. ENFORCEMENT OF ORDERS****1. Jurisdiction (p. 478)**

Government control of railroads as defeating jurisdiction.—In *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (1921) 256 U. S. —, 41 S. Ct. 524, 65 U. S. (L. ed.) —, (affirming (C. C. A. 5th Cir. 1920) 261 Fed. 741) it was held that the objection of government control of the railroads could not defeat jurisdiction of a suit upon a reparation order of the Interstate Commerce Commission where the shipments for which reparation was allowed moved prior to the taking over of the railroads by the government, since, under the provision of § 10 of the Federal Railroad Control Act (see 1918 Supp. Fed. Stat. Ann. 762), "Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government."

V. VENUE (p. 480)

Act of Oct. 22, 1913, abolishing commerce court as repealing venue provision.—The venue provision of the Interstate Commerce Act, permitting suits on reparation orders of the Interstate Commerce Commission to be commenced in any district through which the road of the carrier runs, was not impliedly repealed by the Act of October 22, 1913 (see 5 Fed. Stat. Ann. (2d ed.) 1108), abolishing the commerce court, which, in restoring to the federal district courts the jurisdiction which had been vested exclusively in the Commerce Court, provided that the venue of any suit thereafter brought to enforce, suspend, or set aside any order of the Interstate Commerce Commission, should

be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (1921) 256 U. S. —, 41 S. Ct. 524, 65 U. S. (L. ed.) —, (affirming (C. C. A. 5th Cir. 1920) 261 Fed. 741) wherein the court said:

"The commerce court repealing act was a section of an appropriation act, and dealt with venue only to the extent necessary to redistribute the jurisdiction of the court abolished, and in terms it repealed only acts or parts of acts in so far 'as they relate to the establishment of the commerce court,' and again so far as 'inconsistent with the foregoing provisions relating to the commerce court.' 38 Stat. at L. 219, 221, chap. 32. The venue provided for, and relied upon in this suit, was for suits in the circuit (district) court on an order for the payment of money, and of such suits the commerce court never had jurisdiction.

"The contention that Congress intended by implication to repeal and cut down to such narrow limits the venue which has gradually been so liberally extended cannot be entertained. The terms of the repealing act do not justify it, and we cannot doubt that if such purpose had been intended, it would not have been left to inference and implication, but would have been clearly expressed."

Contracts with another railroad for use of tracks as affecting venue.—A railway company which has such arrangements with another railway company running through a given federal district as are equivalent in practice to a lease of the latter company's road for the former's transportation purposes, and which deals with the public and with the Interstate Commerce Commission with respect to traffic as if it owned or had leased the tracks, is within the venue provision of the Interstate Commerce Act permitting an action upon a reparation order of the Interstate Commerce Commission to be commenced in any district through which the road of the carrier runs. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (1921) 256 U. S. —, 41 S. Ct. 524, 65 U. S. (L. ed.) —, affirming (C. C. A. 5th Cir. 1920) 261 Fed. 741.

VII. PETITION, COMPLAINT OR DECLARATION (p. 480)

Sufficiency of petition.—Allegations in the petition in a suit upon a reparation order of the Interstate Commerce Commission, that the shipper filed its petition with the commission, claiming that it had been charged an unreasonable rate, that, upon hearing, the commission entered an order for the payment of money as reparation on account of unreasonable rates exacted for the transportation of its freight, that the order required payment to be made by a date named, that

the carriers had refused payment when demanded, and that the suit was instituted under the Interstate Commerce Act and its amendments, to which petition copies of the report and order of the commission were attached, are amply sufficient to meet the statutory requirement that the petition in such a case shall set forth briefly the causes for which damages are claimed, and the order of the commission in the premises. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (1921) 256 U. S. —, 41 S. Ct. 524, 65 U. S. (L. ed.) —, affirming (C. C. A. 5th Cir. 1920) 261 Fed. 741.

Vol. IV, p. 506, sec. 20 [K]. [First ed., 1916 Supp., p. 124.]

II. Purpose and dominating features of amendment.

IV. Definition and construction.

V. Effect of state laws.

VI. Shipments affected.

VII. Receipt or bill of lading.

IX. Liability of initial carrier.

1. In general.

2. Former liability contrasted.

4. Nature of liability.

6. Liability for delay.

7. Wrongful delivery or diversion.

X. Liability of connecting carrier.

XII. Limitation of liability.

1. In general.

2. Exemption from negligence.

3. Agreed valuation.

4. Notice of claim.

5. Time for bringing suit.

XVI. Pleading.

II. PURPOSE AND DOMINATING FEATURES OF AMENDMENT (p. 508)

The amendment creates an obligation on the part of the initial carrier to carry safely to destination, where the shipment is interstate, even though no contract is entered into between the parties, and renders it liable for loss or damage to the property occasioned by the connecting carriers. *McGinn v. Oregon-Washington R., etc., Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 81.

Effect of Act of Aug. 9, 1916.—The Act of Congress of March 4, 1915, as amended, expressly exempts baggage from its provisions requiring the payment of full actual damage in case of loss of baggage. *Culbreth v. Martin*, (1920) 179 N. C. 678, 103 S. E. 374.

IV. DEFINITION AND CONSTRUCTION (p. 510)

Presumption against terminal carrier superseded.—This act has superseded and abolished the rule of law or of evidence, heretofore prevailing in Louisiana and in most of the common-law states, that a delivering carrier of an interstate shipment shall be liable for injury to freight delivered in a damaged condition, upon proof merely that the goods

were delivered to the initial carrier, another railroad in another state, in good condition, and without proof that the injury or damage occurred on the line of the delivering carrier. *Henderson v. Kansas City So. R. Co.*, (1920) 147 La. 647, 85 So. 625.

V. EFFECT OF STATE LAWS (p. 511)

A state act penalizing failure to pay promptly claims for loss is invalid as applied to interstate shipments being in conflict with this act which regulates the damages recoverable. *Hines v. Cabaniss*, (1920) 204 Ala. 527, 86 So. 524.

VI. SHIPMENTS AFFECTED (p. 513)

Foreign shipments.—The Carmack Amendment under which carriers may limit liability by published tariffs, must be deemed to apply to the baggage of a passenger carried on the outward trip under a ticket calling for transportation from Canada to Texas and return, in view of the declaration of the Act of February 4, 1887, § 1, that such act applies to any common carrier engaged in the transportation of passengers or property from any place in the United States to an adjacent foreign country, since the test of the application of the act is not the direction of the movement, but the nature of the transportation, as determined by the field of the carrier's operation. *Galveston, etc., R. Co. v. Woodbury*, (1920) 254 U. S. 357, 41 S. Ct. 114, 65 U. S. (L. ed.) —, *reversing* (Tex. 1919) 209 S. W. 432.

Where goods are accepted by a carrier for transportation to a certain port from which they are to be exported to a point in Europe, and the bill of lading prescribes as the measure of damages in case of loss the value of the goods at the time and place of shipment, the owner is bound by such provision in the bill of lading and cannot recover a greater amount as this section has no application to such a shipment. *Fahey v. Baltimore, etc., R. Co.*, (Md. 1921) 114 Atl. 905, wherein it was also held that such provision included a loss resulting from delay in delivery of the goods.

Prior to the Cummins Act the Interstate Commerce Act did not apply to a shipment into the United States from a foreign country. *Mexico Northwestern R. Co. v. Williams*, (Tex. 1921) 229 S. W. 476.

New shipment out of state after arrival of goods at point of destination in state.—The liability of the initial carrier of goods consigned by a shipper to himself at a point within the state, where he intended to sell them, and shipped under an intrastate bill of lading that contained no reference to diversion or reshipment, is governed solely by such bill of lading, subject to any applicable rules and regulations prescribed by state authority, although, upon arrival at destination, at a point beyond such initial carrier's

own line, the carrier then having possession of the goods forwarded them, upon the shipper's request, made after arrival, to a point in another state, taking up the original bill of lading, and issuing an interstate one, and such initial carrier may not be held liable by virtue of the Carmack Amendment for damages sustained in the course of transportation beyond the destination originally specified. *Bracht v. San Antonio, etc., R. Co.*, (1921) 254 U. S. 489, 41 S. Ct. 150, 65 U. S. (L. ed.) —, *affirming* (1919) 200 Mo. App. 655, 209 S. W. 579.

VII. RECEIPT OR BILL OF LADING (p. 514)

Delivery without bill of lading.—The act does not establish a rigid and inflexible rule that delivery can be made only on surrender of the bill of lading. *City Nat. Bank v. El. Paso, etc., R. Co.*, (Tex. 1920) 225 S. W. 391.

New bill of lading by connecting carrier.—When the initial carrier issues the bill of lading, by the terms of which it undertakes to deliver the interstate shipment at a certain place, its contract is performed when it delivers the shipment in good order at the designated place, and it is not liable, under the Carmack Amendment, for damage to the shipment while it is being transported by another railroad company to some other point under a bill of lading issued by the other company to the owner of the property. *Yazoo, etc., R. Co. v. Norman*, (1921) 125 Miss. 636, 88 So. 174.

Interpretation of bill of lading.—A bill of lading is not a negotiable instrument, or a piece of commercial paper, and the doctrines favoring an innocent holder for value do not wholly apply. *The St. Johns N. F.*, (C. C. A. 2d Cir. 1921) 272 Fed. 673.

Permitting inspection as conversion.—Permitting inspection by the consignee contrary to the provisions of the bill of lading, on which inspection the goods were rejected, does not amount to a conversion of the goods by the carrier. *Bernie Mills, etc., Co. v. St. Louis Southwestern R. Co.*, (Mo. App. 1921) 228 S. W. 847, where it was said:

"The shipment of the corn from Bernie to Texas was an interstate shipment and governed by the Carmack Amendment to the Interstate Commerce Act, 34 U. S. Stat. L. 594. This statute pertains to bills of lading and provides that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading, and shall be liable to the lawful holder thereof for any loss or damage or injury to such property caused by it or by any common carrier to which such property may be delivered. It is further provided in said statute that nothing contained therein shall deprive the holder of the bill of lading of any remedy or right of action which he has under existing law. But this

last provision referring to rights and remedies under existing law has reference only to federal laws. *American Silver Mfg. Co. v. Railroad*, 174 Mo. App. 184, 156 S. W. 830. There are several provisions in the Interstate Commerce Act pertaining to bills of lading, but no provision makes the carrier liable for merely permitting inspection contrary to the provisions of the bill of lading."

IX. LIABILITY OF INITIAL CARRIER

1. In General (p. 517)

To the same effect as the first paragraph of original annotation, see *Ostroff v. Hustis*, (N. M. 1921) 114 Atl. 27.

Undisclosed intent to reship.—Liability for damages as an initial carrier depends upon the reception of the goods in one state for transportation to a point in another state or territory, rather than the intention which the shipper may have had at the time of loading the cars, but which does not find expression in some form of a contract, and that where all the obligations of a previous contract of shipment are terminated, and there has been a delivery to the consignee prior to the making of a subsequent contract for shipment into another state, the carrier of the property under the subsequent contract of shipment is the initial carrier under the Carmack Amendment. In this case appellant was the initial carrier. *Rice v. Oregon Short Line R. Co.*, (1921) 33 Idaho 565, 198 Pac. 161 (sheep shipped to another point in state, with expectation of re-shipment to market out of state. Carrier by which re-shipment was made held initial carrier).

Acts of connecting carrier as warehouseman.—"The Carmack Amendment does not make the initial carrier liable for a loss of or injury to goods proximately caused by the conduct of the succeeding carrier while occupying the relationship of warehouseman." *New York, etc., R. Co. v. Chandler*, (Va. 1921) 106 S. E. 684.

Failure to mark goods properly.—Where a carrier by its haste in removing a car from a siding prevents a shipper from complying with the regulations regarding the marking of freight which it has established pursuant to section 1 [D] of this act (4 Fed. Stat. Ann. (2d ed.) 359), it cannot escape the liability imposed upon it by this section by pleading the shipper's failure to observe its regulations. *Grammes v. Central R. Co.*, (1921) 269 Pa. St. 466, 112 Atl. 532. The court said:

"Had defendant observed its own regulations, and the loss been occasioned by plaintiff's failure to comply therewith, the point it now seeks to raise, viz., is a carrier responsible for a loss resulting from the shipper's failure to obey its rules? would have been up for consideration. Here, however, defendant by its haste prevented plaintiff from marking the freight as required: did not

'observe' its own regulations—as the Act of 1910, relied on by it, requires it to do—in that it received freight which was not all properly marked, and issued a through bill of lading therefor which did not show the markings on the barrels, and yet seeks to escape the liability which the Act of Congress imposes, though the fault was all its own. This, of course, it cannot do; and hence, since the assignments of error do not question the amount of the verdict, we need not consider the other points argued; though it may be said the maximum of escape from liability would, in any event, be the value of the brass in the unmarked barrels, and, though having the burden of proof on this point, defendant gave no evidence as to either the number or value."

Failure to feed and water.—"It is clear to our minds that, as to the failure to properly feed and water the stock while being held at Galesburg, the initial carrier would be liable, since, under the federal law, the initial carrier is liable for any negligence of a connecting carrier, and the latter owed plaintiff the duty of properly feeding and watering the sheep (2 Hutchinson on Carriers [3d ed.] § 653), which duty arose, under the circumstances, by virtue of the contract plaintiff made with the initial carrier." *Miller v. Quincy, etc., R. Co.*, 205 Mo. App. 463, 225 S. W. 116.

2. Former Liability Contrasted (p. 518)

This section does not change the common law liability of a carrier. *Lehigh Valley R. Co. v. Lysaght*, (C. C. A. 2d Cir. 1921) 271 Fed. 906, wherein the court holding that a carrier was liable for damages caused by an explosion of explosives said:

"The defendant contends that it is not liable for any loss or damage not 'caused by it,' and alleges that this explosion was not caused by it. These words of the act were used to make the initial carrier liable for any loss or damage occurring during the whole course of transportation, whether caused by it or by a connecting carrier, though they apply, also, to each carrier as to loss or damage on its own line. *Georgia Railway Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Supp. Ct. 541, 60 L. ed. 948. Congress cannot have intended to reduce the liability of common carriers to that of ordinary bailees for their own negligence only. Happier words than 'caused by it' might have been used, but they fairly cover loss or damage for which the carrier would be liable at common law."

Common law liability is not changed with respect to losses occurring on its own line. *C. C. Whitnack Produce Co. v. Chicago, etc., R. Co.*, (1920) 104 Neb. 587, 178 N. W. 177.

4. Nature of Liability (p. 519)

The liability under this section includes the failure to exercise the common law duty

of due care according to the circumstances. Hence a carrier cannot excuse itself for failure to use such care in the handling of explosives as are required by the circumstances, by showing that it had complied with the regulations of the Interstate Commerce Commission in violation thereto. *Lehigh Valley R. Co. v. Allied Machinery Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 900.

6. *Liability for Delay* (p. 519)

Consequential damages from delay.—The initial carrier is liable for the consequential damage which the shipper suffers of the whole value of his goods where by reason of delay he loses a sale which he has made and the goods are thereafter wrongfully sold by the terminal carrier. *New York, etc., R. Co. v. Chandler*, (Va. 1921) 106 S. E. 684.

7. *Wrongful Delivery or Diversion* (p. 521)

Diversion by shipper.—A diversion by the shipper made to avoid loss on learning of an embargo does not destroy the status of the initial carrier as such. *Miller v. Quincy, etc., R. Co.*, (1920) 205 Mo. App. 463, 225 S. W. 116.

X. *LIABILITY OF CONNECTING CARRIER* (p. 522)

Rule stated.—To same effect as original annotation, see *McGinn v. Oregon-Washington R., etc., Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 81.

While the Carmack Amendment gives a right of action against the initial carrier for loss of or damage to goods in shipment in interstate commerce, whether the loss or damage is caused by the initial or a connecting carrier, a suit may nevertheless be maintained against a connecting carrier, where it is shown that the loss or damage is occasioned by its negligence. *Southern Express Co. v. Turner*, (1920) 25 Ga. App. 625, 103 S. E. 802.

Presumption as against terminal carrier.—The rule in South Carolina, that loss or damage will be presumed to have occurred on the terminal carrier, in the absence of proof to the contrary, has not been superseded by the Carmack Amendment, and the federal decisions thereunder, when applied to goods in interstate commerce. *People's Hardware Co. v. Raleigh, etc., R. Co.*, (S. C. 1921) 107 S. E. 146.

Liability for loss on lines of other connecting carriers.—While the Carmack Amendment does, in effect, make the connecting carriers the agents of the initial carrier, it does not make the connecting carriers the agents of one another nor impose any obligation or liability upon a connecting carrier for loss occurring upon the lines of other connecting carriers for which it is in no way accountable primarily. *McGinn v. Oregon-Washington R., etc., Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 81.

Election to sue at common law.—A shipper is not compelled to pursue his remedy under the Carmack Amendment but may elect to prosecute an action at common law against the terminal carrier. *Pittsburgh, etc., R. Co. v. Larosa*, (Ind. App. 1921) 131 N. E. 22.

XII. *LIMITATION OF LIABILITY*

1. *In General* (p. 524)

Limitation to value at time and place of shipment.—In *Crutchfield v. Hines*, (Mass. 1921) 131 N. E. 340, the bill of lading under which the goods were shipped contained the provision that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid." In holding that this provision was inapplicable where, due to deterioration in transit, the goods were worth less at the time of loss than at the time and place of shipment, the court said:

"Relying upon the authority of *Chicago, Milwaukee & St. Paul Railway v. McCaull-Dinsmore Co.*, 253 U. S. 97, 40 Supp. Ct. 504, 64 L. ed. 801, the defendant claims that the provision hereafter quoted taken from the so-called Carmack Amendment to section 20 of the Interstate Commerce Act, was void and without effect to support the contention of the plaintiff, because the first Cummins Amendment to the Interstate Commerce Act made the above stipulation void. Act of March 4, 1915, c. 176, 38 Stat. at L. 1196. On the other hand, the plaintiff contends that the regulation was legalized by the second Cummins Amendment to the Interstate Commerce Act. Act of Aug. 9, 1916, c. 301, 39 Stat. L. 441. From the agreed facts it is inferable that the bill of lading originally issued continued in force as a binding contract by the action of the parties, until the car was destroyed at Vernon, Connecticut. *Gulf, Colorado & Santa Fe Railway v. Texas Packing Co.*, 244 U. S. 31, 35, 37 Sup. Ct. 487, 61 L. ed. 970. A judge of the Superior Court found for the plaintiff in the amount of \$500, and the case is before this court on the exceptions of the plaintiff.

"We do not think the second Cummins Amendment is applicable to the facts of this case."

2. *Exemption from Negligence* (p. 525)

Telegraph companies are not within the provision forbidding limitation of liability. *Brewer v. Postal Tel. Cable Co.*, (Mo. App. 1920) 223 S. W. 949.

3. *Agreed Valuation* (p. 526)

Necessity of offering choice of rates.—A carrier may not, by a valuation agreement with a shipper, limit its liability in case of the loss by negligence of an interstate shipment to less than the real value thereof, unless the shipper is given a choice of rates,

based on valuation. *Union Pac. R. Co. v. Burke*, (1921) 255 U. S. 317, 41 S. Ct. 283, 65 U. S. (L. ed.) —, *affirming* (1917) 178 App. Div. 783, 166 N. Y. S. 100; (1919) 226 N. Y. 534, 124 N. E. 119.

Charge based on agreed valuation harmless. — "Notwithstanding Act Cong. March 4, 1915, respecting the liability of carriers, where plaintiff's evidence as to his actual loss was based upon the agreed valuation set forth in the carrier's receipt, and the defendant's evidence corresponded with such valuation, there was no harmful error in basing the charge on the measure of damages thus agreed upon, as there is a presumption, until rebutted by proof, that goods are worth as much at the place of destination as at point of shipment, if not more." *Payne v. Cheshire*, (Ga. App. 1921) 107 S. E. 557.

Failure to require statement of contents. — In August, 1915, the express company received two trunks for interstate transportation. The trunks were locked and strapped, and their contents were hidden from view. The carrier did not ask or require the shipper to state the character or value of the articles in the trunks, or any of them, the shipper gave no such information, and the shipper did not dictate or suggest what the receipt given him should contain. The receipt contained an agreement limiting amount of recovery in case of loss. It was held the limitation was void, under the provisions of Act March 4, 1915 (the first Cummins amendment), which was in force at the time. *Payne v. Adams Express Co.*, (1921) 108 Kan. 327, 195 Pac. 860, wherein the court said: "The defendant says the plaintiff estopped himself by accepting the receipt. Statutes expressing a definite public policy, in clear and positive terms, are not to be nullified so easily."

4. Notice of Claim (p. 529)

In general.—To the same effect as the original annotation, see *Ostroff v. Hustis*, (N. H. 1921) 114 Atl. 27.

Prior to the Act of 1915 a contract requirement of 10 days' notice of injury was invalid. *Jordan v. Chicago, etc., R. Co.*, (1920) 206 Mo. App. 56, 226 S. W. 1023, holding further that a notice to the contracting carrier on whose line the damages occurred was insufficient to bind the initial carrier.

Requirement of notice valid.—A clause in a contract of affreightment between an express company and a shipper, respecting an interstate shipment, and providing that, in case of the failure of the carrier to make delivery, a claim for loss, damage, or injury must be made in writing to the originating or delivering carrier, within four months after a reasonable time for delivery has elapsed, as a condition precedent to right of recovery, is valid.

The limitation prescribed in such clause is applicable to a claim for the loss of a portion of a package of goods, due to ab-

straction and theft thereof in transit, and consequent failure to deliver it.

In the absence of conduct on the part of the carrier working hindrance, obstruction, or concealment of such loss, nondiscovery thereof by the shipper within the period of the limitation does not exclude the claim from the operation of the limitation, nor extend the time thereof. *Kahn v. American R. Express Co.*, (W. Va. 1921) 106 S. E. 126.

To whom given.—To the same effect as the original annotation, see *Ostroff v. Hustis*, (N. H. 1921) 114 Atl. 27.

Notice of claim dispensed with.—With reference to the last proviso of the act it was said in *Hunt v. Hines*, (1920) 204 Mo. App. 318, 223 S. W. 798. "Congress doubtless concluded that losses for such causes would be sufficiently known to the carrier to start him upon investigation and put him upon inquiry without the formality of a notice from the shipper."

Waiver of notice.—Although a carrier may waive the benefit of such a limitation by express agreement or by inconsistent conduct, a waiver thereof cannot be predicated upon conduct which neither admits liability nor denies it, upon receipt of verbal notice of the loss, after expiration of the period of limitation, and later invokes protection of the limitation, upon disclosure of actuality of the loss and the time and circumstances thereof. *Kahn v. American R. Express Co.*, (W. Va. 1921) 106 S. E. 126.

5. Time for Bringing Suit (p. 532)

While all limitation of liability is made illegal by the Cummins Amendment, certain limitations with respect to other matters remain open to the carrier, of which the period within which suits may be brought is one. *Lazarus v. New York Cent. R. Co.*, (S. D. N. Y. 1921) 271 Fed. 93.

Constitutionality.—Where the period of limitation of an action by a shipper against a carrier is not fixed by contract but by the filing of a uniform bill of lading with the Interstate Commerce and this period expires before the beginning of the action, this section may restore the remedy without violating any provisions of the Constitution. *Lazarus v. New York Cent. R. Co.*, (S. D. N. Y. 1921) 271 Fed. 93.

XVI. PLEADING (p. 535)

Effect of amendment on procedure.—Where a shipper elects to prosecute an action at common law against a terminal carrier for loss of goods, all presumptions that existed in favor of a plaintiff in such an action prior to the passage of the Carmack Amendment were available to him as the amendment did not change the rules relating to the "practice, procedure, or evidence" in common-law actions arising from interstate shipments. *Pittsburgh, etc., R. Co., v. Larosa*, (Ind. App. 1921) 131 N. E. 22.

Form of action as controlling.—Where an action is not only in name, but in substance, one for damages against the delivering carrier, the court will look beyond the technical denomination of the pleading and treat it as such. *McGinn v. Oregon-Washington R. etc., Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 81.

Vol. IV, p. 536, sec. 20 [L]. [First ed., 1909 Supp., p. 274.]

Failure to submit cross-action to jury as ground for venire de novo.—Where, in an action against the Director General of Railroads and several railroads for the conversion of goods by delivering them to the consignee without presentation of the bill of lading, the Director General files a cross-action against the final carrier in behalf of the initial carrier, based upon this section, the failure of the court to submit to the jury the issue of fact raised by such cross-action is ground for the issuance of a venire de novo. *Albro Clem Elevator Co. v. Director General of Railroads*, (N. J. 1921) 112 Atl. 885.

Vol. IV, p. 539, sec. 22. [First ed., vol. III, p. 851.]

I. DISCRIMINATION IN RATES (p. 541)

Reduced rates for army officers.—Reduced rates may be granted by a carrier for the transportation of the personal effects of Army officers changing stations under orders, in view of the provision, this section permitting reduced rates to the United States, and of a conference ruling of the Interstate Commerce Commission, making such action applicable to property transported for the United States. *Western Pac. R. Co. v. U. S.*, (1921) 255 U. S. 349, 41 Sup. Ct. 332, 65 U. S. (L. ed.) —, affirming (1919) 54 Ct. Cl. 215.

Army officers and enlisted men in United States Army.—See *Atchison, etc., R. Co. v. U. S.*, (1921) 256 U. S. —, 41 Sup. Ct. 456, 65 U. S. (L. ed.) —.

Vol. IV, p. 549, sec. 1 [A]. [First ed., 1909 Supp., p. 262.]

VI. WILFULNESS AND KNOWLEDGE (p. 553)

Knowledge—Presumption as to shipper's knowledge of rate.—An agent of an express company who contracts with a shipper to make a shipment at a rate less than that specified in the schedule of rates filed by the company with the interstate commerce commission, cannot be held personally liable where the shipper is compelled to pay the difference between the rate charged him and the correct rate, since the latter is conclusively presumed to have known the correct rate. *Hawkins v. Wilson*, (Vt. 1920) 111 Atl. 634.

Vol. IV, p. 558, sec. 1 [B]. [First ed., 1909 Supp., p. 262.]

Allowances from a rate do not disestablish the rate; it remains just what it was. Neither does an overt or covert deduction from a published rate change the rate or convert it into a new rate. *Lehigh Coal, etc., Co. v. U. S.*, (C. C. A. 3d Cir. 1920) 266 Fed. 457, holding rate named in published tariff to have been a duly established rate.

Vol. IV, p. 559, sec. 1 [C]. [First ed., 1909 Supp., p. 263.]

VI. ENFORCEMENT OF PENALTY [new]

Creditor's bill.—A judgment imposing a fine upon a corporation for accepting rebates, contrary to the Elkins Act of February 19, 1903, § 2, is a debt which will support a creditors' bill by the United States to obtain satisfaction of the judgment out of the assets in the hands of the stockholders, among whom all the corporate property has been distributed, *U. S. Rev. Stat. § 1041* (see 3 Fed. Stat. Ann. 2d ed. 327), having provided that judgments for penalties may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. *Pierce v. U. S.*, (1921) 255 U. S. 398, 41 Sup. Ct. 365, 65 U. S. (L. ed.) —, modifying and affirming (C. C. A. 8th Cir. 1919) 257 Fed. 514, 171 C. C. A. 1.

Vol. IV, p. 573, sec. 1. [First ed., 1914 Supp., p. 203.]

Purpose.—“The essential object of this statute is to create, define, and punish the offense of abstracting or unlawfully having in possession goods while in interstate or foreign transit, and thereby interfering with interstate or foreign commerce.” *White v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 517.

The term “station house,” as used in this section, means a railroad station house. Hence, a person may not be convicted under this section for stealing goods from the station house of a transfer company. *Beckerman v. U. S.*, (C. C. A. 7th Cir. 1920) 267 Fed. 185.

What constitutes “receiving.”—“When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost, and the subsequent delivery of the property by the owner or agent to a particeps criminis, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime, for in a legal sense he does not receive stolen property.” *U. S. v. Cohen*, (C. C. A. 3d Cir. 1921) 274 Fed. 596.

Intention.—It is not necessary that the defendant have possession of the property with the intention of converting it to his own use. “Of course a person should not

be condemned for having innocent possession of stolen property, for example, for the purpose of turning it over to the true owner or to the public authorities. But a knowing possession for the benefit of the thief or any knowing possession with the intent and effect of depriving the owner of his property would be a felonious possession." *Applebaum v. U. S.*, (C. C. A. 7th Cir. 1921) 274 Fed. 43.

Knowledge of receiver as affecting crime.—"If the defendant had knowledge that the goods were stolen when he received them, he took the chance that they might have been stolen from an interstate shipment of freight or express, and received them at his peril. The statute provides that whoever shall steal from a railroad car any goods or chattels, which are a part of or constitute an interstate shipment of freight or express, or shall have in his possession any such goods or chattels, knowing the same to have been stolen, commits the crime denounced, and it is immaterial whether or not he knew the points of origin and destination of the goods." *Freedman v. U. S.*, (C. C. A. 3d Cir. 1921) 274 Fed. 603.

Agent of consignee.—A regularly authorized agent of the consignee with authority to receive and receipt for the goods consigned to his principal may be guilty of larceny under this act where he receives the goods without giving any receipt, and there is an intent at the time he receives them to convert them to his own use. *Nudelman v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 942.

Place from which stolen.—In order to justify a conviction under this section it must be alleged and proved that the property was stolen from some one of the particular places mentioned in the statute. *U. S. v. Cohen*, (C. C. A. 3d Cir. 1921) 274 Fed. 596.

Goods in interstate commerce.—A shipment of coal from one point in a state to another on what is known as a slip bill, which is a customary way of authorizing a conductor to carry cars where the shipment is ready to go before the bill of lading can be prepared, is not such an interstate shipment the theft of which can be punished under this section though after the shipment started a bill of lading was made out to a destination in another state. *Lowery v. U. S.*, (C. C. A. 7th Cir. 1921) 271 Fed. 946.

Possession of other property.—In a prosecution under this section it is not reversible error to admit evidence of the defendants possession of other goods not alleged to have been stolen nor the subject of proof of theft, particularly where the defendant had admitted the possession of such goods in a voluntary statement. *Rich v. U. S.*, (C. O. A. 8th Cir. 1921) 271 Fed. 566.

Indictment—Generally.—An indictment under this section has been held to be sufficient where it described the goods, specifically alleged that they were in interstate transit and gave the name of the consignee and the locality of the offense. *White v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 517.

Knowledge of interstate character.—It is unnecessary to allege in an indictment under this section that the accused had knowledge that the goods were stolen while in interstate commerce. *Rosen v. U. S.*, (C. C. A. 2d Cir. 1920) 271 Fed. 651, wherein it was said:

"To sustain a conviction under the act it must be shown:

"(1) That the goods and chattels involved were stolen.

"(2) That at the time they were stolen they were articles of interstate transportation and in course of such transportation.

"(3) That defendants came into possession of them.

"(4) That they received them knowing them to have been stolen.

"While the indictment charges that defendants knew at the time the goods and chattels are alleged to have been in their possession that they had been stolen, it does not charge that they knew they had been stolen from interstate commerce. But such an allegation is certainly unnecessary. A person who receives stolen chattels knowingly does so at the peril of their having been stolen while in course of interstate transportation. He cannot escape conviction because he did not know whether they were stolen in intrastate or in interstate commerce."

Bailee of goods.—Where an indictment charges that the goods were in the freight yard of a certain designated railroad, a common carrier, and by proper averments alleges that they were a part of an interstate shipment, an objection that the description of the custodian of the goods is not sufficiently complete comes too late after a trial and verdict on the evidence. *Nudelman v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 942.

Description of property.—An indictment under this section which identifies the amount of the article stolen, states that it was whisky, and that it was taken from a particular car at a specified time and gives the name of the shipper, of the bailee carrier from the possession of which it was taken, and the place of shipment, sufficiently describes the property. *Fleck v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 617.

An indictment for larceny of goods in interstate commerce which states that the alleged stolen property was "a large quantity of Wayne knit hose, to wit, one case of hose, then and there of the value of, to wit, five hundred seventy-six dollars (\$576.00)" sufficiently describes it. *Pounds v. U. S.*, (C. C. A. 7th Cir. 1920) 265 Fed. 242.

Number of articles.—An indictment under this section charging the receiving of a "large number" of tierces of lard, knowing them to have been stolen, is sufficient without specifying the exact number of tierces. *Rosenblatt v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 435.

Ownership of goods.—An indictment for larceny of goods in interstate commerce need not allege the ownership of the goods beyond

that qualified ownership which arises from the carrier's possession of the goods while transporting them. *Pounds v. U. S.*, (C. C. A. 7th Cir. 1920) 265 Fed. 242.

Name of owner and custodian of stolen property.—In *Fleck v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 617, it was contended that an indictment under this section was defective in omitting to state the name of the owner of the property stolen. Answering this contention, the court said:

"The argument pressed does not meet the point as stated, but is that the bailee is charged to be the St. Louis Merchants' Bridge Terminal Railway Company, while the court must take judicial knowledge that all interstate carriers and shipments were then under control of William G. McAdoo, as Director General of Railroads. From this it is contended that the St. Louis Merchants' Bridge Terminal Railway Company, as such, could not have been the bailee or carrier in charge of the shipment. The allegation that the goods were taken from a railway car, and that they were moving and constituted a part of an interstate shipment of freight, which had been shipped by the consignor named, from Owensboro, Ky., to the consignee named at Granger, Tex., was, in legal effect a statement that the goods were in the possession of the Director General of Railroads as the bailee and carrier (*Bloch v. United States*, 261 Fed. 321, 323, — C. C. A. —), and this necessary legal conclusion from the facts stated is not overcome by the further statement that the goods were in the possession of the St. Louis Merchants' Bridge Terminal Company as bailee and common carrier. The defendants have suffered no prejudice, and it would be trifling with justice to permit a reversal of this case upon such a flimsy basis."

Taking without consent of owner.—An indictment for a violation of this section which alleges that the defendants "did knowingly, willfully and feloniously take, steal and carry away" the property, sufficiently alleges that the property was taken without the consent of the owner and of the bailee having it in possession. *Fleck v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 617.

Election.—Whether the court below erred in not requiring the district attorney to elect whether he would proceed on a count charging the receipt of stolen property, or on the one charging the stealing of property is unimportant, where the court imposed punishment for one offense only. *Nudelman v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 942.

Evidence—Method of opening doors of freight car.—Testimony as to method of opening the doors of a freight car so as to permit entrance without breaking the seal has been held admissible. *Fowler v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 15.

Accomplices.—The testimony of accomplices may be sufficient to sustain a conviction under this section. *Rosen v. U. S.*,

(C. C. A. 2d Cir. 1920) 271 Fed. 651, wherein it was said:

"At common law a jury can convict upon the testimony of an accomplice, although it is not corroborated, if it satisfies the jury beyond a reasonable doubt. In many of the states statutes have been passed which expressly provide that a person cannot be convicted of crime on the uncorroborated testimony of an accomplice. But no such statute has been passed by Congress. It is, however, usual in the federal courts to caution juries in reference to such testimony."

"While the jury should be cautioned to scrutinize most carefully the uncorroborated testimony of accomplices, yet, when this has been done, there is nothing which forbids the conviction of a defendant, at common law or in a federal court, on their uncorroborated testimony." *Freedman v. U. S.*, (C. C. A. 3d Cir. 1921) 274 Fed. 603.

Confession—corroboration.—In a prosecution under this section evidence that the goods in question were a part of a shipment in interstate commerce and that after their disappearance they were in the possession of one to whom the defendant had sold them, was held to be a sufficient corroboration of the defendant's confession. *Rich v. U. S.*, (C. C. A. 8th Cir. 1921) 271 Fed. 566.

Receiving stolen goods.—On a prosecution for receiving stolen goods the subject of interstate commerce the evidence must show that they were so stolen. *U. S. v. Freedman*, (E. D. Pa. 1920) 268 Fed. 655, holds the evidence to be sufficient to establish the fact.

Presumption from possession of goods.—While the possession of goods proven to have been stolen when in transit in interstate commerce, standing alone, does not establish guilt, such possession raises a presumption of guilt which in the absence of explanation may authorize a jury to infer guilt. *Rosen v. U. S.*, (C. C. A. 2d Cir. 1920) 271 Fed. 651.

Demurrer to evidence.—The introduction of evidence by a defendant after his demurrer to the evidence of the prosecution has been overruled operates as a waiver of any error in overruling the demurrer. *Rich v. U. S.*, (C. C. A. 8th Cir. 1921) 271 Fed. 566.

Variance.—In *Nudelman v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 942, it was said:

"It is contended, also, that as to the first count there was a fatal variance between the allegations and the proof—first, in that the indictment charged that the goods were stolen from a certain designated car standing in the freight yard, whereas the evidence was that the goods were stolen from a freight house in the freight yard; and, second, in that the indictment alleged that the goods were taken from the custody and control of the Oregon-Washington Railroad & Navigation Company, and the evidence was that

they were taken from the custody and control of the United States Railroad Administration as the operator of said railroad. These objections were first presented after all the testimony had been taken. In our opinion they are insufficient to invalidate the judgment, and that after verdict they are cured by the operation of section 1025, Rev. Stat. (see 2 Fed. Stat. Ann., 2d ed., 661). It was not a substantial variance between pleading and proof that the goods were taken from a freight house in the freight yard of the railroad company instead of from a designated car in the yard. While in the freight house they were still in the custody of the railroad company. Nor was it a fatal variance that the railroad company named in the indictment was then under the management of the United States Railroad Administration. The administration was operating the road as the railroad of the Oregon-Washington Railroad & Navigation Company, issuing tickets and bills of lading and carrying on the business in the name of that company, and this was matter of common knowledge."

Instructions.—For correctness of instructions in a prosecution under this section, see *Pounds v. U. S.*, (C. C. A. 7th Cir. 1920) 265 Fed. 242.

Vol. IV, p. 575, sec. 1. [*Federal Trade Commission, etc.*] [First ed., 1914 Supp., p. 112.]

Purpose of act.—"The purpose of the act is to make unfair methods of competition in commerce, unlawful, and the commission is empowered and directed to prevent persons, partnerships, or corporations, other than banks and common carriers, subject to the acts to regulate commerce, from using unfair methods of competition in commerce. The power granted is far-reaching in its results, and of a most salutary character. Banks and common carriers were doubtless excepted from the provisions of the act, because each was subject to the direction and control of a separate commission largely similar to that of the Trade Commission." *Hurst v. Federal Trade Commission*, (E. D. Va. 1920) 268 Fed. 874.

Vol. IV, p. 577, sec. 4. [First ed., 1916 Supp., p. 113.]

Voluntary unincorporated associations.—Where an association composed of manufacturers contended that it was not subject to the act because it was a voluntary unincorporated association without capital stock and not engaged in business itself, it was said: "This contention overlooks the fact that the association is not the only one proceeded against; but that its officers and the members of its executive committee, as well

as its membership generally, are included in the proceedings as parties and made subject to the commission's order. The language of the act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business." *National Harness Mfrs.' Assoc. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1920) 268 Fed. 705.

Vol. IV, p. 577, sec. 5 [A]. [First ed., 1916 Supp., p. 114.]

Constitutionality.—This section is constitutional. *Hurst v. Federal Trade Commission*, (E. D. Va. 1920) 268 Fed. 874; *National Harness Mfrs.' Assoc. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1920) 268 Fed. 705.

Distinction between this and Clayton Act.—"In considering the cases which arise under the jurisdiction of the Federal Trade Commission, the distinction between the Clayton Act [see 9 Fed. Stat. Ann. 2d ed. 730] and the act which creates and defines the jurisdiction and duties of the Federal Trade Commission must be kept in mind. The purposes of the Clayton Act and of the Federal Trade Commission Act are different. The Clayton Act is intended for the prohibition of contracts and combinations in restraint of trade which are of sufficient force of oppression or coercion as amount to a monopoly or trust. In order for the government to succeed in an equity or criminal action, or for a private litigant to succeed, where he seeks damages as a result of such alleged trust or combination, each must successfully bear the burden of establishing a combination which restrains trade. No such obligation is imposed upon the Federal Trade Commission before its order may issue requiring an individual, partnership, or corporation engaged in commerce to desist from a practice which might lead eventually to an unlawful trust or combination which would be in restraint of trade. Section 5 of the Federal Trade Act prohibits unfair methods of competition in commerce, declaring them unlawful. This act forbids all unfair methods of competition. It does not define what is unfair competition, but leaves that to the commission for determination. Section 5 provides that the commission is empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, by using methods of unfair competition in commerce. It will thus be observed that there is no restriction or qualification to the powers thus conferred,

but the method of commerce must be unfair." *Beech-Nut Packing Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1920) 264 Fed. 885, per Manton, C. J., in concurring opinion.

Commission as censor of commercial morals.—"The commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce, if so doing will be of interest to the public, and if such method of competition is prohibited by the act to issue an order requiring the person or corporation using it to cease and desist from doing so." *Winsted Hosiery Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1921) 272 Fed. 957.

Necessity that unfair competition relate to interstate commerce.—This section does not apply to a contract of sale made and performed in the same state. *Quincy Oil Co. v. Sylvester*, (Mass. 1921) 130 N. E. 217, 14 A. L. R. 111.

In *Ward Baking Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1920) 264 Fed. 330, it was held that where a baking company transported its bread in its own wagons to another state, and the drivers of such wagons called at the retail stores in the latter state and sold the bread to such retailers as desired to buy, this did not constitute interstate commerce and that an order of the trade commission in regard thereto was unauthorized.

Voluntary unincorporated association.—The Federal Trade Commission has jurisdiction in the case of a voluntary unincorporated association of manufacturers where the members of the association are engaged in interstate commerce and such commerce is claimed to have been directly affected by the alleged unfair methods of competition. *National Harness Mfrs.' Assoc. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1920) 268 Fed. 705.

Giving gratuities to employees of customer.—The Federal Trade Commission has jurisdiction to determine whether the giving of money or other gratuities to employees of a customer without the knowledge or consent of their employer as an inducement to influence the employees or owners to purchase supplies is in violation of this act and if it determines that it is then to order such acts to cease. *Hurst v. Federal Trade Commission*, (E. D. Va. 1920) 268 Fed. 874.

Elements to be considered.—"Freedom of access to the consumer, and the entire absence of monopoly and nondeprivation of the public, have been regarded as an important element in the decision of cases of alleged unfair business competition." *Curtis Pub. Co. v. Federal Trade Commission*, (C. C. A. 3d Cir. 1921) 270 Fed. 881.

Damage as immaterial.—The fact that no damage has been shown is immaterial as the remedy afforded by the statute is preventive not compensatory. *National Harness Mfrs.'*

Assoc. v. Federal Trade Commission, (C. C. A. 6th Cir. 1920) 268 Fed. 705.

Prevention of competition as to resale price.—A company in selling its products to such purchasers, principally wholesalers and jobbers, as do not resell at a price lower than that fixed by the company and in refusing to sell to such as do, with the purpose of eliminating competition in the sale of the company's products does not engage in an unfair method of competition in violation of this provision. *Beech-Nut Packing Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1920) 264 Fed. 885, wherein the court said:

"The ground upon which the conclusion of law rests is that the method is unfair, because it stifles competition and so restrains trade. The obvious purpose of the respondent is to prevent any competition as to the resale price between purchasers of its products. Such a method, founded upon an agreement between a manufacturer and purchasers severally, was held to be a violation of the Sherman Act in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. ed. 502. It is difficult to say why a different conclusion should be reached, if the same result is attained by acquiescence and co-operation without express agreement between the manufacturer and his purchasers severally. *Eastern States Retail Lumber Association v. United States*, 234 U. S. 600; 34 Sup. Ct. 951, 58 L. ed. 1490, L. R. A. 1915A, 788. But we understand the Supreme Court to hold in *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. ed. 992, that a similar, but less drastic, method of sale constitutes merely the exercise of a man's right to do what he will with his own, and is not obnoxious to the Sherman Act."

Customers misled by labels on goods.—Where labels on goods were thoroughly established and understood in the trade and there was no passing off of one manufacturer's goods as those of another, and no combination in restraint of trade or to create a monopoly, the fact that some customers were misled by the labels or that some dealers deliberately deceived them as to their meaning has been held not to constitute unfair competition within the meaning of this act. *Winsted Hosiery Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1921) 272 Fed. 957.

Condition as to use of leased devices.—A condition imposed by the sellers of gasoline that devices leased by them to the retailers for the storing and vending of gasoline shall be used by the latter solely for the handling of the product of the sellers is not a situation which constitutes an "unfair method of competition" within the meaning of this section. *Standard Oil Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1921) 273 Fed. 478.

"The practice of leasing, at a nominal rental, tanks and automatic measuring

pumps, for the storing and distributing of gasoline, upon condition that the tanks and pumps so leased be used by the lessee, the retailer, exclusively for the purpose of storing and marketing gasoline purchased from the lessor," is not a violation of this section. *Canfield Oil Co. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1921) 274 Fed. 571.

Contract between magazine publisher and agent.—In *Curtis Pub. Co. v. Federal Trade Commission*, (C. C. A. 3d Cir. 1921) 270 Fed. 881, contracts between a magazine publisher and its agents were held not to constitute unfair competition.

Dealers with same name invading each other's territory.—Where two persons of the same name carry on similar businesses one as a retailer and the other as a wholesaler, it is not unfair competition for the retailer to expand his business into a wholesale one and invade the territory of the other, where there is no similarity in the labels of the goods. To prohibit such expansion would interfere with the fundamental rights of reasonable trade competition, and with reasonable and commendable purposes of trade enterprise through expansion. *Walker v. Walker Bros. Co.*, (C. C. A. 1st Cir. 1921) 271 Fed. 395, wherein it was said:

"Unfair competition cannot be said to result from the idea that a single salesman sought to palm off one Walker product for another Walker product; and this would be so, whether it was in the wholesale or retail trade.

"Unfair competition in commerce results from actual misdoings, or from an assembly of circumstances, which are calculated, in and of themselves, to mislead the public, or, as it is sometimes expressed, 'the average trade.'

"We fail to see anything unreasonable in the efforts of a business concern to expand its enterprise by carrying it into broader fields and into larger and broader ways of doing business. We cannot avoid the view that restraints upon business expansion would be an unreasonable restraint, and an unreasonable hamper, not only of the natural trade ambition, but of the broad right of opening free competition.

"It is quite true, in cases of unfair competition, in the usual phase, that the question of good or bad faith, while upon another phase the question would be whether a situation, in and of itself, without regard to the question of good or bad faith; the ways and means are, in and of themselves, calculated to deceive members of the public into buying one thing when they think they are getting another. The questions always are whether trade is being unfairly interfered with, and whether the public is being cheated into buying and paying for something which it is not, in fact, getting. It is true that the defendants' goods as well as the plaintiffs', carried the name 'Walker'; but that was a rightful name which they had used for many years. It cannot be seen that this

involves deceitful similitude, because it was their own name, and because the goods bore distinctive descriptions and designations of the product of the Philadelphia Walkers."

Vol. IV, p. 578, sec. 5 [B]. [First ed., 1916 Supp., p. 114.]

Order against voluntary association.—*"The order may be enforced by reaching the officers and members, personally and individually. A voluntary association, having many members, may be brought into court by service on its officers and such of its members as are known and can be conveniently reached, sufficient being served to represent all the diverse interests."* *National Harness Mfrs. Assoc. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1920) 268 Fed. 705.

Vol. IV, p. 578, sec. 5 [C]. [First ed., 1916 Supp., p. 114.]

Finding of commission as conclusive.—*"The facts as found by the commission, being supported by testimony, are conclusive; but the effect of them is a question of law, to be expressed in a conclusion of law."* *Beech-nut Packing Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1920) 264 Fed. 885.

"While the act provided that the findings of fact made by the Commission were final and conclusive, it still remained the duty of the supervising court to determine the same legal questions which a supervising court had in reviewing actions of the trial court, namely, whether under all the facts found by the Trade Commission a case of unfair business competition was established." *Curtis Pub. Co. v. Federal Trade Commission*, (C. C. A. 3d Cir. 1921) 270 Fed. 881.

One function of the Trade Commission is to discover and prohibit in the beginning practices which tend to "unfair methods of competition" but an inference from the facts as found by the commission is a question of law for the court. *Standard Oil Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1921) 273 Fed. 478.

Vol. IV, p. 578, sec. 5 [D]. [First ed., 1916 Supp., p. 114.]

Review by Circuit Court of Appeals.—*"The commission is given full power and authority to investigate, make findings of fact, and render its judgment and order in relation thereto, and before the same is carried into effect, the judgment of the Circuit Court of Appeals, the second highest court under the government, is to be sought by the commission, to enforce its order, and any party required by such order to cease and desist from using such method of competition may obtain a review of such order in the Circuit Court of Appeals, by filing its written petition praying therefor. The action*

of the Circuit Court of Appeals is final, save that when its interposition is sought by the commission, certiorari lies from its decision to the Supreme Court of the United States. The jurisdiction of the Circuit Court of Appeals to enforce, set aside, or modify orders of the commission, is exclusive. In all of the proceedings, whether before the commission or the court, the amplest provision is made for notice to and full hearing of all parties interested, and for this court, [the district court] for any of the reasons urged, to anticipate by injunction the action of the commission, and the judgment of the court charged under the law with the review thereof, would be clearly an usurpation of authority." *Hurst v. Federal Trade Commission*, (E. D. Va. 1920) 268 Fed. 874.

Scope of review.—As to the scope of review by the Circuit Court of Appeals it is said by that court:

"Now, it is very apparent that, where the supervisory review by the Circuit Court of Appeals, which Congress invoked, provided that that court 'shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript, a decree,' it is the province, and indeed the duty, of the reviewing court, to consider not merely the findings of the Commission, but the whole record, the whole proofs, and the whole proceeding, and to say, first, whether, in view of all the proofs, the limited facts found by the Commission really passed on the pertinent and decisive facts, and so warranted an injunction; and, second, if such limited facts do not reach the merits, and do not alone legally justify and warrant a decree of unfair competition and injunctive relief, then, since Congress has enacted the Circuit Courts of Appeals 'shall make and enter upon the pleadings, testimony and proceedings set forth in such transcript, a decree affirming, modifying or setting aside the order of the Commission,' it is quite clear that it is not only the province, but the duty, of the Circuit Court of Appeals, and indeed the expressed purpose of Congress that such reviewing court should itself examine the pleadings, the entire testimony and proceedings, and upon such inclusive examination determine whether the facts found by the Commission and the proofs on which the Commission made no findings, and which the court, in the absence of such finding, itself finds and determines, legally established a case of unfair business competition by the Curtis Company." *Curtis Pub. Co. v. Federal Trade Commission*, (C. C. A. 3d Cir. 1921) 270 Fed. 881.

Mode of exercising power to review.—The Circuit Court of Appeals says in this connection:

"In passing this act and granting to a commission power, in a new and untested field, to issue injunctions which should stop and prohibit commerce, we are of opinion that Congress, in invoking the reviewing supervision of federal courts, experienced

in review, meant that those courts should exercise that reviewing power as they had been accustomed to do it theretofore." *Curtis Pub. Co. v. Federal Trade Commission*, (C. C. A. 3d Cir. 1921) 270 Fed. 881.

Vol. IV, p. 580, sec. 6 [A]. [First ed., 1916 Supp., p. 115.]

Constitutionality.—This section is constitutional. *Hurst v. Federal Trade Commission*, (E. D. Va. 1920) 268 Fed. 874.

Vol. IV, p. 581, sec. 9. [First ed., 1916 Supp., p. 117.]

Constitutionality.—This section is constitutional. *Hurst v. Federal Trade Commission*, (E. D. Va. 1920) 268 Fed. 874.

Right to attack statute.—One cannot attack this Act on the ground that this provision violates the provision of the Fourth Amendment against "unreasonable searches and seizures," where the commission has not attempted to exercise the powers conferred by this and the following section. *National Harness Mfrs. Assoc. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1920) 268 Fed. 705.

Vol. IV, p. 583, sec. 10. [First ed., 1916 Supp., p. 118.]

Constitutionality.—This section is constitutional. *Hurst v. Federal Trade Commission*, (E. D. Va. 1920) 268 Fed. 874.

1918 Supp., p. 387. [*Initial carrier of goods, etc.*]

See also annotation under sec. 20 [K], *supra*, this title, p. 515.

Amendment as altering rule regarding liability for baggage.—This amendment to the Cummins Amendment did not alter the rule regarding liability for baggage. Under this act carriers may limit liability of baggage by published tariffs. *Galveston, etc., R. Co. v. Woodbury*, (1920) 254 U. S. 357, 41 Sup. Ct. 114, 65 U. S. (L. ed.) —, *reversing* (Tex. 1919) 209 S. W. 432.

Limitation of liability as to baggage.—Change made by this act in Cummins Amendment recognized and applied. *Culbreth v. Martin*, (1920) 179 N. C. 678, 103 S. E. 374.

Limitation must be in accordance with rules.—Even though the Interstate Commerce Commission, under the authority conferred upon it by said statute, has adopted and promulgated regulations by which such limitation of liability may be effected as to all property in interstate shipment, except ordinary live stock, and in compliance with such regulations a carrier has filed and published and put into effect its tariffs and rules for maintenance of rates dependent upon value declared in writing by the shipper or agreed upon in writing as the released value of the property, approved by said com-

mission, it remains liable for such full actual loss, damage, or injury, in the case of any particular shipment, unless it takes from the shipper a written declaration of the value of the property, or a written agreement with him upon the released value thereof, signed by him. In such case the delivery to the shipper, of a receipt executed by the carrier, in which there is no statement of value signed by the shipper, does not relieve the latter from liability based upon full actual value, even though the rate charged for carriage of the property is the same as would have been legally charged upon the minimum value of the property, under the regulations and tariffs validly promulgated, posted, and maintained. *Lindenburg v. American R. Express Co.*, (W. Va. 1921) 106 S. E. 884.

Extent of liability.—Under the act of Congress passed August 9, 1916, known as the "Second Cummins Amendment" to the Interstate Commerce Act, a common carrier is liable for the full actual loss, damage, or injury to ordinary live stock received by it for shipment in interstate commerce, caused by it or any connecting carrier to which it is delivered, and for such loss, damage, or injury to any other property so received, except baggage, unless, by the action of the Interstate Commerce Commission and itself, exoneration from such liability and adoption of a limited one, based upon a declared or agreed value, are effected. *Lindenburg v. American R. Express Co.*, (W. Va. 1921) 106 Atl. 884.

Burden of negating negligence.—"The value of the hog shipped having been agreed upon by the parties, and the rate fixed in accordance with the value, it is specifically provided by the federal statute (1915-1917, 39 Stat. 1, c. 301, p. 441) that a special contract of shipment may not be made relative to certain live stock (including hogs) so as to release the carrier of any of its common-law duties, or restricting the valuation. This then leaves the carrier as an insurer, under the rule declared in *A. C. L. R. R. Co. v. Rice*, 169 Ala. 265, 268, 269, 52 South. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389. This rule as there stated, and which it is unnecessary for us here to repeat, places the burden upon the carrier in cases such as the one at bar of acquitting itself of negligence in case of damage to live stock received for shipment." *American R. Express Co. v. Dunaway*, (1920) 17 Ala. App. 649, 88 So. 60.

1920 Supp., p. 77, sec. 206 (a).

Claim affected in general.—"The statute was not intended to provide that every claim with relation to the property which had previously been in the government's possession must be brought against the United States, nor did the statute intend that the government should thus indirectly become liable for anything more than those acts for which the government should be properly responsible." *The Arizona*, (E. D. N. Y. 1920) 267

Fed. 598, wherein it was further said that this section was to be construed as meaning that the claim must have as a proximate cause possession and use by the government.

Suit in rem.—This section does not bar a suit in rem against a boat for salvage services. *The Arizona*, (E. D. N. Y. 1920) 267 Fed. 598.

Return of corporation to private ownership as affecting prior liability.—The liability of a carrier for negligence occurring while it was being operated under a lease made under Act. of Aug. 29, 1916 (9 Fed. Stat. Ann. (2d ed.) 1095), is not affected by the return of the corporation to private ownership. *Gilham v. Atlantic Coast Line R. Co.*, (1920) 179 N. C. 508, 103 S. E. 10.

The carrier may be joined in an action against the federal agent for a cause arising during federal control. *Parker v. Seaboard Air line R. Co.*, (1921) 181 N. C. 95, 106 S. E. 755.

Substitution of agent.—"We hold that under said Transportation Act of 1920, it is proper to substitute John Barton Payne, the agent designated by the President under said section 206, paragraph (a), as defendant in this case, in lieu and in place of both the railroad company and the former Director General of Railroads. The said Act of 1920 contemplates that such agent shall be so substituted, without reference to whether the suits of the character designated, of which the suit before us is one, were pending against the railroad company, or the former Director General of Railroads, or both." *Adams v. Quincy, etc., R. Co.*, (Mo. 1921) 229 S. W. 790. See also *Kersten v. Hines*, (1920) 283 Mo. 623, 223 S. W. 586.

As to the effect of the act on pending actions and the necessity of substituting the federal agent for the Director General, the court said in *Hines v. Collins*, (Tex. 1921) 227 S. W. 332:

"We are inclined to the opinion that it was the intention of the legislation that these suits should be prosecuted further only under the provisions of section 206 of the act. It must be remembered that the government can be sued only by its permission. So that the language authorizing the suit is naturally permissive. If in granting the privilege a particular method of proceeding is provided this would be exclusive. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles*, 192 S. W. 612. It is the rule that general provisions are controlled and limited by more specific provisions in reference to the same subject. Section 202, in which the more general language concerning the settlement and adjustment of questions or disputes arising out of federal control was used, is in a setting of provisions dealing with other kinds of claims, and provides a separate fund for their payment. Section 206 deals specifically with the subject of litigation of this character, and provides a dif-

ferent fund for the payment of the judgments that might be rendered in such cases. A provision for the substitution of another agent who should represent the government in the conduct of such litigation, already instituted, would not be unconstitutional, as depriving the litigant of a vested right, as this relates merely to the remedy, and does not affect the right itself. *Ettor v. City of Tacoma*, 228 U. S. 148, 33 Sup. Ct. 428, 57 L. ed. 773. Even if the President might have granted authority to the agents named by him, in pursuance to the general authority conferred by sections 202 and 211 to conduct this litigation, yet it does not appear that the President and his agents, appointed in pursuance thereto, have acted under this authority. On the contrary, the President has named an agent under section 206, and the agents and attorneys who had theretofore been conducting the litigation under other authority granted before the act of February 28, 1920, are in effect denying their authority to further act for the government in this litigation. In this respect this case might be distinguished from that of the case of *Keene v. Hines*, *supra*.

"The further question then arises as to whether, since the titular defendant would be the same, before and after the substitution, it would be necessary to go through the form of substitution, including the service of process on such defendant. We confess that we have not arrived at a conclusion as to this question entirely satisfactory to ourselves. On the one hand, it appears reasonable to conclude that it was probably the purpose of the President in appointing said Walker D. Hines, as agent to conduct such litigation, to provide for the continuance of the suits then pending without a break, it being perhaps contemplated that the said agent would use the same agencies as he had theretofore employed in the defense of such litigation and proceed with the same without delay. On the other hand, a substitution of parties ordinarily requires a service of process on the party substituted in case he does not voluntarily appear. *White v. Johnson*, 50 Am. St. Rep. 741. It is also true that where the same person is sued in a different capacity service upon him in his new capacity is required before the suit may proceed. *Henderson v. Kissam*, 8 Tex. 46; Enc. of Pleading & Practice, vol. 20, p. 967. We may assume that the Director General had no personal knowledge as to the many suits that were pending at the time of the termination of federal control, and that upon his appointment as agent to conduct this litigation he could have employed different agents than those who had been theretofore representing him in his other capacity; and it may be that, in the absence of the voluntary appearance by his duly constituted agents acting for him in his new capacity, he had the right to rely upon formal substitution being made

and service had in the regular way upon such agents as he might appoint to represent him, in accordance with the provisions of section 206 of the act. We reverse the case on other grounds, but suggest that it would be the safest policy, under the circumstances, to require a formal substitution of the present agent representing the government in the conduct of this litigation."

Where a judgment has been rendered against a carrier and the Director General, the agent appointed under this section will on motion be substituted. *Gundlach v. Chicago, etc., R. Co.*, (1920) 172 Wis. 438, 179 N. W. 985.

Substitution in Appellate Court.—"The plaintiff, respondent in this case, in his brief here and now respectfully moves the Supreme Court to make a proper order of substitution . . . as has been repeatedly done." Such substitution was made by this court in *Kersten v. Hines*, 223 S. W. 586, and is not without precedent elsewhere. In *Gundlach v. Railroad*, (Wis.) 179 N. W. 985, said John Barton Payne, as such agent, was substituted, as sole defendant, instead of the railroad company and the federal Director General, after affirming a judgment against both of them by amending the mandate. This substitution was made on motion of the defendants in that case. But we hold that such substitution can be made on motion of either or any party to a suit of the character designated in said Transportation Act. Consequently, 'John Barton Payne, Agent designated by the President, under the Transportation Act of 1920,' is hereby substituted for the appellants, defendants below, as sole defendant and appellant in this cause." *Adams v. Quincy, etc., R. Co.*, (Mo. 1921) 229 S. W. 790.

Waiver of notice of substitution.—In *Payne v. White House Lumber Co.*, (Tex. 1921) 231 S. W. 417, in upholding a substitution without notice, by supplemental petition of the agent appointed under this act the court said:

"In this state, while notice or citation is ordinarily required to bring in a new party, yet such notice or citation may be waived by making an appearance, and we think under the facts of this case that the court was justified in holding that the attorney, whose names were signed to the pleadings of Hines, were in fact the attorneys representing John Barton Payne, Agent, under the Transportation Act. We take judicial notice of the fact that he was the agent for the company, some time prior to the trial of this case in the lower court, and that Hines was no longer a Director General or entitled to represent the government at that time. If Hines was dismissed from the case by the appellee in a supplemental petition, and by order of the court, it was rather a strange and anomalous, procedure for him to still remain in the Trial

Court and make a complete defense to the cause of action alleged as a party to the suit, when he was no longer a party, and that John Barton Payne should then take advantage of his bills of exceptions and his objections to the testimony and to the action of the court in rendering judgment and present the very same objections to this court for review and at the same time contend that he had not made an appearance in the Trial Court. To hold that the Trial Court was not justified in treating appellant as having appeared in the court below, would be to do so in the face of almost a conclusive presumption that he had then made his appearance, and to set aside the findings of the court in the judgment that the defendant did appear by counsel and answer would be in the face of the record."

New service of process on the agent appointed under this section in a pending action is not necessary. *Payne v. Stockton*, (1921) 147 Ark. 598, 229 S. W. 44, wherein the court said:

"It is clear that the Transportation Act of February 28, 1920, was not intended to destroy vested rights of action, or to authorize the President or his agents to do so. The sole purpose of the act, as shown by its terms, was to provide for the designation of an agent by the President who might be served as an agent of the United States and defend suits which had arisen out of the operation of the railroads by the President. It did not purport to destroy any right of action which the claimants might have had before the Transportation Act was passed."

Dismissal as to Director General.—A judgment rendered against the Director General as well as the agent appointed under this act will be reversed as to the former. *Hines v. Jordan*, (Tex. 1921) 228 S. W. 633.

Venue.—"The venue of suits against the federal agent on causes of action arising out of the operation of any particular railroad by the government is that fixed by law for the prosecution of such suits on such causes of action as if they had arisen against such carrier." *Payne v. Coleman*, (Tex. 1921) 232 S. W. 537, holding that the federal agent could not be sued in a county where the road represented by him had no agent. It appeared in that case that goods consigned through connecting carriers to the place where suit was brought were seized before coming into the hands of the terminal carrier, and the federal agent was sued as the representative of the intermediate carriers.

Removal of action.—An action for damages for the wrongful death of an employee, on a railroad while under federal control, is removable, being one arising under the laws of the United States. *Stark v. Payne*, (D. C. Mont. 1921) 271 Fed. 477, wherein it was said:

"In reference to section 206a, it is permissive, and not mandatory; it relates to

original jurisdiction, which it extends, and not to removal, which it does not restrict. But for it plaintiff might be constrained to sue at defendant's residence or in the federal court.

"The action is a new species of the genus of removable cases, and the law of the latter opens to include it. In legal contemplation the United States is the real defendant. The liability is imposed upon it, and it will pay any judgment against defendant. All plaintiff's right is created by federal law, though admeasured by state law. Hence the case arises under the laws of the United States, and is removable, regardless of citizenship."

In *Mizell v. Atlantic Coast Line R. Co.*, (1921) 181 N. C. 36, 106 S. E. 133, it is declared that the fact that this act does not repeat the prohibition of removal contained in the act of 1918 (Fed. Stat. Ann. 1918 Supp. 757) does not give a right to remove a suit which was begun against the Director General.

1920 Supp., p. 79, sec. 206f.

Constitutionality and construction in general.—In *Standley v. U. S. Railroad Administration*, (N. D. Ohio 1920) 271 Fed. 794, the court holding that this section was applicable to an action for personal injuries which was barred by the state statute said that its language "admits of no other interpretation than that the period of federal control is not to be taken into account in computing the period of time within which causes of action are barred by statutes of limitation. The period of federal control thus excluded runs from and after December 31, 1917, to March 1, 1920, and, excluding this time, plaintiff's action is not barred by the four-year statute of limitations."

"Nor can any question be properly made respecting the power of Congress to enact this legislation. Plaintiff's action, it is true, was barred February 28, 1920, when this act was approved; but there is no constitutional prohibition forbidding the removal of the bar of the statute of limitations against causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed. *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. ed. 483; 12 Corpus Juris, 980, § 576.

"Nor does it seem to me any question can be made as to the power of Congress to legislate upon this subject-matter. Its power so to do rests upon the same basis as its power to pass the other acts relating to the federal control of railroads."

Under its power, as a war measure, to extend the period of limitations fixed by the laws of the several states, Congress was empowered to enact this section, which is applicable to an action against an interstate carrier to recover damages for failure to

furnish cars which was barred by the state statute of limitations. *Wenatchee Produce Co. v. Great Northern R. Co.*, (E. D. Wash. 1921) 271 Fed. 784.

Period of limitation fixed by uniform bill of lading.—An action by a shipper for the loss of goods is governed by the terms of this section, where in the absence of contract between the parties, the period of limitation is fixed by the terms of the uniform bill of lading published and filed with the Interstate Commerce Commission, and consequently the time so fixed is extended. *Lazarus v. New York Cent. R. Co.*, (S. D. N. Y. 1921) 271 Fed. 93.

Application of section to suits under Employers' Liability Act.—This section does not apply to suits under the federal Employers' Liability Act [8 Fed. Stat. Ann. (2d ed.) 1208]. *Jones v. Delaware, etc., R. Co.*, (N. J. 1921) 114 Atl. 331.

1920 Supp., p. 80, sec. 208 (a).

Constitutionality.—The retention by the federal government of a measure of control over intrastate rates even after the period for full control has expired is within the war power of Congress and therefore this section is not open to objection on constitutional grounds. *Michigan Cent. R. Co. v. Michigan Public Utilities Commission*, (E. D. Mich. 1921) 271 Fed. 319, wherein it was said:

"We cannot think that Congress exceeded its war powers in this particular. It was delivering back the railroads to their owners, saddled with burdens which made the rates of a year or two earlier quite impossible. In making this return, it was certainly proper for Congress to fix conditions which should preserve the property temporarily from the immediate destruction that would otherwise surely result; and Congress, in effect, declared that these existing rates, which had proved to be necessary during the war, were also necessary until the still existing war conditions should be materially modified. It turned over the property to the owners, and (as we are now assuming) it returned to the states the power of regulatory control, saying, only that this control must not be exercised without a fresh consideration of what would be right and proper. We are content to rest our conclusion upon this construction of the war power."

Effect on intrastate rates.—The intrastate as well as interstate rates adopted during federal control of the railroads remain in effect under this statute until changed by federal or state law or in pursuance to authority of law, and do not automatically return to the pre-control status. *Michigan Cent. R. Co. v. Michigan Public Utilities Commission*, (E. D. Mich. 1921) 271 Fed. 319, wherein the court said:

"Prior to the taking over of federal control, a complete system of intrastate rates

existed in many or all of the states, and these rates were fixed, sometimes directly by statute, and sometimes by regulatory bodies. It was recognized that these intrastate rates were within the state jurisdiction, and were not a matter of federal control, save to a degree and in contingencies not here important. Undoubtedly all these various state laws and regulations were suspended by the operation of the Federal Control Act, and, having been thus merely suspended, and not repealed, they would automatically take effect again at the end of the suspension; that is, at the termination of the federal control. *Tua v. Carriere*, 117 U. S. 201, 209, 6 Sup. Ct. 565, 29 L. ed. 855. If Congress, in passing the Transportation Act, intended that this automatic reversion should occur, that is the end of the matter, and the commission was right in proposing to enforce the Michigan act after September 1st; but if Congress intended otherwise, we come to further questions. The congressional intent must, therefore, be ascertained.

"To us the intent seems very clear upon the face of the statute. We take notice of the orders of the Director General and of the Interstate Commerce Commission under which, during the period between March 21, 1918, and February 29, 1920, the cost of railroad operations had enormously increased and the rates had been advanced in an effort to provide the increased cost. We take notice, also, of the general change in conditions, such that, in February, 1920, perhaps no one could have been found who would contend that it would be fair or reasonable to reduce the railroad rates to the figures prevailing before the war and leave the roads subject to the permanently fixed and greatly increased costs of operation. It would seem most natural and reasonable that the rates, both interstate and intrastate, should remain at the figures then existing until the proper authority, federal with reference to one and state with reference to the other, should have opportunity to investigate the situation as it might then exist and determine whether or not any change should occur. In apparent execution of this natural intent, we find the statute saying that the rates in effect on February 29, 1920, shall continue in force, 'until thereafter changed by state or federal authority, respectively, or pursuant to authority of law,' and then providing that in no event shall the rates be reduced before September 1, 1920, unless with the approval of the Interstate Commerce Commission. It would be a strained construction of language to say that the mere automatic reversion to the pre-control status, which would have occurred on February 29, if the Transportation Act had made no inconsistent provision, is that change, subsequent to February 29, which the act contemplates when it speaks of 'thereafter changed.'"

See on this question *New York Cent. R.*

Co. v. Public Service Commission, (N. D. N. Y. 1920) 268 Fed. 558, wherein the court said:

"The case turns entirely upon the construction of this section. It clearly authorizes the states to change the existing federal rates as to intrastate carriage on and after March 1, 1920, except that they cannot reduce those rates before September 1, 1920, without the approval of the Interstate Commerce Commission. The continuance of the federal rates for 6 months from March 1, 1920, was coincident with the government's guaranty of just compensation to the railroads for this period provided in section 209, and is a protection to the government.

"Congress was legislating for 48 states, some of which we suppose had not fixed intrastate rates by legislation or by administrative commissions, and therefore it was provided that the change of the federal rates should be made by 'state authority' or 'pursuant to authority of law.' When a state law existed regulating the rates the Federal Control Act did not repeal, but merely suspended, that law. Upon the termination of federal control the state law continues to control the rates *ex proprio vigore*. See the very analogous situation discussed in *Tua v. Carriere*, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. ed. 855, and *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. ed. 981.

"It seems to us incredible that Congress could have intended to require a state which had enacted such a law to express its intention to continue its established rates by enacting a new law in the same terms. Section 48 of the Public Service Commissions Law of the state of New York (Consol. Laws, c. 48) authorizes the commission to investigate of its own motion any act done or omitted to be done by a railroad corporation 'in violation of any provision of law.' If, as we hold, the existing legislation of the state of New York will change the federal rates by restoring the state's rate on and after September 1, then the plaintiff was bound to file with the Public Service Commission an amended tariff in accordance therewith on or before August 1. It was this which the order complained of required the plaintiff to do, and the plaintiff refuses and has omitted to do so in violation of law.

"We are told that the case is one of great importance, will go to the Supreme Court, and that no time should be lost; therefore, without saying more, the motion is denied."

State statute enacted during federal control.—A state statute passed during the period of federal control, but containing a provision suspending its operation until after the period of federal control, stands on the same footing as a statute regulating rates enacted prior to federal control and therefore does not automatically go into effect after the cessation of federal control without further change as provided by this section. *Michigan Cent. R. Co. v. Michigan Public*

Utilities Commission, (E. D. Mich 1921) 271 Fed. 319.

1920 Supp., p. 87, sec. 211.

The Director General of Railroads appointed pursuant to this section, clothed with all the powers and duties conferred or imposed on the President except the powers and duties specially reserved under section 206 is the proper party plaintiff in actions or suits to recover on causes of action accruing to the United States during the period of federal control. The practice adopted and followed and approved under the Federal Control Act of March 21, 1918 (1918 Supp. p. 757), of bringing these actions in the name of or against the Director General is equally proper under this section. *Hines v. Struthers Furnace Co.*, (N. D. Ohio 1920) 271 Fed. 792.

1920 Supp., p. 88, sec. 302.

Effect on boards created by prior act.—This section did not continue the existence of a board of adjustment appointed under section 3 of the Federal Control Act of 1918 (Fed. St. Ann. 1918 Supp. 760). *Gregg v. Starks*, (1920) 188 Ky. 834, 224 S. W. 459.

1920 Supp., p. 88, sec. 303.

Controversies within act.—It was not the intention of Congress by this act to provide for the trial by a board of adjustment of a controversy between two conductors as to their rights of seniority, and a state court has jurisdiction of such a controversy. *Gregg v. Starks*, (1920) 188 Ky. 834, 224 S. W. 459.

1920 Supp., p. 89, sec. 307.

The reasonableness of wages of employees of a railroad in the hands of a receiver is subject to the jurisdiction of the United States Labor Board, though the question of the ability of the receiver to pay the established wages is within the jurisdiction of the court. *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 731, wherein it was said: "Receivers are not expressly mentioned in the portion of the Transportation Act establishing the Labor Board, but its definition of the carriers dealt with as including 'any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation' (41 Stat. 469), is sufficiently broad to cover a receiver operating an interstate railroad. See *United States v. Nixon*, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207. Many questions touching terms and conditions of railroad employment, in view of the superior information and wider experience of the Labor Board on such questions, might be better handled by it than by the court, and no objection is seen to a receiver submitting such to the board, with the approval of the court.

"But where, as is the case here, there is no dispute as to conditions of employment, nor as to the just and reasonable wage normally to be paid, but only a question as to the ability of the receiver to pay the wage that has been established, without violating the Constitution, it is not seen how a decision of the Labor Board would be helpful. Not only are the purse strings of the receivership in the hands of the court, but the interpretation and application of the Constitution is the function of the court as against all boards and commissions, and the court cannot abdicate that function. Its decision upon the question indicated is the only ultimately effectual decision, and to seek that of another tribunal would be barren of practical result. Questions between a receiver and his employees do not ordinarily involve matters of normal railroad operation or abstract desirability, but are always complicated by the peculiar condition of the business in his hands and are limited to short periods of readjustment. Frequently the expense and delay of seeking an advisory decision from a Labor Board would be disastrous in the exigencies of the receivership."

1920 Supp., p. 92, sec. 312.

Failure of receiver to comply with order as to wages.—Where a carrier is in the hands of a receiver and its earnings are insufficient to pay the wages established by the Railroad Labor Board, and unable to obtain by loans the money necessary to comply with its order, the receiver is not subject to punishment under this section for failure to comply with the order. To require the carrier to continue in business at a loss is beyond the power of Congress or a state. *St. Louis Union Trust Co. v. Missouri, etc., R. Co.*, (E. D. Ark. 1921) 270 Fed. 796.

1920 Supp., p. 95, sec. 400, subd. (4). [*Duty of carriers, etc.*]

Section as declaratory of common law.—The provision in this section requiring the carrier to provide and furnish transportation on reasonable request is merely declaratory of the common law rule concerning the duty of common carriers. *Lucking v. Detroit, etc., Nav. Co.*, (E. D. Mich. 1921) 273 Fed. 577.

1920 Supp., p. 96, sec. 402, subd. (12). [*Distribution of coal cars.*]

Purpose and effect of act.—In *Baltimore, etc., R. Co. v. Lambert Run Coal Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 776, the court said: "We cannot doubt that by subdivision 12 of section 402 the Congress clearly expressed the intention to abolish all prefer-

ence to mines furnishing railroad fuel coal under the assigned car rule in periods of ordinary car shortage. The count of each and every car required is not a mere independent futile enumeration, but a count of each and every car furnished or used against the mine, to the end that there should be proportional distribution of all available coal cars, resulting in fair and equal opportunity to each mine on the basis of its rating. Before the enactment of the statute the matter had been controlled by rules, regulations, and practices made by railroads, or the government railroad administration, which had been the subject of much controversy. Evidently the Congress, having in view this controversy, after full consideration settled the matter by an imperative enactment against the assigned car rule in times of ordinary coal car shortage."

The real purpose of paragraph 12 was to carry into the statute what had been a requirement of the Interstate Commerce Commission; that is, that each car must be counted against the mine to which assigned, in determining whether the assigned cars equal or exceed the distributive share of such mine. *Corona Coal Co. v. Southern R. Co.*, (N. D. Ala. 1920) 266 Fed. 726, wherein it was further said: "In considering the effect and scope of this paragraph, the high and comprehensive administrative powers and duties of the Interstate Commerce Commission must not be forgotten; and it is well to remember that the acts of Congress furnish repeated evidence of a legislative policy to broaden and add to, rather than to narrow and subtract from, the powers and useful work of the commission. Again it is to be borne in mind that the Supreme Court of the United States has often, in interpreting the Interstate Commerce Act (24 Stat. 379) and the amendments thereto, given judicial recognition of this legislative policy."

"I think the paragraph 12 quoted should be considered and construed in the light of this knowledge, as well as in *pari materia* with the other related sections of the Interstate Commerce Law."

"Apply just and reasonable ratings."—**"The origin and history of the phrase 'apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mines for transportation of coal against the mines,' shows the reason for its adoption by the commission and its incorporation afterwards into the statute. Congress knew that at one time assigned cars were not taken into account in the distribution by the carriers to mines served by them, and that the mines receiving assigned cars were given the same pro rata share of the ordinary commercial cars as were given to the mines that received no assigned cars, and that the assigned cars were not counted against the mines favored with them. In the *Hocking Valley Case*, 12 Interst. Com. R. 396, and in the *Traer Case*, 13 Interst. Com. R. 451, this practice**

was complained of and held to be unjust and not to be allowed. When the question came before the Supreme Court of the United States, the decision was upheld in *I. C. v. Ill. C. R. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. It is well to read the opinion in the Traer Case, rendered by Commissioner Clark, now Chairman of the Interstate Commerce Commission. It may be ventured that Congress did not intend to change the meaning of the phrase "count against the mine," or to enlarge the scope of the rule which is referred to in the *Ill. C. R. R. Case*, *supra*, and the *Morrisdale Coal Co. Case*, *supra*.

"In the argument of this case the statement of Commissioner Clark made before the House committee on interstate and foreign commerce, when it had under consideration the Each-Cummins Bill, which put into statutory law the rule found in paragraph 12 hereinbefore referred to, was read to me, and at the same time the pertinent part of the report of the House committee was stated. Undoubtedly this report shows that the House committee understood what the language, 'and to count each and every car furnished to or used by such mines for transportation of coal against the mine,' meant and gave legislative sanction, so far as it could, to the application of this rule theretofore adopted by the commission and approved by the courts; and from the hearings of the committee and its report it is evident that it was not intended to say assigned cars should in any event be prorated among the mines." *Corona Coal Co. v. Southern R. Co.*, (N. D. Ala. 1920) 266 Fed. 726.

"To count each and every."—"Prior to the amendment of the Interstate Commerce Law by the insertion in paragraph 12 of the words "and to count each and every car furnished to or used by any such mine for transportation of coal against the mine," this rule, now statutory, had been by order of the Interstate Commerce Commission a rule of long standing for the government of railroads, and it had been often sanctioned by the courts in adjudicated cases. So it can be said that this approved rule, in effect already law, was by the Transportation Act of 1920 merely crystallized into statutory form." *Corona Coal Co. v. Southern R. Co.*, (N. D. Ala. 1920) 266 Fed. 726.

Estoppel to assert unconstitutionality.—A plaintiff who claims the benefits of this act cannot at the same time assert the unconstitutionality of limitations contained in it. *Baltimore, etc., R. Co. v. Lambert Run Coal Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 776.

Complaint as to practice in delivering assigned cars as question for commission.—Where the issue between the parties was on account of the practice pursued by the defendant in respect to "assigned cars;" that is to say, the defendant delivered its own cars to mines with which it had contracts for fuel for its own use, and delivered the cars

belonging to other railroads and privately owned cars committed to it for transportation to mines with which said other railroads and owners have contracts for fuel, and it was established that such cars were counted against the distributive share of the mines to which assigned, and that such mines were not given a share of the cars available for ordinary commercial shipments, unless, and to the extent only, that the assigned cars fail to equal the distributive share of these mines, which receive the assigned cars, it was held that the plaintiff's grievance should have been taken to the Interstate Commerce Commission and that the District Court was without jurisdiction. *Corona Coal Co. v. Southern R. Co.*, (N. D. Ala. 1920) 266 Fed. 726.

Opinions of Interstate Commerce Commission as binding.—"It must be said that the opinion of the Interstate Commerce Commission in giving the working construction of the Interstate Commerce Act and its amendments, while not binding upon the court, is nevertheless deserving of serious and deferential consideration." *Corona Coal Co. v. Southern R. Co.*, (N. D. Ala. 1920) 266 Fed. 726.

1920 Supp., p. 97, sec. 402, subd. (15). [*Shortage of equipment, etc.*]

Construction of statute generally.—"The Congress has not, however, conferred on coal mines equality among themselves—the right of each mine in time of coal car shortage to be furnished cars in proportion to mine ratings, without regard to the public welfare and safety. Coal is a public necessity. From many causes, crises and emergencies may arise in mine operation, transportation, and unexpected needs of the public, which cannot be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

"We think the Congress has clearly conferred on the commission the power to grant relief in such conditions, by providing—

"Whenever the commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the commission shall have and is hereby given authority * * * (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them."

"The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long-existing car shortage. But, recognizing the necessity of a degree of flexibility, the Congress conferred upon the commission power, in case of a car shortage which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings, with preference and priority to such extent as will in its opinion meet the emergency.

"All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the commission when they find an emergency requiring it." *Baltimore, etc., R. Co. v. Lambert Run Coal Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 776.

Extent of authority given to suspend rules, etc.—"The authority given to the commission by (a) subdivision 15 in cases of emergency 'to suspend the operation of any or all rules, regulations or practices then established with respect to car service' does not extend to the suspension of a positive and definite enactment of the statute covering the subject. Rules, regulations, and practices mean the rules, regulations, and practices adopted by the commission or by the railroads in conformity to the act, or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from subdivisions 11 and 14 of the same section and other portions of the statute." *Baltimore, etc., R. Co. v. Lambert Run Coal Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 776.

Conclusiveness of order.—"The commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the commission was unwisely or improvidently exercised." *Baltimore, etc., R. Co. v. Lambert Run Coal Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 776.

Enjoining execution of order.—The execution of an order made by the commission under this section can be enjoined only by three judges, one of them being a circuit judge, after a notice to the commission and to the attorney-general. *Baltimore, etc., R. Co. v. Lambert Run Coal Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 776.

1920 Supp., p. 98, sec. 402, subd. (18). [*New and extended lines, etc.*]

Right to discontinue carriage by water.—The right of a carrier by water to discontinue its service does not seem to be prohibited by this provision. As to the right of such a carrier to thus act it has been said: "Is there, then, any statutory provision which prevents the defendant from exercising the right, which it otherwise has, to with-

draw from the business in which it has been engaged, to the extent which it deems necessary or desirable? Plaintiff invokes the fourth subdivision of the first section of the Interstate Commerce Act, hereinbefore quoted, to the effect that:

"It shall be the duty of every common carrier subject to this act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor."

"This language is merely declaratory of the common-law rule governing the duty of common carriers. 10 Corpus Juris, 66. It is to be observed that the provision in question applies to common carriers subject to the act 'engaged in the transportation' of passengers or property, and the obligation referred to is the duty 'to provide and furnish such transportation upon reasonable request therefor.' It is clear that the meaning and effect of this language is that a common carrier, subject to the act, which is actually engaged in transporting passengers or freight must receive and carry such passengers or freight as may be offered to it, without discrimination, and in the performance of the duty under which it rests so long as it holds itself out as a carrier of such passengers or freight to provide the necessary facilities and equipment for 'such transportation,' provided that 'reasonable request' is made therefor.

"There is nothing in this or any other section of the statute which prevents a common carrier, such as the defendant, from disengaging itself from the transportation of passengers or freight between particular points, or which makes it the duty of such a carrier to furnish such transportation if it is not actually 'engaged in' in the business of furnishing any transportation between such points. If in the present case the grievance of the plaintiff were that the defendant, while engaged in transporting passengers and freight over its so-called Detroit and Mackinac route, refused or failed to furnish adequate facilities or equipment for such transportation, the claim of plaintiff for proper relief from such a situation, on the ground that the defendant was violating a duty created or expressed in the language just quoted, would not be without force. The situation, however, actually presented, is quite different. To the extent that defendant discontinues the furnishing of any transportation over one of its routes, to that extent it ceases to be engaged as a common carrier in transportation, or subject to the obligation referred to in this portion of the statute. Considering the right which a carrier such as defendant has at common law to abandon entirely one or more routes for the operation of its vessels, an intention on the part of Congress to take away such right, and impose on such a carrier the duty resting upon a carrier by railroads in this respect, cannot be deduced from language which falls so far short of expressing such an intention as does

the provision now under consideration. It would have been easy to have expressed such a purpose, and it must be assumed that if Congress had intended to create such an obligation, in derogation of the common-law rule applicable, it would have done so in appropriate terms.

"The conclusion, moreover, that it was not intended by the Interstate Commerce Act to impose upon such a carrier the obligation mentioned, is strengthened and confirmed by the provision in the eighteenth subdivision of section 1 of the act to the effect that:

"No carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

"In this part of the statute, Congress has legislated upon the subject of the abandonment of existing lines of transportation, and in so doing it has expressly imposed the limitations created, not upon 'every common carrier subject to this act,' as in other sections and clauses of the statute, but only upon a 'carrier by railroad subject to this act.' 'Expressio unius exclusio alterius.' The express imposition of this obligation upon common carriers by railroad evidences, in my opinion, an intention to exclude from the burden thereof every other common carrier. But, however this may be, I am unable to discover in any of the comprehensive terms of the statute invoked any language indicating a purpose to subject a carrier such as the defendant to the duty which plaintiff seeks to have this court enforce. Nor do I know of any statutory provision creating such an application, or any decision applying or announcing such a rule; none of the cases cited by plaintiff involving a proposed discontinuance or abandonment of a route of

transportation by such a carrier. For the reasons stated, it results that the motion to dismiss the bill must be granted, and an order will be entered accordingly." *Lucking v. Detroit, etc., Nav. Co.*, (E. D. Mich. 1921) 273 Fed. 577.

1920 Supp., p. 106, sec. 416.

Power as to intrastate rates.—Congress has the power to legislate granting the authority to fix such intrastate rates so as to prevent undue or unreasonable advantages, prejudice, or preference between persons and localities in intrastate commerce and interstate or foreign commerce on the other hand, thus avoiding undue and unjust discrimination. *Lehigh Valley R. Co. v. Public Service Commission*, (N. D. N. Y. 1921) 272 Fed. 758.

Order of commission as controlling.—"No local rule can nullify the lawful exercise of federal authority, and, after the Interstate Commerce Commission has made an order within its jurisdiction, there is no compulsion on the carrier to comply with any inconsistent local requirements. . . . Where state and federal views conflict, the judgment of Congress and the agencies of the government lawfully established by the laws of Congress must control." *Lehigh Valley R. Co. v. Public Service Commission*, (N. D. N. Y. 1921) 272 Fed. 758.

Conclusiveness of findings.—The findings of the commission that certain railroads are engaged in interstate commerce are binding on the courts where they have some evidence to support them. *New York v. U. S.*, (E. D. N. Y. 1921) 272 Fed. 768.

Findings of the Interstate Commerce Commission in respect to the reasonableness of rates are binding on the courts if they have any evidence to support them. *Lehigh Valley R. Co. v. Public Service Commission*, (N. D. N. Y. 1921) 272 Fed. 758.

INTOXICATING LIQUORS*

1919 Supp., p. 199, sec. 1.

Constitutionality.—See *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

Effect of act generally.—See *Thome v. Lynch*, (D. C. Minn. 1921) 269 Fed. 995; *State v. Fisher*, (Del. 1920) 111 Atl. 432.

Effect of cessation of war.—The War-Time Prohibition Act had not become invalid in November, 1920, by reason of the cessation of the war powers of Congress as the government of the United States was still officially at war. *Vincenti v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 114.

Effect of National Prohibition Act.—This act was not repealed by the National Prohibition Act (1919 Supp. Fed. Stat. Ann.

2d ed. p. 202). *Vincenti v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 114.

Evidence.—See *Ford v. U. S.*, (C. C. A. 5th Cir. 1921) 269 Fed. 609; *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

1919 Supp., p. 202, sec. 2.

Prosecution by information.—Where one is charged with a violation of this act the prosecution need not necessarily be by indictment but may be by information, notwithstanding the provision in this section as to the conduct of the prosecution for the purpose of having offenders held for the action of the grand jury, the violation being a misdemeanor. *U. S. v. Achen*, (E. D. N. Y. 1920) 267 Fed. 595, wherein the court said: "A

* Legislation supplementing the Volstead Act will be found, *supra*, p. 228.

violation of the act is a misdemeanor, and in the absence of any intent on the part of Congress to require all prosecutions under the act to be by indictment, except as such intent may appear in the foregoing section, it does not seem to me that there is justification for holding that Congress has shown a purpose to abolish the long established practice of proceeding by information against a defendant not charged with an infamous offense. This section seems to me to be merely intended to secure the enforcement of the law by providing that the investigation of violations shall be under the direction of the Commissioner of Internal Revenue and prosecutions therefor conducted by the several United States attorneys." See also *Young v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 967.

1919 Supp., p. 203, sec. 3.

Sufficiency of information.—An information charging the maintenance of a nuisance in violation of this section is sufficient which follows the language of the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation, and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense. *Young v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 967.

Evidence held sufficient to sustain a conviction for violation of this section, see *Young v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 967.

1919 Supp., p. 203, sec. 4.

Evidence necessary to issuance of injunction.—In order that a temporary injunction may be issued under this section it is sufficient that there should be a prima facie finding that illegal sales of liquor have been made at the place complained of as a nuisance, for which the defendant is now under arrest, and that illegal sales have been made at the same place since the arrest, and the further finding that the nuisance complained of exists. *U. S. v. Schott*, (E. D. Pa. 1920) 265 Fed. 429.

1919 Supp., p. 204, sec. 1.

- I. Volstead Act generally.
- II. Constitutionality and construction of provision fixing alcoholic content.

I. VOLSTEAD ACT GENERALLY

Constitutionality.—The "National Prohibition Act" is not unconstitutional as permitting the taking of private property for public use without just compensation. *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

Validity of 18th Amendment.—See *infra*, this volume, annotation to the 18th Amendment.

Act as limitation on privilege.—This act instead of granting a right is a limitation

on privilege. *Woods v. Seattle*, (W. D. Wash. 1921) 270 Fed. 315.

Effect on state legislation.—*In general.*—The Volstead Act did not in view of the provision of the Eighteenth Amendment as to "concurrent power" annul previous state legislation appropriate to the enforcement of that amendment. *State v. District Ct.*, (1920) 58 Mont. 684, 194 Pac. 308. See to the same effect *Alexander v. State*, (1921) 148 Ark. 491, 230 S. W. 548; *Jones v. Hicks*, (1920) 150 Ga. 657, 104 S. E. 771, 11 A. L. R. 1315; *Scroggs v. State*, (1920) 150 Ga. 753, 105 S. E. 363; *Smith v. State*, (1920) 150 Ga. 755, 105 S. E. 364; *Shreveport v. Marx*, (1920) 148 La. 31, 86 So. 602; *Meriwether v. State*, (1921) 125 Miss. 435, 87 So. 411; *Kyzer v. State*, (1921) 125 Miss. 79, 87 So. 415; *State v. Fore*, (1920) 180 N. C. 744, 105 S. E. 334; *State v. Muse*, (1921) 181 N. C. 506, 107 S. E. 320; *Banks v. State*, (1921) 88 Tex. Crim. 380, 227 S. W. 670; *State v. Hartley*, (1921) 115 S. C. 524, 106 S. E. 766; *Allen v. Com.*, (Va. 1921) 105 S. E. 589; *State v. Turner*, (Wash. 1921) 196 Pac. 638; *State v. Woods*, (Wash. 1921) 198 Pac. 737; *State v. Knosky*, (W. Va. 1921) 106 S. E. 642.

This act does not invalidate a state statute prohibiting the sale of intoxicating liquor which gives a different definition of intoxicating liquor and prescribes a different penalty for its sale. *Franklin v. State*, (1921) 88 Tex. Crim. 342, 227 S. W. 486; *Ex p. Gilmore*, (1921) 88 Tex. Crim. 529, 228 S. W. 199; *Robert v. State*, (1921) 88 Tex. Crim. 488, 228 S. W. 230; *Russell v. State*, (1921) 88 Tex. Crim. 582, 228 S. W. 948. And see *Reece v. State*, (Tex. 1921) 88 Tex. Crim. 569, 228 S. W. 562.

A state act is not invalidated by the fact that it prescribes a penalty different from that imposed by the Volstead Act. *Allen v. Com.*, (Va. 1921) 105 S. E. 589.

Regulations more stringent than those in the federal act with respect to the manufacture and sale of intoxicants may be enacted by a state. *State v. Barksdale*, (1921) 181 N. C. 621, 107 S. E. 505.

Bribing police officer.—A state has the power to punish the acceptance of bribe by a police officer for agreeing not to arrest a certain person for violation of the Volstead Act. *Harris v. Superior Ct.*, (Cal. App. 1921) 196 Pac. 895.

The Bone Dry Law of Alaska of Feb. 14, 1917, was not repealed by the National Prohibition Act. *Abbate v. U. S.*, (C. C. A. 9th Cir. 1921) 270 Fed. 735.

Effect of internal revenue regulations.—The provisions of this act cannot be extended in their scope by regulations of the Commissioner of Internal Revenue beyond the terms of the act. *Oertel Co. v. Gregory*, (W. D. Ky. 1921) 270 Fed. 789, holding the following regulation to be unauthorized: "The use of the words beer, ale, or porter, and the well known synonyms for same, such as lager,

bock or stout, either with or without prefixes or suffixes, is not permissible on labels for cereal beverages." The court said: "If Congress had deemed it proper to put into the Volstead or other act the language used in the new regulation, of course no objection could then have been made to it, but Congress did not do so, and in this situation the Commissioner undertook to supply what he must have supposed was a defect in the legislation. If Congress had chosen to add to the words 'beer, ale, or porter,' the words 'or any synonyms for same such a lager, bock or stout,' the regulation might have been authorized, but in the absence of those words from the act the rules plainly established by the Supreme Court make it clear that the Commissioner could not, even with the approval of the Secretary of the Treasury or otherwise, add those words to those used by Congress in the legislation it enacted, and the attempt to do so must be held to have been unauthorized by law, and consequently not enforceable as against the plaintiff in this case."

Statute forbidding sale without license repealed.—In Louisiana it was held that: "Act 66 of 1902, by prohibiting the selling of intoxicating liquors without a license, implies the right of any and every person to obtain the license. Such a law, if enacted subsequent to the adoption of the Eighteenth Amendment, would not be 'appropriate legislation.' It would be absolutely violative of the amendment. The statute is altogether inconsistent with the constitutional amendment, and is therefore without effect." *State v. Green*, (1921) 148 La. 376, 86 So. 919.

Act as affecting power of municipality.—It is held that a city has the power to regulate the possession of intoxicating liquors by action which is not in conflict with the National Prohibition Act or the laws of the state. *U. S. v. Viess*, (W. D. Wash. 1921) 273 Fed. 279.

Act as affecting lease of real property.—In *Goldberg v. Callender*, (Conn. 1921) 113 Atl. 170, a lease provided that: "It is hereby agreed that the premises herein leased shall be used only as a saloon and liquor establishment, and this instrument is conditioned upon said agreement, which shall be a condition precedent to the operation of this lease. * * * It is expressly agreed and understood by and between the parties hereto that if, at any time during the leasehold term, or any renewal thereof, the city of Hartford shall vote 'no license,' or if for any reason other than the unsuitability of the applicant a license should be refused by the county commissioners in and for Hartford county in said premises, during the leasehold term or any renewal thereof, then this lease is void at the option of said party of the second part." It was held that the lessee had the option to declare the lease void on the passage of this act, but that if he did not exercise his option, he was bound by the provisions of the lease and could not use the

premises for any other purpose than that specified therein. The court said: "Suppose, for example, the General Assembly had forbidden the maintenance of saloons in theater buildings. The lessee would then have a right to vacate the premises and stop paying rent, without waiting to go through with the idle ceremony of asking the county commissioners for a license which they would have had no power to grant. The Volstead Act (41 Stat. 305), which is also a domestic statute, has superseded Gen. St. 1918, § 2731, so far as that section authorizes the county commissioners to grant licenses for the sale of intoxicating liquors containing one-half of 1 per cent. or more of alcohol. If we assume that the covenant to use the premises only as a saloon and liquor establishment would not be performed, within the fair meaning of the contract, by using them for the restricted purpose of selling beverages containing less than one-half of 1 per cent. of alcohol, then the Volstead Act, when it became operative on January 17, 1920, deprived the county commissioners of any power to grant a license to use the premises for the covenanted use, and also revoked the license which was then in force; and as the lessee was not bound to ask the county commissioners to do what they were forbidden by law to do, he was then entitled at his option to cancel the lease, or to keep it in force.

"On the other hand, if we assume that the use of the premises for the restricted purpose of selling beverages containing less than one-half of 1 per cent. of alcohol is a performance of the covenant to use the premises as a saloon and liquor establishment, then the continued performance of the covenant has not been forbidden by law. In either case the lease is, for the purposes of this case, still in force as a contract controlling the legal rights of the parties because the lessee has not attempted to avail himself of his opinion to escape from its obligations.

"We hold that the contingency of a legal prohibition of the covenanted use was contemplated and its consequences provided for in the lease; that the revocation by the Volstead Act on January 17, 1920, of the existing license to sell intoxicating liquor containing more than one-half of 1 per cent. of alcohol and the revocation of the authority of the county commissioners to grant a new license were, in legal effect, equivalent to a refusal by the county commissioners to grant a license, for a reason other than the unsuitability of the applicant; that the lessee was thereupon entitled, and within a reasonable time required, to elect whether he would declare the lease void or leave it in force, and that, having elected, notwithstanding the prohibition of the Volstead Act, to leave the lease in force, he remained bound by his covenants so far as they were legally capable of performance, and could not use the premises for a purpose for which he agreed not to use them.

"The use of the premises as a retail shoe store by the sublessees or assignees, Noll, Noll & Worden, was a breach of covenant which entitled the lessors to enter for condition broken and to retake possession of the premises."

Effect of prior conviction or acquittal in state court.—As to the effect of a prior conviction or acquittal in a state court under a state statute for the same transaction for which the defendant is indicted in the federal court under the National Prohibition Act it has been said: "Coming, now, to consider the question of the former conviction or acquittal in the state courts, I know of no decision by any authoritative tribunal. There are two cases submitted to me—the one, *U. S. v. Peterson et al.*, (D. C.) 268 Fed. 864, where it is held that the proceedings in a state court are a complete bar to subsequent prosecutions in the federal court for the same transaction. *U. S. v. Holt*, (D. C.) 270 Fed. 639, is a case where the same question was presented, and the contrary conclusion reached by Judge Woodrough, in an opinion in which I fully concur, not only in the legal proposition decided, but in the practice to be followed, where it is shown that the accused has already been punished in the state courts.

"In addition to the views so well expressed by Judge Woodrough, and what has been said heretofore in this opinion, it occurs to me that something further might be said as to the meaning of the Fifth Amendment of the Constitution of the United States:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

"What meaning shall be given the words 'the same offense?' How shall they be construed? If the Congress can pass legislation to enforce the Prohibition Amendment, and the states may also do so, it is manifest that such legislative acts will differ—that different laws will be provided for the enforcement of the amendment, and different punishments will be imposed. It is also manifest that often the same act or transaction will violate both the federal and state provisions, so the question arises: Where the same act violates both statutes, has there been only one or more offenses committed? It will be conceded that the offender cannot be tried in the federal court for violation of the state statute, nor in the state court for the violation of the federal statute; so it appears that the offense is not the act or transaction alone, but that the act or transaction must be considered in the light of the legislative provisions and prohibitions.

"In the absence of such legislative prohibitions, the act or transaction committed would not be an offense. It is not the prohibited act, but the terms of the statute, which declares and defines the offense. It seems to me, therefore, that as each legislative entity, whether state or federal, declares its own offense, this cannot be the same offense as that provided by the other, though

the same act or transaction may violate each of them, but that there are as many offenses as the legislative provisions may declare." *U. S. v. Bostow*, (S. D. Ala. 1921) 273 Fed. 535.

Prosecution as affected by indictment in state court.—The fact that the defendant indicted for violating the National Prohibition Act has been indicted in a state court under a state statute for the same transaction does not prevent the federal court from proceeding to try the defendant for the violation of the federal act, the offenses not being the same. *U. S. v. Bostow*, (S. D. Ala. 1921) 273 Fed. 535. The court said: "It is manifest in this case that the indictment in the state court which is pleaded here is based upon an offense of violating a state statute, and this court would have no power to try the defendant so charged in that indictment. It is also manifest that the indictment in this court, being based upon the National Prohibition Act, charges no offense on which this defendant could be prosecuted and convicted in the state court because no offense against the state laws is charged in the federal indictment, and no offense against the federal laws is charged in the state indictment.

"It is manifest that the federal government cannot appear in the prosecution before the state court, for it has no standing there, no federal statute being involved, and it is also manifest that the state has no right to appear in the federal court, because no state statute is involved. To hold otherwise must necessarily be to hold that, if one was prosecuted and convicted in the federal court for a transaction which violated the federal statute, and the same transaction also violated the state statute, the federal government, having prosecuted and convicted the defendant, should have the right to say that he should not be further prosecuted and put in jeopardy in any other court, and it should have and exercise the power to enjoin the state court from the prosecution of this man who has already been punished for the same act which was a violation of the federal statute. To state the proposition is to answer it. The whole question grows out of an incorrect analysis of the question."

II. CONSTITUTIONALITY AND CONSTRUCTION OF PROVISION FIXING ALCOHOLIC CONTENT.

"In so far as Congress, in aid of the general purpose of making possible the practical enforcement of prohibition, fixed a definite, maximum alcoholic content to 'nonintoxicating' beverages, it was acting clearly within its competency, and was proceeding in a way calculated to the attainment of the ultimate end in view and the successful performance of the duty imposed upon it by the constitutional amendment." *U. S. v. Dodson*, (S. D. Cal. 1920) 268 Fed. 397.

In *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186, the court said: "Is the definition of intoxicating liquors as 'containing one-half of 1 per centum or more of

alcohol by volume which are fit for use for beverage purposes,' without basis in fact, and, therefore, arbitrary and void? It is the presence of alcohol that makes liquor intoxicating. Experts differ in their beliefs and opinions as to what quantity of alcohol will or will not produce intoxication. The effect of the same quantity upon different persons varies, depending upon a number of conditions, and defying exact definition.

"A failure to define legislatively what was intoxicating liquor would of necessity refer that question to judicial decision. This would inevitably result in a serious lack of uniformity of decision as to what constitutes intoxicating liquor. As persons are affected differently by liquor containing the same percentage of alcohol, and as in the absence of a fixed standard the effect upon the individual would most frequently control the decision, we would have conflicting decisions as to liquor drawn or poured from the same container at the same time. Such results would conduce neither to a proper enforcement of the Prohibition Amendment nor to a due respect for the administration of laws generally. Therefore, when Congress concluded, as it had a constitutional right to do, that a definition was necessary for a proper enforcement of the Prohibition Amendment, it, in determining what should be the standard, engaged in a work that necessarily involved discretion, the bounds of which were only that it should be reasonably exercised. If, in its exercise of such discretion, it determined that the proper enforcement of such prohibition required that a percentage be adopted that would certainly prevent intoxicating liquors being made and bartered, and the adopted basis or percentage has a reasonably appreciable relation to the subject-matter of the prohibition, it cannot be judicially condemned as arbitrary."

By the terms of this section nothing comes within the purview of the act except such fluids as contained an amount of alcohol over one-half of 1 per cent in the whole. Otherwise it is not intoxicating, and therefore not intended to come within any of the provisions of the Volstead Act, nor, indeed, those of the Eighteenth Amendment itself. *Oertel Co. v. Gregory*, (W. L. Ky. 1921) 270 Fed. 789.

1919 Supp., p. 205, sec. 2.

Search warrants to what officers issued.—One effect of this section is to grant power to issue search warrants under the limitations provided in the Espionage Act (1918 Supp. p. 128 et seq.) to other officers in addition to those named in that Act. *U. S. v. Friedman*, (E. D. Pa. 1920) 267 Fed. 856. See to the same effect *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

Power of state officers to arrest without warrant.—The power of state officers to make arrests under this act exist only under Rev. St. § 1014 (2 Fed. Stat. Ann. 654) and

accordingly a warrant is necessary to such an arrest. *Lenski v. O'Brien*, (Mo. App. 1921) 232 S. W. 235, wherein the court said:

"In our view it is apparent that the only state officers who are authorized to make arrests are those who are specifically designated in said section 1014, each of which said state officers is clothed with power to issue warrants for arrest. It is self-evident that it is not intended that the state officers mentioned in said section 1014 shall themselves do the actual arresting of the offenders, but that said officers, in their official capacity, upon proper showing 'agreeable to the usual mode of process against offenders in such state,' shall issue the necessary warrant for the arrest of any offender who shall have committed a crime or offense against the United States; and before any such state officer mentioned in said section 1014 is authorized to issue a warrant for the arrest of a person charged with the violation of any of the provisions of the National Prohibition Act of the United States, some person authorized under the law of the state where the arrest is sought to be accomplished must, agreeably to the statutes of such state, file a complaint before such authorized officer from whom the warrant is sought."

Issuance of warrant to municipal police officers.—Under this section and Rev. St. § 1014 (2 Fed. Stat. Ann. 2d ed. 654) a warrant for a violation of the Volstead Act may be issued to a municipal police officer. *Harris v. Superior Ct.*, (Cal. App. 1921) 196 Pac. 896.

Contents of affidavit and warrant.—Whether an affidavit is filed and a warrant issued under R. S. sec. 1014, (2 Fed. Stat. Ann. 2d ed. p. 654) or under the act of June 15, 1917, (1918 Supp. p. 128, et seq.) the contents of each must be the same. *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

1919 Supp., p. 206, sec. 3.

Constitutionality.—The provisions of this section forbidding the transportation of intoxicating liquor "except as authorized in this act" are declared to be warranted by the Eighteenth Amendment. *Corneli v. Moore*, (E. D. Mo. 1920) 267 Fed. 466.

This act is not unconstitutional because of the provision in this section that no person shall possess any intoxicating liquor after the Eighteenth Amendment to the Constitution of the United States goes into effect, except as authorized and permitted by that Act, although such intoxicating liquors were lawfully acquired before that time. *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

"Congress has obviously intended to prevent the use of intoxicating liquor as a leverage, and the provisions of the Volstead Act, forbidding any person to manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor, except as authorized in this act, are consis-

tent with an endeavor to make that intent effective.

clusion that the Volstead Act is valid as a war measure, even if it should be held to be

"While there seems no escape from the conclusion that the Volstead Act is valid as a war measure, even if it should be held to be an act to enforce the Eighteenth Amendment, it does not follow that the provision of section 3 against possession is unconstitutional. The amendment in question was adopted in order that the use of intoxicating liquor as a beverage might come to an end. It was within the power of Congress to adopt any reasonable means calculated to bring about the desired result. Limiting possession as the act has done will tend to such an effect." *U. S. v. Murphy*, (E. D. N. Y. 1920) 264 Fed. 842.

The exception in this section "is merely in keeping with, and in recognition of, other specific provisions in the act permitting the manufacture, sale, possession, etc., of 'intoxicating liquor' for certain nonbeverage purposes, such as sacramental, medicinal, etc., and for its possession in private dwellings only (title 2, § 25) for beverage purposes. It is in no wise inconsistent with, or counter to, the general purpose of the act." *U. S. v. Dodson*, (S. D. Cal. 1920) 268 Fed. 397.

Purpose as preventing use of liquors for beverage purposes.—The chief purpose of the framers of the Volstead Act was to reduce and as far as possible to prevent the use of intoxicating liquors as a beverage. *U. S. v. Turner*, (W. D. Va. 1920) 266 Fed. 248; *U. S. v. Masters*, (M. D. Pa. 1920) 267 Fed. 581; *Street v. Lincoln Safe Deposit Co.*, (S. D. N. Y. 1920) 267 Fed. 706; *Ledbetter v. Bailey*, (W. D. N. C. 1921) 274 Fed. 375; *Kelly v. Lewellyn*, (W. D. Pa. 1921) 274 Fed. 108.

"If anything is well settled and determined, it is that the Volstead Law, enacted pursuant to, and in consequence of, the adoption of the Eighteenth Amendment to the federal Constitution, was intended and calculated by Congress, and by those interested in its passage, to prohibit the manufacture, sale, and transportation, for beverage purposes, of any and every kind of intoxicating liquor within the United States; and Congress expressly defined such 'intoxicating liquor' to be any spirituous, vinous, malt or fermented liquor or liquid 'fit for use for beverage purposes' containing alcohol to the extent of 'one-half of one per cent. or more' by volume. Volstead Law, tit. 2, § 1. So that by this law, which was enacted after much consideration of the circumstances and of the obvious intent and purpose of the people of the United States, as reflected by their ratification of the amendment, it was definitely and positively determined that any liquor or liquid, fit for use as a beverage, and possessing alcohol in excess of the maximum mentioned, might not be manufactured, sold, or transported in the United States. Even its mere possession was similarly prohibited, save under exceptional, severely

necessary, and obviously harmless circumstances.

"This conclusion results, not only from the reading of the act in its entirety, looking at the big purpose in view and the means to be employed to gain the end sought, but also from the language of section 3 of title 2, the controlling section of the act, which is to the effect that:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

"Here, in unequivocal language, we have a declaration on the part of Congress that, however this act may be viewed, and tested by every means known to those whose duty and function it is to construe statutes, in every instance the statute 'shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.' Nothing can be plainer than that, and it seems to me that Congress there, as it might properly do, has said that the courts shall not seek to construe the statute so as to permit the use of intoxicating liquors as a beverage, but that they shall use all reasonable means to construe it so as to prevent such use." *U. S. v. Dodson*, (S. D. Cal. 1920) 269 Fed. 397.

The primary object of the Prohibition Act is the prevention of the use of intoxicating liquors as a beverage, although it retains features of a revenue law. To effectuate that purpose the statute requires that all of its provisions shall be liberally construed. *U. S. v. Saccin Rouhana Farhat*, (S. D. Ohio 1920) 269 Fed. 33.

"It is apparent from the provisions of this act that intoxicating liquor may be imported for nonbeverage purposes. It is likewise manifest that the provisions of this act shall not in any way interfere with the operation of existing law, except where it is inconsistent, and the act expressly provides that persons shall not be relieved from any taxes or other charges imposed upon the traffic in such liquor." *The Goodhope*, (W. D. Wash. 1920) 268 Fed. 694.

Offenses under act.—Manufacturing intoxicating liquor without a permit; failing to make a permanent record of such liquor; and possession of property designed to manufacture liquor intended for use in violation of this act are separate offenses. *Ex p. Poole*, (D. C. Mont. 1921) 273 Fed. 623.

"Provisions of this act shall be liberally construed."—"If it were conceded . . . that the provision in section 3 that the act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented, is in excess of legislative

power, that would by no means require a court to hold that the entire act is unconstitutional. That provision is but an inconsequential part of the entire act. Therefore, if, in the opinion of the court, Congress has no power to direct that an act penal in its nature shall be liberally construed, the advice will be wholly disregarded, and the essential parts of the statute, which clearly would have been enacted by Congress, regardless of whether this part is or is not constitutional, construed and applied in accordance with the established rules for the construction and application of penal law." *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

The liberal construction provided for in this section does not justify the court in extending the prohibited provisions of the act beyond what is plainly stated, nor omitting language which would change its plain meaning. *U. S. v. Crossen*, (E. D. Pa. 1920) 264 Fed. 459.

Under the provision in this section that "all provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," it has been held that the delivery to an individual of whisky owned by him and stored in a bonded warehouse may be properly refused. *Corneli v. Moore*, (E. D. Mo. 1920) 267 Fed. 456, dismissing a bill in equity, praying for a decree compelling defendant, as collector of the internal revenue for the first district of Missouri, to accept the internal revenue taxes on a certain barrel of whisky, owned by complainant, and contained in a bonded warehouse of the United States, and to deliver this whisky to complainant.

Prosecution by information.—Violations of this act may be prosecuted by information, but an application by the government for leave to file an information against a defendant for such a violation will be denied where it appears that the government has failed to show probable cause of his guilt and that the only evidence which it can offer has been obtained as a result of an unlawful search in violation of the defendant's rights under the Fourth Amendment to the Constitution. *U. S. v. Quaritius*, (E. D. N. Y. 1920) 267 Fed. 227.

The district court has power to permit an information to be filed although the proceeding was instituted by a commissioner. *U. S. v. Metzger*, (E. D. N. Y. 1920) 270 Fed. 291.

Sufficiency of indictment.—An indictment charging a violation of section 16 of the Act of Feb. 8, 1875 (3 Fed. Stat. Ann. (2d ed.) p. 1053), which is repealed by the National Prohibition Act, has been sustained as sufficient to charge a sale in violation of this section, it being declared that an allegation contained in the indictment respecting the omission to pay the special tax may, with propriety, be treated as surplusage.

Farley v. U. S., (C. C. A. 9th Cir. 1921) 269 Fed. 721.

An indictment charging the defendants with conspiring to commit the offense of knowingly, wilfully and unlawfully transporting, selling, bartering, furnishing and possessing intoxicating liquors in violation of this act is sufficient, though it does not allege that the liquor, the transportation of which was the object of the conspiracy was not to be used for nonbeverage purposes. *Davis v. U. S.*, (C. C. A. 9th Cir. 1921) 274 Fed. 928.

Sufficiency of plea.—Where an information charges the unlawful manufacture and possession of distilled spirits and from the defendants' plea it appears that they have complied with the National Prohibition Act by having a still registered and obtaining a permit to operate a dealcoholizing plant, and there is no charge that any of the prohibited articles were knowingly sold, the provisions of sections 4 and 5 of the National Prohibition Act are applicable, and a demurrer to the plea should be overruled. *U. S. v. Mozzone*, (W. D. Wash. 1920) 268 Fed. 652.

Evidence.—Under an indictment for violation of this act it is not necessary to prove that the defendant was engaged in the business of a retail liquor dealer, it being sufficient to show that he sold liquor in any quantity. *Farley v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 721.

Where a person has been arrested for intoxication, whisky obtained on a search of his person is not obtained by "unreasonable search" and is admissible in evidence on a prosecution against him for a violation of this section. *U. S. v. Murphy*, (E. D. N. Y. 1920) 264 Fed. 842.

For evidence held sufficient to sustain a conviction for a violation of this section, see *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

Acts of officers as entrapment.—In *Farley v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 721, where all that the officers did was to go to the tavern, and while at their meals order the waiter to serve them with some cough syrup, which was understood to be whisky, and they were served accordingly with drinks in small glasses and the officers had nothing to do with furnishing the whisky; their only purpose being to ascertain whether or not the defendant was dealing in or dispensing drinks of the kind to his customers, it was held that such deportment on the part of the officers does not constitute an entrapment that relieves the defendant from guilt. *Farley v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 721.

1919 Supp., p. 206, sec. 4.

"Preserved sweet cider"—*Definition.*—"Preserved sweet cider has been defined as cider which has not fermented; cider which

is devoid of alcoholic content coming from fermentation—but also that it must be “preserved”; it must be cider to which some preservative, in the nature of heat or otherwise, has been applied, contributed in sufficient quantity to insure that its sweetness and its nonfermented, nonalcoholic state may be maintained. In other words, it must not only be “sweet cider,” within the meaning to be accorded to that term, as defined by authorities; it must be “preserved” sweet cider. Or, to phrase it still more simply, “preserved sweet cider,” under the accepted definition, is cider without alcohol, and in which the possibility of the natural development of alcohol has been prevented, through the use of some sort of preservative. *U. S. v. Dodson*, (S. D. Cal. 1920) 268 Fed. 397.

Manufacture and sale of.—As to liability under this Act for the manufacture and sale of “preserved sweet cider” it has been said in a case of an information charging the sale of cider having an alcoholic content in excess of that allowed by law:

“If, then, the thing actually manufactured and sold by defendant at wholesale was ‘preserved sweet cider,’ in virtue of the positive language of section 4, notwithstanding it might possibly develop, through the usual processes of fermentation, an alcoholic content in excess of the amount allowed by law, it was not at that time, or at any time thereafter, to be construed to be subject to the penal provisions of the Volstead Law. Parenthetically, however, if at the time of its manufacture and distribution by the defendant, it was merely ‘nonintoxicating,’ because below the prohibited alcoholic content, yet was not in fact ‘preserved sweet cider,’ and it afterwards developed the proscribed alcoholic content—in the language of the statute, ‘acquired a kick’—its subsequent sale would render the vender liable to all the provisions of the act respecting an unlawful marketing of a prohibited article, viz. ‘intoxicating liquor.’” *U. S. v. Dodson*, (S. D. Cal. 1920) 268 Fed. 397.

Effect of treatment with benzoate of soda.—The fact that cider has been treated with benzoate of soda and as thus treated is known in the trade as “preserved sweet cider” does not, in face of the prohibitory provisions of this Act, make it still vendible and possessable, irrespective of its actual alcoholic content and intoxicative effect. *U. S. v. Dodson*, (S. D. Cal. 1920) 268 Fed. 397.

The unadulterated juice of apples preserved by the addition of one tenth of one per cent of benzoate of soda has been held to come within the exception in this section of “preserved sweet cider.” *Hildick Apple Juice Co. v. Williams*, (S. D. N. P. 1920) 269 Fed. 184.

Proof of alcoholic content.—On prosecution for selling cider in violation of this act the government is not required to show that the defendant knew that the cider contained

alcohol in excess of one half of one per cent by volume. *U. S. v. Mathie*, (S. D. Cal. 1921) 274 Fed. 225, wherein the court said:

“Any person who sells cider as a beverage does so at his peril. He must know that he is not violating the law. He must know that the cider contains less than one-half of 1 per cent. of alcohol by volume. This is the only way the act could be enforced against persons selling cider containing more than one-half of 1 per cent. of alcohol by volume.”

1919 Supp., p. 207, sec. 6.

Possession of permit as prerequisite to removal of whisky from bonded warehouse.—Injunction does not lie to compel a collector of internal revenue to accept taxes on, affix thereto and cancel the proper internal revenue stamps, and to deliver to plaintiff possession of whisky stored in a bonded government warehouse, and belonging to him, but in the custody of the collector, where the plaintiff is without a permit required by this section. *Corneli v. Moore*, (E. D. Mo. 1920) 268 Fed. 993.

Application of this section and R. S. sec. 3296 to same transaction.—Both this section and R. S. sec. 3296 (4 Fed Stat. Ann. (2d ed.) 57) may in some cases apply to the same transaction. “There is no constitutional objection to making one act or one transaction a violation of two statutes, although both emanate from the same sovereignty, if each offense embraces an element not embraced in the other.” *U. S. v. Turner*, (W. D. Va. 1920) 266 Fed. 248.

Power of commissioner.—While the commissioner is given authority under this section to prescribe the forms of permits and applications for the same he cannot evade the plain provisions of this act in exercising this authority. *U. S. v. Masters*, (M. D. Pa. 1920) 267 Fed. 581.

Contents of permit.—A permit issued to a person under this section should set forth fully and in detail what he may do, and when and where such acts may be performed, in order that the government and its agents may at all times be informed of his doings, and, if desirable, to supervise and inspect his conduct, so as to ascertain whether the law is being respected. In other words, whatever is done shall be done openly and with knowledge. *U. S. v. Masters*, (M. D. Pa. 1920) 267 Fed. 581.

Conviction for manufacturing whisky as bar to prosecution under revenue law.—A conviction under this section for manufacturing whisky without a permit does not bar a prosecution for violation of sections 3258, 3260 and 3279 of the revenue law. *U. S. v. Sacein Roubana Farhat*, (S. D. Ohio 1920) 269 Fed. 33.

Conviction in state court for transporting liquor as bar.—A conviction in a state court for unlawfully transporting liquor within the limits of that state is not a bar to a prose-

cution under this section for transporting liquor without permission from the Commissioner of Internal Revenue, on the ground that the defendant being twice put in jeopardy, though both prosecutions involve the same act. *U. S. v. Regan*, (D. C. N. H. 1921) 273 Fed. 727.

1919 Supp., p. 210, sec. 10.

Seizure of books and papers.—The right to inspect does not give the right to seize books and papers. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

1919 Supp., p. 212, sec. 21.

Constitutionality.—This provision is constitutional. *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

"Sold, kept, or bartered."— "Congress, by the use of the words 'sold, kept, or bartered' in violation of law, meant either habitually, or continuously, or recurrently so sold, kept, or bartered. . . . A single sale, without more, and with no evidence of the continuation or recurrence of law violation, or of facts strongly indicating either habitual sales, or long-continued violations, or such a recurrence of unlawful acts or sales to colorably indicate that the criminal prosecutions and penalties provided by other parts of the act are inadequate to cope with the situation, would constitute a nuisance or warrant the interference of a court of equity by injunction; for in such case it is not the crime of selling liquor, or selling a single drink of liquor, by a given person, at a given place, which constitutes the nuisance, but it is the maintenance and use of the room, house, or place as a situs for the doing thereof of unlawful or criminal acts, which constitute the nuisance.

"If the Volstead Act is construed to mean that a single sale is sufficient to constitute a nuisance, I should seriously question its validity, for upon such a view we are met by the rule which forbids equity taking jurisdiction where an adequate remedy at law exists, as also the rule that even Congress may not say a thing is a common nuisance, when in fact it is not." *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

The word "kept" as used in this section refers to keeping for sale or for other commercial purpose. *U. S. v. One Cadillac Touring Car*, (E. D. Mich. 1921) 274 Fed. 470.

Meaning of nuisance.—Congress in using the word nuisance in this act must be deemed to have used the word in its usual and ordinary legal significance, and to have had in mind that it could not pass a law which had the effect to wipe out the constitutional rights of the citizen in private property. *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

Knowledge of sale.—On a prosecution under this section for maintaining a common nuisance where the evidence shows

ownership of the premises and of the liquors in the defendant and that there was a nuisance maintained on the premises, it is not necessary to prove that the defendant knew of sales being made or that he profited by the particular sale or sales complained of. *Wiggins v. U. S.*, (C. C. A. 2d Cir. 1921) 272 Fed. 41.

Admissions as to ownership.—For the purpose of showing ownership evidence is admissible of admissions made by the defendant to the officers that he was owner of the premises and of the liquors seized. *Wiggins v. U. S.*, (C. C. A. 2d Cir. 1921) 272 Fed. 41. The court said:

"The defendant made statements to other officers admitting ownership of the liquors and his desire to keep the liquors which had been seized. The admissions of a defendant, made voluntarily, and not impeached as having been made involuntarily, are strong evidence of the truth of what they purport to say."

An automobile seized while illegally transporting liquor is not subject to forfeiture as a common nuisance under this section, as being a vehicle in which intoxicating liquor is "kept." *U. S. v. One Cadillac Touring Car*, (E. D. Mich. 1921) 274 Fed. 470.

1919 Supp., p. 212, sec. 22.

Constitutionality.—This section is constitutional. *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420, wherein it was said that the contentions that provisions of this section invade the police powers of the state, "and that, since no phase of interstate commerce is involved, the plaintiff has no standing and the federal court no jurisdiction, may be considered together, and disallowed almost out of hand, under the doctrine announced by the Supreme Court in the case of *Rhode Island v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. ed. —. It may be conceded that the provisions of the Volstead Act, in so far as they provide for the exercise of police powers by the Congress, would have been unwarranted and unconstitutional before the adoption of the Eighteenth Amendment; but one of the chief things accomplished by that amendment was, as to the manufacture, transportation, and traffic in intoxicating liquor, to confer police powers on Congress, and to extend those powers into the territories of the several states." *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

Right to jury trial.—It has been held that defendants are not entitled to a trial by a jury either upon a hearing of a suit to abate and enjoin, or upon a trial of any contempt which may grow out of a violation of any injunction which may be granted. *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

Although the affidavits may be insufficient as a matter of law to warrant a temporary injunction a motion to dismiss should not be sustained where the bill is sufficient to

justify the issuance of an injunction after a final hearing. *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420. The court further said:

"In short, the affidavits seem to go to the authority of the court to issue a temporary injunction, and, the bill being sufficient, these affidavits have no bearing upon the authority of the court, after a final hearing, to perpetually enjoin."

Pleading.—In an action under this section to enjoin the maintenance of a nuisance facts should be pleaded tending to show the inadequacy of the law remedy or remedies. *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

1919 Supp., p. 213, sec. 25.

- I. In general.
- II. Search and seizure.
 1. Existence of right.
 2. Necessity of warrant.
 3. Affidavit to procure.
 4. Warrant.
 5. Return of warrant.
 6. Seizure under warrant.
 7. Rights in respect to property seized illegally.

I. IN GENERAL

"Property designed for the manufacture of liquor."—In construing this phrase it has been held that if a defendant has a still or distilling apparatus set up, or wort, wash, and mash fit for distillation, he violates the National Prohibition Act, because he has in his possession property designed for the manufacture of liquor intended for use in violating the act. *U. S. v. Puhac*, (W. D. Pa. 1920) 268 Fed. 392.

A still and mash constitute property within the meaning of this section. *U. S. v. Stafoff*, (E. D. Mo. 1920) 268 Fed. 417.

Possession of liquor in one's home is not unlawful under this section. *State v. Helms*, (1921) 181 N. C. 566, 107 S. E. 228, following *Street v. Lincoln Safe Deposit Co.*, (1920) 254 U. S. 88, 41 S. Ct. 31, 65 U. S. (L. ed.) —, 10 A. L. R. 1548.

"The exception applies to the building or to the part of a building that is used and occupied by the person who is in possession of such intoxicating liquor. If all of the building or the part exclusively occupied by such person is used as a dwelling only, then such possession is not unlawful, although other persons may conduct in some other part of the same building, a store, shop, saloon, restaurant, hotel, or boarding house." *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

Presumption as to unlawful possession.—Where liquor was found in the basement or cellar vault of a hotel and seized by the internal revenue agents and title was claimed by a third person, the hotel owner disclaiming ownership, it was held that the attend-

ing circumstances and character of the place raised the presumption that the liquor was kept there in violation of this section. *U. S. v. Masters*, (M. D. Pa. 1920) 267 Fed. 581.

"No property rights" in liquor as preventing it from being subject of larceny.—Although whisky has no market value under this act except where it is purchased and kept under a government permit, yet it has an actual value and may be the subject of larceny. *People v. Wilson*, (1921) 298 Ill. 257, 131 N. E. 609, wherein it was said:

"Burglary may be committed where personal property which is the subject of ownership is taken, and the fact that the property is kept for an unlawful purpose does not change the nature of the crime. This has been decided as to intoxicating liquors kept for sale contrary to the provisions of a statute, or property used for gambling purposes contrary to law, or a pistol the sale of which was forbidden. *State v. May*, 20 Iowa 305; *Bales v. State*, 3 W. Va. 685; *Commonwealth v. Smith*, 129 Mass. 111; *Osborne v. State*, 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797, 17 R. C. L. 29. The whisky had an actual value, whether it had a market value or not, and was the subject of larceny."

R. S. sec 3456 (see 4 Fed. Stat. Ann. 2d ed. 56) is not repealed by this section. *U. S. v. Turner*, (W. D. Va. 1920) 266 Fed. 248.

II. SEARCH AND SEIZURE

1. Existence of right

State law permitting search and seizure of private dwelling.—Notwithstanding the provision in this section prohibiting the issuance of a search warrant to search a private dwelling, a state or a municipality acting in conformity with state laws may provide for search and seizure. *U. S. v. Viess*, (W. D. Wash. 1921) 273 Fed. 279.

The reference to the Espionage Act only refers to the proceeding to be followed, and does not restrict the issuance of a search warrant to cases involving property used in committing a felony. If that construction were adopted, no search warrant could be issued. *U. S. v. Metzger*, (E. D. N. Y. 1920) 270 Fed. 291.

2. Necessity of Warrant

In general.—"In no case is a prohibition officer or agent justified in seizing intoxicating liquor or other property without a search warrant, except as provided in section 26, which makes it his duty to seize all intoxicating liquors found being transported contrary to law in any wagon, buggy, automobile, water or air craft, or other vehicle. Upon seizure in either case, however, the act contemplates a remedy by orderly process of law for the disposition of the intoxicating liquor seized." *U. S. v. Crossen*, (E. D. Pa. 1920) 264 Fed. 459.

Private dwelling.—This act "provides that no search warrant shall issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicating liquor, or is in part used for some business purpose. It should not be difficult to keep within these provisions. If in the attempted enforcement of the prohibition law a search warrant is applied for, the first inquiry of the judge or commissioner should be as to the character of the place to be searched. If it be a private dwelling, then the inquiry should be:

"What evidence have you that this place is being used for the unlawful sale of intoxicating liquor?"

"If the officer has no such evidence, he should not apply for the warrant; or if the judge or commissioner is not satisfied with the evidence offered, he should not issue it. If the officer is acting upon information, he should lay all the facts before the judge or commissioner, with the names of the persons from whom his information is received.

"It is not merely a pro forma matter, but one of utmost importance, that search warrants should be properly issued in the first instance. They should not be lightly applied for, nor lightly issued, as they trespass upon the most important rights of the people. When issued, they should be promptly served and promptly returned." *U. S. v. Mitchell*, (N. D. Cal. 1921) 274 Fed. 128, wherein the court further said:

"Much confusion seems to exist among the enforcement officers concerning the necessity for search warrants and their use. The confusion arises generally, in my opinion, because they are not willing to be bound by the limitations of the Constitution or the law. In pursuing liquor, recently made an outlaw by the Eighteenth Amendment to the Constitution, they are, in their zeal, inclined to disregard other provisions of the same document equally sacred and far more important to the rights of the people. The language of the Fourth Amendment to the Constitution is as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"The protection thus afforded to the people can only be insured by the courts. It is far more important that the right to be secure in their persons, houses, and effects be zealously guarded than that a few individuals be convicted of violating the prohibition or any other law. It is one of the most sacred rights that the Constitution guarantees, and officers sworn to defend the Constitution should be the first to recognize and defend it. There is nothing obscure

about it; the language is plain, and means what it says."

The search of a private dwelling and the seizure of intoxicating liquor found therein, without a warrant, is unlawful and not excused by a pretended consent obtained by a show of force and firearms. *U. S. v. Marquette*, (N. D. Cal. 1920) 271 Fed. 120, wherein the court said:

"The liquor was in a private home, where liquor might lawfully be, and could not be taken therefrom without a warrant, except upon consent of the occupants of the home, voluntarily given. A consent accorded to a show of arms, even though no open objection be made, will not be regarded as voluntary. The outlawing of liquor by the Eighteenth Amendment did not abrogate either the Fourth or Fifth Amendment to the Constitution, and the zeal of the enforcement officers in pursuing this recent outlaw cannot be permitted to carry them without warrant across the threshold of the home.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

"Such is the language of the Fourth Amendment. The protection thus afforded can only be insured by the courts. Every case arising must, of course, be determined upon the facts of that particular case; and where, as here, the record shows an invitation to enter, but also shows the presence of shotguns and pistols, I cannot disassociate the one from the other. As there was no warrant either to search the premises or seize the liquor, and as the only justification pleaded is that of 'invitation to enter, and consent to the seizure,' under the circumstances recited, I am of the opinion that the motion for an order for the return of the property should be granted upon the pleadings."

A private dwelling does not lose its character as such and become a distillery from the fact that evidence procured on an unlawful search disclosed a home made still in operation. *U. S. v. Kelih*, (S. D. Ill. 1921) 272 Fed. 484.

Evidence obtained in a search of a private dwelling under a state law may be used in a prosecution under the National Prohibition Act, the purpose of the provision in this section against the search of a private dwelling not being to establish a special rule of evidence for prosecutions under the act but rather to define probable cause under the act for search. *U. S. v. Viess*, (W. D. Wash. 1921) 273 Fed. 279.

Garage.—The entry without permission, express or implied, into a private garage, without warrant, on a mission of search and

seizure, by prohibition agents of the United States, is unlawful. *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818, wherein the court said: "The right of the people to be secure in their houses and effects against unreasonable searches and seizures is not limited to dwelling houses but extends to a garage used personally and for hire."

Search of arrested person.—Where agents have properly arrested a person they have the right to search his person as an incident of the arrest. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

Sense of smell indicating presence of still as justifying search without warrant.—In *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408, it appeared that a warrant had been issued for the search of a nearby house. While engaged in the search, the officers smelled raisins in the process of cooking somewhere. They saw a light in the cellar of a house, perhaps two or three doors away. Persons could be seen there moving around. The officers went to such house and, entering the cellar, found a still in operation. They discovered the defendants in the commission of an act of a criminal character, a felony, and, having declared their purpose to search the premises, proceeded to do so. The evidence, although somewhat controverted, is that there was no objection made by either of the defendants to the search, and that one of them assented to its making; but the pending application may be decided without determining that question one way or the other. The fact is admitted that raisins were cooking on a stove in that cellar, that a still was in fact in operation, that raisin whisky and mash were found, and that the articles used in making the whisky and in the process of distillation were seized. Defendant admitted then and at his trial that he "was making a little whisky for Easter." The court said: "If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

Insufficient evidence of consent to search.—A search permitted by a person after declaration by the prohibition officer, with a display of his badge, that they were there to search the premises, was not by such consent as will amount to a waiver of constitutional

rights, but, on the contrary, is to be attributed to a peaceful submission to officers of the law. *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818.

3. Affidavit to Procure

In general.—"Under the act of 1917 (1918 Supp. p. 128 et seq.), a search warrant cannot be issued, except upon probable cause supported by affidavit naming or describing the person and particularly describing the property and place to be searched." *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

The commissioner, before issuing the warrant, must examine on oath the complainant and any witnesses he may produce, and must require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing them to exist.

Facts and not beliefs furnished.—Where an affiant merely swears that he has good reason to believe and does verily believe certain things but does not in any instance affirmatively swear that anything is true and does not state any facts or circumstances which will enable the United States commissioner to determine whether there was probable cause for his belief the affidavits are insufficient and a search warrant should not issue. *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

"No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises, but facts—which, when the law is properly applied to them, tend to establish the necessary legal conclusions, or facts which, when the law is properly applied to them, tend to establish probable cause for belief that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser." *U. S. v. Kelih*, (S. D. Ill. 1921) 272 Fed. 484.

Description of premises.—An affidavit on which a search warrant is issued has been held to sufficiently describe the premises to

be searched where the property is described by street and number, and it is stated that they are occupied as a saloon and dwelling. *U. S. v. Friedman*, (E. D. Pa. 1920) 267 Fed. 856.

Where two streets have the same name except that they are distinguished by the added words "north" and "south" a designation of the street on which the premises are located by its common name without specifying whether "north" or "south" is insufficient. *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

Property used as means of committing felony.—"It is not necessary, in order to have a search warrant under the National Prohibition Act, to set out in the affidavit that the property was used as a means of committing a felony, which is one of the grounds upon which a search warrant may issue under the Espionage Act." *U. S. v. Friedman*, (E. D. Pa. 1920) 267 Fed. 856.

Sufficiency.—An affidavit that "a violation of the National Prohibition Act has been committed, and affiant further states that he has reason to believe that there are illegally manufactured liquors and an illicit still are now concealed in or on the premises," etc., is insufficient of itself to warrant the judicial officer to find that a violation of the National Prohibition Act has been in fact committed as the witness attempts to find the ultimate fact, which must be ascertained by the officer authorizing the issuance of the warrant. *U. S. v. Kelih*, (S. D. Ill. 1921) 272 Fed. 484.

Affidavits which are made by a federal prohibition agent and which set out that the premises are occupied as a saloon and dwelling, that on a day and hour stated the affiant purchased intoxicating liquor there, and which further set out the kind and quantity of liquor purchased, and that it contained one-half of 1 per cent or more of alcohol, also setting out the sum paid for the liquor, state facts on which the commissioner can find probable cause to believe that an offense against the National Prohibition Act has been committed on the premises and which will justify the issuance of a search warrant. *U. S. v. Friedman*, (E. D. Pa. 1920) 267 Fed. 856.

4. Warrant

Presumption of validity.—The court will not assume that a search warrant is void where the petition for the return of papers seized contains loose allegations of its insufficiency and neither the warrant nor its supporting papers are presented. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

A search at night has been held to be in disregard of the law where the warrant contained no direction that it might be served at any time of the day or night. *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

Amendment of warrant.—Search warrants are of such grave importance that they may be amended, if at all, only by the officer

issuing them, and then only in conformity with the affidavits or depositions upon which they are based. They cannot be amended by the officers on a telephone communication from the commissioner. *U. S. v. Mitchell*, (N. D. Cal. 1921) 274 Fed. 128.

5. Return of Warrant

The failure to make a return of a search warrant is only an irregularity which may be corrected on motion. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

"The failure of the officer to whom a search warrant is directed to make a return thereof cannot invalidate the search or seizure made by authority of such warrant. If the officer neglects to do this, he can be required to make return of the writ at any later time, or if the person whose premises were searched or whose property was seized is injured in any way by the failure to make this return, the officer failing to make such return is liable to him in damages. The making of the return is merely a ministerial act, to be performed after the warrant is executed." *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

6. Seizure under Warrant

Seizure of books and papers.—It has been held that when books required under section 3318 of the Revised Statutes (4 Fed. Stat. Ann. 2d ed. 71) are not kept or are kept insufficiently, all documents showing transactions which should be so recorded may be seized on search warrant under the pertinent provisions of the Espionage Act. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

Right to remove locked safe.—In *U. S. v. Metzger*, (E. D. N. Y. 1920) 270 Fed. 291, the point involved was whether the government, having concededly a right to enter and search the premises, and being refused permission to search a locked safe therein contained, might take the safe into possession for a reasonable time till it could be forcibly opened. The court declared:

"I think this question must be answered in the affirmative. The power conferred by such a warrant to break and enter premises by force, if necessary, must carry with it power to take all reasonable measures which may be rendered necessary by resistance to ascertain what the actual contents of the premises may be. The act of the defendant in locking the safe and in refusing to open it upon demand might render a search warrant of no value. The officers of the government would be authorized to open the locked door of a closet in order to make a search; they were authorized to open by force, if necessary, this safe. Metzger should not be heard now to complain of the act of the officers in taking steps to prevent property of evidential value from being removed and the warrant rendered of no value."

7. Rights in Respect to Property Seized Illegally

The evidence obtained on an unwarranted search for intoxicating liquor cannot be used either to secure the owner's conviction or to forfeit his property, if petition for its return is presented to the court before trial. *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818, wherein the court said:

"An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people."

To permit the government to use the evidence gained upon an unlawful search in the prosecution of a criminal case would be to compel defendant to give evidence against himself within the meaning of the Fifth Amendment to the Constitution. *U. S. v. Kelih*, (S. D. Ill. 1921) 272 Fed. 484, wherein it was said:

"It is further contended, because the Volstead Act provides that there shall be no property rights in illicit liquors, or apparatus for their manufacture, that therefore the property in question does not come within the Fourth and Fifth Amendments. The reason for a return of property in all cases of this character is not based upon property rights so much as the personal security afforded by the Fifth Amendment, which relieves a man from being compelled to be a witness against himself in a criminal case. To permit the government in this case to retain possession of the property described in the motion, and use it in the trial of the case before the jury, would be in legal effect to require this defendant to be a witness against himself in a criminal case, which is clearly prohibited by the Constitution."

Property seized by state officers.—On a prosecution in the federal court for a violation of the federal Act bottles of whisky were declared not to be inadmissible in evidence because seized by state officers without a search warrant. *U. S. v. O'Dowd*, (N. D. Ohio 1921) 273 Fed. 600; *U. S. v. Burnside*, (W. D. Wis. 1921) 273 Fed. 603. In the latter case it was said:

"The United States had no part in securing the search warrants in question, nor in executing the same. The proceedings were carried on by the police officers of the city of Superior prior to the time when any proceedings were taken by the United States government, and it appears from the testimony taken in connection with this application that the proceedings by the city officers were entirely independent of the United States government or any of its agents, and that it was some time after the search had been executed and the liquor seized that the police officers of the city of Superior delivered the liquor so seized to the United States

attorney for use as evidence in the pending proceeding. While it is well settled that competent evidence tending to prove crime is rendered inadmissible, where it has been secured by federal officers by unlawful search and seizure in violation of the Fourth Amendment, or where its admission is deemed a violation of the Fifth Amendment to the Constitution (*Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746; *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. ed. 575; *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177), and this rule has recently been applied by the Supreme Court to contraband articles in the case of *Amos v. U. S.*, in an opinion handed down February 28, 1921, 254 U. S. —, 41 Sup. Ct. 266, 65 L. ed. —, I know of no case where such effect has been given to the trespasses of strangers to the government."

Where a warrant is based on information obtained at the time of making an unlawful search, papers seized under the warrant cannot be retained. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

Seizure made on warrant afterward vacated.—Where a seizure of liquors and books and papers was illegal because made on a search warrant afterward vacated by the commissioner who issued it, a motion to impound the property will be denied. *U. S. v. Porazzo*, (E. D. N. Y. 1921) 272 Fed. 276.

Property illegally seized held on a second warrant.—Where the original entry into the defendant's home was unlawful, the seizure of property at that time is therefore unlawful and cannot be cured by another warrant issued on information thereby secured, and property so taken will be ordered restored. *U. S. v. Mitchell*, (N. D. Cal. 1921) 274 Fed. 128.

1919 Supp., p. 214, sec. 26.

- I. In general.
- II. Extent of right of seizure.
- III. Forfeiture and sale.
- IV. Grounds for relief from forfeiture.
- V. Return of vehicle.

I. IN GENERAL

Remedy exclusive.—The remedy provided by this Act for the forfeiture of vehicles when transporting liquor is exclusive. The Goodhope, (W. D. Wash. 1920) 268 Fed. 694.

Procedure as jurisdictional.—The procedure provided in this act is not merely directory and cumulative, but is jurisdictional. This statute gives a new power, a power to divest title from the owner of property, and the statute provides means of enforcing such power, which is controlling. *U. S. v. Hydes*, (W. D. Wash. 1920) 267 Fed. 470; *U. S. v. Graham*, (W. D. Wash. 1920) 267 Fed. 472.

Effect of section on R. S. sec. 3450.—It

has been held that this section repeals section 3450 of the Revised Statutes (4 Fed. Stat. Ann. (2d ed.) 311) in respect to the forfeiture of vehicles in which liquor has been illegally transported. *U. S. v. One Haynes Automobile*, (S. D. Fla. 1920) 268 Fed. 1003, wherein the court said: "The transportation of the liquor is clearly one which, if illegal, would violate the Volstead Act, and would subject the vehicle to forfeiture according to the provision of that act. It is not, therefore, to be assumed that Congress intended to provide for the forfeiture of vehicles under section 26 of the Volstead Act, with its provisions for preserving the rights of third persons, and still leave them subject to be forfeited under the more drastic provisions of Revised Statutes, § 3450."

In another case, however, it has been said: "Distilled liquors whether produced under permit for lawful purposes or in violation of law, are still 'a commodity in respect whereof a tax is imposed,' in the language of Rev. St. § 3450, and its provisions are applicable to a case within them, unless defeated by inconsistent provisions of the Prohibition Act. The suggestion that repeal was intended because the whole subject of intoxicating liquors was covered is answered by the express language to the contrary in section 35. Section 26 is not only reconcilable with Rev. St. § 3450, but applies to a substantially different subject-matter. . . . In terms it applies only when 'a person is discovered in the act of transporting in violation of law.' The officer must 'at once proceed against the person arrested under the provisions of this title,' and 'the court upon conviction of the person' orders a sale. This section seems to apply only when a person is caught and can be prosecuted. The provision at the end of it as to no claimant appearing is not to the contrary, for the person transporting or possessing the liquor and the claimant of the vehicle need not be the same person. And again only unlawful transportation or possession is the occasion of the forfeiture. Since the person is to be 'prosecuted under the provisions of this title,' it is apparent that transportation or possession in violation of this title is the unlawful transportation and possession meant. By title 2, § 3, transportation and possession are made unlawful, except as authorized in the act. By section 6 transportation without a permit, and by section 10 transportation without making the prescribed records, is condemned. By section 33 possession after February 1, 1920, is *prima facie* unlawful. But none of these unlawful acts have any reference to the nonpayment of taxes and may occur equally of taxed or untaxed liquor. Rev. St. § 3450 deals only with untaxed liquor, and may extend to cases of deposit and concealment, as well as transportation, and to cases where no person can be connected with the transportation or deposit so

as to be prosecuted. The forfeiture arises from no illegality under the Prohibition Act, but wholly under the revenue law. The causes of action are unlike and independent of each other. It is true that an automobile transporting untaxed intoxicating liquors without permit may transgress both statutes at the same time, but that results only in giving the United States an election as to which cause of forfeiture it will pursue. Rev. St. § 3450 still has its place in the law, and the remedy under it may be sustained in this case, if the facts alleged are proven." *U. S. v. One Essex Touring Automobile*, (N. D. Ga. 1920 266 Fed. 138.

Forfeiture of vessel.—In order that intoxicating liquor may have a legal status as merchandise, it must come into the United States in harmony with the provisions of the Prohibition Act, which requires as a prerequisite a permit from the commissioner. No permit having been issued, it cannot be entered at the custom house; it is contraband the instant it comes into the United States and the vessel carrying it is subject to forfeiture under this section. *The Goodhope*, (W. D. Wash. 1920) 268 Fed. 694.

"Boat . . . or water craft."—In construing this phrase as not including a vessel of about 2,600 gross tonnage it was said: "The words used as applicable to the means of transportation by water are 'water craft' and 'boat.' Ordinarily the term 'boat' and the term 'craft' are applied to water transporting conveyances of small character. As a rule, the word 'boat' is used somewhat in contradiction to the word 'vessel'—'vessel' being a boat of larger size, generally one fitted to navigate the high seas; while 'boat' as a rule was applied to an undecked, small, open vessel.

"Anterior to the application of propulsion to small boats by means of gasoline, so as to bring them within the class of self-propelled vessels, the word 'boat' was usually applied to small, open vessels only, propelled by oars in the hands of oarsmen; although poetically, and otherwise, the term 'boat' may be sometimes applied to a vessel of any size. The word 'water craft,' or the term 'craft,' as usually used, was applied to small vessels generally engaged in coastwise or domestic navigation. For larger vessels, as used in the present day, especially in the case of large iron steamships, the terms 'steamer,' 'steamship,' or 'vessel' are generally used. Unless, therefore, the generality of the language of the statute be sufficient to embrace vessels used in water transportation, of any size; and of any kind, the words of the statute in this case would not cover a large iron steamship.

"But, more than this, the intention of the statute is to be regarded. The intention of the statute is that the officer shall seize water craft or boat or land means of transportation which are actually engaged in the transportation of intoxicating liquors as its pur-

pose so to say. Where that purpose is merely incidental, and carried on illegally by some one upon the vehicle or water craft, it would not necessarily come within the purport and intention of the law to seize the conveyance. An automobile carrying liquor, and evidently engaged in it for that purpose, for the occasion, at least, would clearly be within the terms of the law. But a railway train, upon which liquor may be found, which is being illegally transported by some employee or passenger, would not be liable to summary seizure, as would be an automobile. So, a small or comparatively small boat or sailing boat, or gasoline- or steam-propelled small vessel, which at the time it is used for that purpose, at the time, as the main purpose of its then employment, would be subject to seizure under the statute. But if a large vessel of 10,000 tons, engaged in general commerce, such as the transportation of general merchandise, as its purpose and object, had liquor aboard only incidentally, through the unlawful act of some member of the crew, it would not necessarily be subject to seizure. The ancient and immemorial maxim of the law is that ships were made to plow the seas, and should be released, as far as possible, from all detention that would prevent them from accomplishing that main and primary purpose." *The Saxon*, (E. D. S. C. 1921) 269 Fed. 639.

Transportation and removal from warehouse distinguished.—"Failure to pay the tax on the liquor before removing it from the bonded warehouse, or to remove it during the absence of the storekeeper or without his knowledge, which are denounced by the earlier act, are a different class of offenses from those of transporting liquor without a permit, or without complying with the other requirements of the Enforcement Act, relative to transportation. And a conviction or acquittal of any or all of one class would not exempt the defendant from prosecution or conviction of any or all of the other class." *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

II. EXTENT OF RIGHT OF SEIZURE

Vehicle actually engaged in illegal transportation.—"The highest degree of evidence, viz, that an officer of the law perceive some person in the act of illegal transportation, is necessary. Seizure of the vehicle can only be made when liquor is seized. The law does not forfeit all vehicles at some time used for illegal transportation of liquor, but only those taken in the act. One may be convicted of illegal transportation, yet the vehicle will not be forfeited, unless seized at the time. . . . The seizing officer is to have the vehicle in possession on the day of the trial of the person arrested, to abide the judgment in the same proceeding. Should the defendant be acquitted, the automobile must be released, for it is only upon con-

viction that its sale may be ordered." *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818.

Seizure after transportation has ended.—Under the provision in this section as to the taking of the vehicle while in the act of illegal transportation the taking of a vehicle subsequent to transportation and without process is without warrant of law. *U. S. v. Hydes*, (W. D. Wash. 1920) 267 Fed. 470; *U. S. v. Graham*, (W. D. Wash. 1920) 267 Fed. 472.

Automobile in garage.—In the case of an automobile with liquor in it seized while in a garage where there was no evidence to show that the liquor had been transported or was in the automobile for the purpose of transportation it was held that there could not be a forfeiture of the automobile. *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818. The court said:

"In the present case the automobile was standing in the garage with liquor in it. The defendant was in his house, eating his breakfast. The government does not claim that the defendant had theretofore been seen using it for the illegal transportation charged. The evidence might perhaps justify an inference that the liquor had been transported in the automobile to the garage, or that the liquor was loaded with intent to transport it from the garage, or that it was temporarily halted in the progress of transportation. But this is not the degree of proof required to warrant seizure. The evidence does not show that any one was discovered in the act of transporting. It is not necessary that the vehicle should be discovered while actually in motion, but it is necessary that some one should be discovered performing some act in furtherance of transportation and the government's own evidence here shows that no one was caught in such an act at the time the seizure was made."

III. FORFEITURE AND SALE

Essential elements.—"The forfeiture of an automobile, under the twenty-sixth section of the Volstead Law, must be in strict pursuance to the terms thereof. *United States v. Hydes*, (D. C.) 267 Fed. 471; *The Goodhope*, 268 Fed. 694. The following elements are essential:

(1) That an officer of the law discover some person in the act of illegally transporting liquor in a vehicle.

(2) The seizure of the liquor so transported or possessed.

(3) The seizure of the vehicle and arrest of the person.

(4) That the officer proceed against the person and retain the vehicle, unless re-delivered to the owner, upon giving bond to return it to the custody of the officer on the day of trial to abide the judgment of the court.

(5) Conviction of the person and order of sale of the vehicle.

(6) Distribution of the proceeds." *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818.

"The intent of the Congress as disclosed in section 26 is clearly expressed. The conclusions respecting its interpretation are:

First—The seizure, forfeiture, and sale of vehicles is not absolute, as under section 3450 of the Revised Statutes, [4 Fed. Stat. Ann. (2d ed.) 311] but is subject to the order of court after it has heard all the facts of each case.

Second—An owner who transports intoxicating liquor illegally forfeits the intoxicating liquor and the vehicle and suffers a penalty.

Third—A conditional vendor or a mortgagee, who allows the vehicle to be used for such unlawful purpose with his knowledge, or who gives his consent to the illicit transportation, shall also forfeit all interest in or his lien upon the vehicle.

Fourth—A bona fide vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his bona fide lien, as far as possible.

Fifth—The owner of a vehicle, who loaned it to another, who, in turn, transported intoxicating liquor therein, is entitled to a return of the vehicle, where he had no knowledge of the purpose of the borrower, and no facts are shown which should have aroused his suspicion.

Sixth—In the second and third instances, the vehicle shall be sold by the United States marshal at public auction, and after the costs are paid, as provided by law, then the balance of the proceeds of the sale shall be turned into the treasury of the United States.

Seventh—In the fourth instance, after the bona fide lien and lack of notice or knowledge have been established, the vehicle shall be sold at public auction, and after the costs, as provided by law, have been paid, the United States marshal shall then pay, if possible, the amount of the bona fide lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States." *U. S. v. Sylvester*, (D. C. Conn. 1921) 273 Fed. 253.

Libel or information ancillary to the criminal cause as proper procedure.—It is not necessary that the forfeiture be declared in the criminal cause. The proceeding to procure the condemnation and sale of the vehicle in which the liquor was being transported may be by libel or information which is not an original proceeding but merely ancillary to the criminal cause. *U. S. v. One Stephens Automobile*, (D. C. Ore. 1921) 272 Fed. 188.

Conviction of person arrested as prerequisite to sale of property seized.—This section contemplates and requires, as a prerequisite to the sale of the property seized, a judicial determination that such property has been used in violation of the law. The statute requires as a jurisdictional basis for the sale a conviction of the person so arrested, and

until such conviction the court cannot order sale by virtue of any authority conferred by this section. *U. S. v. One Cadillac Touring Car*, (E. D. Mich. 1921) 274 Fed. 470.

Court may subsequently vacate order confiscating automobile.—*U. S. v. Brockley*, (M. D. Pa. 1920) 266 Fed. 1001.

IV. GROUNDS FOR RELIEF FROM FORFEITURE

"Good cause to the contrary."—"Good cause" is a term that cannot be reduced to legal certainty, and vests discretion in the court when it has statutory authority to do a thing on good cause shown. See *Kerchner v. Singletary*, 15 S. C. 535; *Kendall v. Brilly*, 86 N. C. 56; *People v. Sessions*, 62 How. Pr. (N. Y.) 415. What is good cause, to relieve the owner from forfeiture of the vehicle, depends upon the circumstances, including the owner's conduct before, during, and in respect to the case. See *Harnett v. Vise*, 5 Ex. D. 307.

"If the circumstances do not reasonably inspire belief that justice will be better served by refusal to impose or enforce the statutory order of forfeiture and sale, prima facie due or made, good cause has not been shown. See *Jones v. Curling*, 13 Q. B. D. 272; *Huxley v. Company*, 14 App. Cas. 26; *Whitcher v. Benton*, 50 N. H. 25. Each case will depend upon its own facts and circumstances, and no more definite rule can be declared in advance. The burden of proof to relieve from forfeiture is upon those seeking relief. The statute is definite in respect to what shall be proven by a lienor; indefinite in respect to an owner. This difference in statutory phraseology, and the greater accountability of an owner, indicates that the 'good cause' that must be proven by an owner is something other and more than the lack of notice at a particular time that must be proven by a lienor.

"An owner may assert that he is free from complicity in the illegal use, and had no notice such use was contemplated, and yet, by reason of neglect, indifference, consent, or acquiescence manifested in advance, or condonation or ratification afterward, or other fault or inequitable conduct, he may fail to show good cause against forfeiture and sale." *U. S. v. Kane*, (D. C. Mont. 1921) 273 Fed. 275, wherein the court further said:

"In the case at bar, intervener sold the car to a stranger association, one of whom was of a vocation notoriously often a cloak for illicit liquor traffic. It made no inquiries into the vendees' purpose or repute, and does not disclose whether they were bad or known to it. Its attitude is it was not interested, nor obliged to inquire. It was indifferent to illegal use of the car and to its conversion or confiscation (which, for all that appears, it may have manifested to vendees), for it was insured against loss. Indeed, it blandly declared that, had it known illegal use was contemplated, the

'chances are' it would have made the sale, being insured.

"It contemporaneously learns of the conversion and seizure of the car, and no doubt of the car's redelivery to the defendant; but it does not invoke forfeiture and retake possession of the car, as it had engaged to do. It accepts one deferred payment about the time of or subsequent to seizure, invokes no forfeiture for default in all others, and did not seek to collect the latter, so far as appears. It did not make known its ownership to plaintiff until more than eight months after seizure, and after defendant by misrepresentations of ownership had escaped with a small fine. All these facts and circumstances, however it might be were they not thus in combination, suffice to the conclusion that good cause against sale of the car has not been shown by intervener, the owner.

"Its conduct throughout manifests a degree of indifference, if not of consent, that its property be devoted to illegal uses, that is reprehensible, at least. It may have disclosed its attitude to the vendees then, as it has to the public now. Why not? Business would be stimulated, and the car confiscated; deferred payments would be made by a responsible insurer, avoiding hazard of loss by the default of a stranger association of unknown repute and responsibility. Failure to resume possession of the car for defendant's conversion, offense, and defaults, failure to collect deferred payments, failure to disclose its ownership as aforesaid, all unexplained, and the disingenuity of its petition, which implies but recent knowledge of the offense, savor of condonation and ratification of defendant's offense, of collusion and strategy in his interest and to plaintiff's prejudice, and constitute inequitable conduct. To remit forfeiture of the car seems less consistent with justice than does to enforce it."

As to what would amount to good cause to the contrary, it is said:

"Good cause to the contrary would certainly be that the owner of the method of transportation, whether it be by vehicle or watercraft, was wholly ignorant and innocent of the illegal use of his property. For instance, if a man left his automobile in the street, and it was unwarrantably taken possession of by an evil-doer, who transported liquor in it, it would not be sold. So if a vessel was at anchor, and was seized and taken possession of by an evil-doer, who then proceeded to subject it to the unlawful uses of transporting liquor, good cause to the contrary would be shown in the innocence of the owner, and the property would not be sold. It would likewise follow that a large iron steamship, in the employment and use of which likewise a large crew of officers and men is required, would not be subject to sale and forfeiture, because one or more of the crew, without the knowledge or assent

of the owners and in dereliction of their duties, were to seek to use the vessel to carry out for their own individual purposes the illegal transportation of intoxicating liquors." The Saxon, (E. D. S. C. 1921) 269 Fed. 639.

In order to show good cause against the sale of a vehicle seized under the Volstead law, and shown to be an instrument of illegal transportation of liquor, the owner must show the absence of guilty knowledge. U. S. v. Burns, (S. D. Ohio 1921) 270 Fed. 681.

Circumstances justifying cancellation of bond for production of vessel.—The cancellation of a bond given for the production of a vessel which had been seized because of intoxicating liquor being found on board has been held proper where the liquor was found in the possession of some of the officers and crew of the vessel who had been arrested and bound over for trial and it was not shown that the owners had any knowledge that the liquor was on board. The Saxon, (E. D. S. C. 1921) 269 Fed. 639. The court said:

"The officers and members of the crew, in whose possession was found this liquor, have been arrested and bound over for trial. There is no charge or evidence that the owners of the vessel were aware the liquor was on board. To allow the vessel to remain tied up and not performing the purpose for which she is created until these parties are tried, when they are mere employees, and not the owners, of the vessel, and when their conviction would in no wise necessarily lead to the forfeiture or sale of the vessel, would seem to be wholly useless. If the vessel, under the circumstances of this case, would not be held, then no bond should have been required for its production, and any bond given to procure its release was improperly required, and should be canceled. If the circumstances should show that through the improper use of the vessel it should be forfeited to the United States, then it can be libeled wherever found in the United States, and by proper proceedings, in which the owners can appear and defend their rights, an adjudication can be had."

Proof of permit.—It has been declared that in a prosecution for transporting liquor without a permit the government would not have to prove the want of the permit in order to make out a prima facie case. But if the defendant should introduce any substantial evidence tending to show that the transportation had been authorized by a permit, the government would then have to introduce evidence that no permit was issued, or that it was obtained by fraud, or that it did not apply to the act of transportation charged. U. S. v. Turner, (W D. Va. 1920) 266 Fed. 248.

Establishment of lien on vehicle.—The lien which is referred to in this section must be established by competent evidence. The mere

assertion of a bona fide lien does not prove the fact that the lien is such. *U. S. v. Masters*, (E. D. Mo. 1920) 264 Fed. 250.

Vehicle purchased on conditional sale.—As to the rights of a conditional vendor of a vehicle used in violation of this act for the transportation of liquors it is declared:

"It is apparent that just such cases were in mind when the law was framed, and that the Congress realized that vehicles would be used for the illegal transportation of intoxicating liquor by persons who would purchase the same on conditional bills of sale, and that such vehicles would be used for such unlawful purpose without the knowledge or consent of the conditional vendor or his assignee. In order, therefore, to protect a person retaining title under a valid conditional bill of sale, or one who holds a valid chattel mortgage, such person must satisfy the court that he holds a bona fide lien and lacked the knowledge or information of the illegal purpose for which the vehicle was used or was to be used. Having done this, he is entitled to receive from the proceeds of the sale the amount of the lien, established by intervention or otherwise, after the costs as provided by law, are paid. Section 26 of the act seems so clear that there can be no possible doubt but that it was the intention of the Congress to protect innocent vendors or mortgagees, as far as possible." *U. S. v. Sylvester*, (D. C. Conn. 1921) 273 Fed. 253, wherein the court further said:

"When a defendant is arrested for transporting intoxicating liquor, and the vehicle is seized, what is to be done with it depends upon what interest the defendant has in it. If he had no interest—that is, if he had stolen it, or had borrowed it from its real owner, who neither knew nor could be presumed to have knowledge of the illegal purpose for which it was to be used—manifestly the wrongdoer had no interest to forfeit, and it logically follows, under the provisions of the act, that the vehicle should be returned to its rightful owner, by order of court. If, on the other hand, the wrongdoer had an interest in the vehicle, his interest should be confiscated and the vehicle ordered sold."

Automobile used without owner's knowledge.—An automobile used by the owner's chauffeur in illegally transporting liquor may be subject to forfeiture even though the owner did not participate in or know of the illegal use. *Lewis v. McCarthy*, (D. C. Mass. 1921) 274 Fed. 496.

Forfeiture of borrowed automobile.—In a case where the automobile which it was sought to confiscate was borrowed it was said:

"The admitted facts in the present case show ownership and want of knowledge on the part of the vehicle's owners as to the purpose for which the vehicle was to be employed. Without any other attending cir-

cumstances, this is sufficient to warrant the court to order its return. It might be otherwise if, from the reputation of the person intrusted with the vehicle or other circumstances attending his occupation or employment, the inference would arise that the owners had reason to suspect that their property might be used for the purposes it was employed.

"The construction contended for by the learned representative of the government would admit of no reason or cause for the return of property used in connection with a violation of the provisions of this statute, if such was intrusted to the violator of the same and used in connection therewith. This would work greater hardship upon innocent owners of such property than was contemplated by the legislators; otherwise they would not have provided for the return on good cause shown." *U. S. v. Brockley*, (M. D. Pa. 1920) 266 Fed. 1001, wherein the court further said:

"Whether the property seized shall be confiscated and sold depends upon the facts appearing, and whether the facts presented constitute good cause or reason to the contrary is a question addressed to the judicial sense and judgment of the court. This provision in the act is not analogous, as was contended for by the government's attorney, to that found in section 3450 of the Revised Statutes, under which it has been held that the ignorance of the owner of a vehicle used by a third person for the removal of goods with the intent to defraud the United States will not save his property from confiscation. *Logan v. United States*, and *Wisdom & Strickland v. United States* (C. C. A.) 260 Fed. 746; *United States v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. ed. 555. From these cases, as well as from the general provisions of the revenue laws therein construed, it is conclusive that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture absolutely, whether or not good cause appears to the contrary."

A third party who intervenes claiming to be the owner of an automobile in which liquor was being illegally transported has the burden of proof to show good cause in law why the vehicle shall not be condemned and forfeited. *U. S. v. One W. W. Shaw Automobile Taxi, etc.*, (N. D. Ohio 1921) 272 Fed. 491.

Condemnation and sale of taxicab.—In *U. S. v. One W. W. Shaw Automobile Taxi, etc.* (N. D. Ohio 1921) 272 Fed. 491, an order of condemnation and sale of a taxicab was entered though it appeared that the owners had instructed their drivers not to engage in the illegal transportation of intoxicating liquors. The court said:

"Upon these facts I am of opinion that good cause is not shown to exonerate the

automobile from condemnation and forfeiture. The driver in a way represented the owner at the time he devoted its car to this illegal service. It is true that his authority and powers were restricted as compared with the authority and power of a manager or superintendent, but within that limited scope he had power and authority to act for the owner, which, being a corporation, must of necessity always act by agents. He was so far within the scope of his authority that the owner during the entire period would have been liable for his negligence in operating the car and for repairs and supplies ordered during the trip. If he had negligently injured some one en route, the owner would have been liable in damages. I do not hold that an automobile livery is to be held liable in all cases, if a driver, contrary to instructions, devotes one of its cars to the illegal transportation of intoxicating liquor. It should, no doubt, depend upon the facts and circumstances of each case. In the instant case, the facts and circumstances are that the owner's dispatcher or superintendent sent its driver to premises used for saloon purposes; that he permitted the driver, after being informed that the car was destined for Cleveland, to engage in that enterprise without inquiry or investigation; that full authority was conferred on the driver to engage or refuse to engage in the enterprise, using his own judgment as to whether the transaction was legal or illegal; and that no precautions were taken at any time to ascertain whether or not the transaction was legal or illegal. The distance to be traveled each way is approximately 150 miles. The expense of a round trip, at 40 cents a mile, would be approximately \$120. It is difficult to believe that this is a simple, ordinary transaction in the usual course of business. It was then a matter of public notoriety that whisky was being transported, not only in suit cases and trunks upon railway trains, but upon the public highways in automobiles and trucks. To exonerate the owner on a showing merely that instructions had been given to its drivers not to engage in the illegal transportation of intoxicating liquors, notwithstanding the drivers were intrusted with full authority to decide whether the transaction was legal or illegal, would open wide the door to collusion and evasion of the law. Upon the facts and under these circumstances, I am of opinion that the owner has not shown good cause for the return of its car."

V. RETURN OF VEHICLE

Giving of bond.—By the provisions of this section, the vehicle after seizure may be instantly returned to the owner, upon execution by him of a bond to produce the property at the criminal trial, and disposition must be decreed upon the trial of the criminal case. Forfeiture by original seizure de-

pends upon the statute. Congress may declare the forfeiture absolute upon seizure, or make the forfeiture depend upon conditions. The Congress may provide for the seizure of the vehicle at any time, for having offended, but before any forfeiture can be decreed, the jurisdictional facts as outlined by the statute must be present, and the statutory provision must be in harmony with the taking or detention. *U. S. v. Hydes*, (W. D. Wash. 1920) 267 Fed. 470; *U. S. v. Graham*, (W. D. Wash. 1920) 267 Fed. 472.

Property seized without process.—In the case of the seizure without process of an automobile in which whisky was being transported it is declared that "The auto and whisky, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have." *U. S. v. Fenton*, (D. C. Mont. 1920) 268 Fed. 221.

Where the seizure of a vehicle subsequent to the act of transportation was without warrant of law it has been held that an order decreeing the return of the vehicle and exonerating the owner's bond may be presented. *U. S. v. Hydes*, (W. D. Wash. 1920) 267 Fed. 470; *U. S. v. Graham*, (W. D. Wash. 1920) 267 Fed. 472.

Return of vehicle to lienor.—It has been held that a lienor or mortgagor is not entitled to have a vehicle which has been seized for a violation of this act returned to him and thus permit him to profit by the transaction but that he must look for reimbursement to the extent of his lien from the proceeds of the sale. *U. S. v. Sylvester*, (D. C. Conn. 1921) 273 Fed. 253, wherein the court said:

"Cases may arise where the application of this rule would result in realizing an insufficient amount at the sale to pay the full amount of the bona fide lien; but where a substantial amount has already been paid, as here, on a new truck, undoubtedly the full amount of the balance due, plus the costs, will be realized, so that the lienor will be fully protected. Where, however, the amount paid by the purchaser is small in proportion to the purchase price, so that a large amount will have to be realized by the United States marshal at the sale, and where the highest bid is insufficient to meet the costs and the amount of the bona fide lien, the United States marshal shall then

abandon the sale and report the facts to the court for further instructions. In such event further hearing will be had before the court to determine then whether the lienor has shown 'good cause' why the vehicle should not be sold."

Power of federal court in summary proceedings to order return of automobile.—In *Lewis v. McCarthy*, (D. C. Mass. 1921) 274 Fed. 496, the facts as stated by the court together with its holding were as follows:

"This is a petition for the return of an automobile, the property of the petitioner, which is held by the respondents as prohibition enforcement officers. They have moved to dismiss. The case stated in the petition is as follows: The petitioner is the owner of the automobile. On the occasion in question it was taken and used without her knowledge or consent by her chauffeur. He was arrested by a Boston police officer for operating it while under the influence of liquor, and a complaint for that offense is pending against him in the state court. While the petition does not so allege, I infer that there was liquor in the automobile, which was being illegally transported by the chauffeur, because the petition recites that he got liquor and was arraigned before a United States commissioner on the charge of illegal transportation. No proceedings have been instituted for the forfeiture of the automobile; but the case is still pending against the chauffeur for violation of the Volstead Act (41 Stat. 305).

"Under the circumstances, the court has no power, in summary proceedings such as these, to order the return of the automobile. Such power exists only over officers of the court, which the defendants are not. *In re Chin K Shue*, (D. C. Mass.) 199 Fed. 282; *U. S. v. Hee*, (D. C.) 219 Fed. 1019. Moreover, under *Grant v. U. S.*, 254 U. S. 505, 41 Supp. Ct. 189, 65 L. ed. —, if the chauffeur shall be convicted the automobile may be subject to forfeiture, even though the owner of it did not participate in or know of the illegal use. Compare *The Little Charles*, 1 Brock. 347, at 354, Fed. Cas. No. 15,612, an interesting case of forfeiture under an embargo act."

Releasing automobile and canceling bond.—Where an automobile seized while illegally transporting liquor has been returned to the owner on his giving the required bond, there is said to be no authority which would justify the court in releasing the automobile and canceling the bond of the claimant before the trial or during the period within which the trial of the person arrested in connection with the seizure can be had. *U. S. v. One Cadillac Touring Car*, (E. D. Mich. 1921) 274 Fed. 470.

1919 Supp., p. 215, sec. 28.

Powers conferred by section.—This section "of the National Prohibition Act con-

fers on the Internal Revenue Commissioner and subordinate officers, for the enforcement of the National Prohibition Act, the powers which are conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors. Section 28, therefore, simply gives to the Commissioner and subordinate officers the same powers of enforcement in reference to the National Prohibition Act as they had under existing laws relating to the manufacture and sale of intoxicating liquor. Those powers include the enforcement by distraint in cases of special taxes and certain penalties annexed to them under the internal revenue laws. But if, as we have seen, the exactions under section 35 of the National Prohibition Act are none of them taxes, but all of them penalties, so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that section 28 gives no power to collect these penalties by distraint.

"It may be further observed that the preliminary steps provided in section 3172, R. S. [3 Fed. Stat. Ann. (2d ed.) 1002], and leading up to the notice and demand in section 3184, R. S. [3 Fed. Stat. Ann. (2d ed.) 1012], all relating to assessment and collection of internal revenue taxes proper, to wit: The canvassing by the collector; the returns by parties liable to the taxes; the call for such returns; the summons by the collector for examination; and, upon refusal, the making of a return by the collector—were never intended and are not suitable as procedure for collection of penalties such as are prescribed in section 35 of the National Prohibition Act. Nor, indeed, was the procedure under the sections above mentioned followed in the instant cases. Further, that a civil suit is a proper remedy for the collection of these exactions provided for in section 35 of the National Prohibition Act is recognized by the Internal Revenue Department, but the attitude of that department is shown by the following extracts from Regulation No. 12, revised October 1, 1920, issued by the department. On page 42 is the following:

"In making reports in prohibition cases, a tax and assessable penalty imposed by section 35 of title 2 of the National Prohibition Act should not be overlooked. It will often prove more effective to suppress violations of the law than the actual criminal liabilities imposed."

"And again, on page 19, is the following:

"Legal proceedings will not generally be commenced until after the remedy by distraint is exhausted." *Thome v. Lynch*, (D. C. Minn. 1921) 269 Fed. 995.

Removal of action against officer.—Cases against officers under the National Prohibition Act are removable from state to federal courts under the provision of the act for the

protection of revenue officers. *In re Higgins*, (D. C. N. H. 1921) 273 Fed. 832.

1919 Supp., p. 215, sec. 29.

Effect of conviction in state court.—A conviction in a state court for conduct which is in violation of the National Prohibition Act is held to be a bar to a prosecution in the federal courts, it being declared to be manifest that it was not the intent that a person should be punished by the state and federal law for the same offense. But a conviction for a violation of a municipal ordinance pursuant to grant of power given by a state is not a bar to a prosecution in the federal court for a violation of the National Prohibition Act. *U. S. v. Peterson*, (W. D. Wash. 1920) 268 Fed. 864. So it has been held that the previous conviction of a defendant in the state court for importing, transporting, and having intoxicating liquor in his possession in violation of the state law cannot be availed of to prevent his prosecution in a federal court for violating the Volstead Act by importing, transporting, and having intoxicating liquor in his possession. *U. S. v. Holt*, (D. C. N. D. 1921) 270 Fed. 639. The court, however, declared in this case:

"In the case at bar I have seen the young man charged, and have heard the circumstances of his arrest. If he shall be advised to plead guilty to the charge, the circumstance of his previous punishment will be given consideration, a record made of his conviction, to protect the government in case of a repetition of such acts, and a nominal penalty will be imposed."

Imprisonment.—A jail sentence may be imposed on the first conviction of one for a violation of sections 3 and 6 of this act. *Dusold v. U. S.*, (C. C. A. 7th Cir. 1921) 270 Fed. 574.

1919 Supp., p. 216, sec. 33.

Power of Congress with reference to possession of liquor.—Under the police power delegated by the Eighteenth Amendment Congress has the right to prohibit any transportation of liquors and in order to reduce the necessity for transportation to a minimum it has the power to legislate as to the places where liquor may lawfully be possessed. *Street v. Lincoln Safe Deposit Co.*, (S. D. N. Y. 1920) 267 Fed. 706, wherein the court said that since the adoption of the Eighteenth Amendment Congress can deal not only with interstate, but also with intrastate, transportation of liquor, and that the limitations in this section as to the places of possession were not arbitrary or unreasonable.

"Congress in the exercise of its power has determined that it is essential and appropriate to the enforcement of this constitutional amendment to restrict the possession of intoxicating liquors to those having per-

mits to keep and possess the same and to private homes when intended for the sole use of the owner and his family and their bona fide guests. The possession of intoxicating liquors is the first essential to its barter and sale as a beverage. Intoxicating liquors, stored in the same building in which the owner or occupant of the building is conducting a business with the public generally, not only furnishes opportunities for the violation of the provisions of this constitutional amendment, but would also tend to hinder, delay, and prevent the detection of unlawful traffic therein. It would therefore appear that this provision of the National Prohibition Act has a substantial relation to the enforcement of national prohibition, and that Congress has not in this respect transcended its power or abused the discretion conferred upon it by the second section of the Eighteenth Amendment." *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

Possession in private dwelling by wife of saloon keeper.—The wife of a saloon keeper may have lawful possession of liquors on premises occupied by her as a dwelling although such premises are in part used by the husband for the purpose of conducting a saloon. *U. S. v. Crossen*, (E. D. Pa. 1920) 264 Fed. 459, wherein the court said:

"Section 33 makes it lawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquors need not be reported, subject to the provisions concerning the use of the liquor and the burden of proof. The exception to unlawful possession applies, therefore, to the one possessing in one's private dwelling while the same is occupied and used by that one as that one's dwelling only; but any other person, while the dwelling is used and occupied by him not as his dwelling only, but for other purposes, is not included in the exception, and liquor possessed by him in his dwelling is unlawfully possessed and must be reported to the commissioner. I think that is the plain effect of the words 'used by him as his dwelling only.' A comparison of the paragraph of section 25 prohibiting search warrants to search private dwellings lends weight to that conclusion. It is there provided that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house. It is significant that the language of section 33 applies to the person occupying and using a private dwelling as a dwelling only, while the search warrant provision in section 25 applies to the dwelling occupied as a private dwelling, and exempts such dwelling from search unless it is being used for the unlawful sale of intoxicating liquors, or unless 'it is in part

used for some business purpose,' etc., so that any private dwelling which is used in part for some business purpose is subject to search. If it were intended that it should be unlawful for any one to possess liquors in one's private dwelling, which is in part used for some business purpose, Congress would not, in expressing that intent, have made use of the personal pronoun in the language 'occupied and used by *him* as *his* dwelling only,' and the intent would have been clearly expressed by using the language 'while the same is occupied and used as a dwelling only.' The conclusion is, in my judgment, unavoidable, therefore, that the clear effect of the words 'by him' and 'his' is to make possession in a private dwelling lawful as to any one except the person who is occupying and using the dwelling for other purposes than as a dwelling."

Storage in warehouse.—This section does not permit the storage of liquors in a warehouse for the personal use of the owner for beverage purposes. *Street v. Lincoln Safe Deposit Co.*, (S. D. N. Y. 1920) 267 Fed. 706.

Duty of officers making seizure.—"If the officer proceeds by search warrant to seize articles in which a citizen may or may not have property, the intent of the act must necessarily be that he shall take such other appropriate proceedings as in due course of law follow seizure; and that is clearly indicated throughout the entire act. It is not necessary for the purposes of the present question to examine other sections than section 25, under which the seizure was had, and section 33, under which the respondent claims property in the liquor seized. Section 25 provides that the liquor so seized shall be subject to such disposition as the court may make thereof, and, if it is found to be unlawfully held or possessed or used, it shall be destroyed, unless the court shall otherwise order, and, under section 33, the burden of proof is placed upon the possessor in any action to prove that the liquor was lawfully acquired, possessed, and used. It is plain, therefore, that the intent of Congress as expressed in the act is that the officer making seizure shall cause appropriate proceedings to be brought in a court having jurisdiction, in order that claimants may have their day in court for the hearing and determination of the property rights in the liquor seized. If it appears to the officer, through the claim of a citizen or otherwise, that a judgment affecting the liquor seized might be rendered and that a citizen has claimed property in such liquor, a summons must be issued and served requiring such person to appear as claimant." *U. S. v. Crossen*, (E. D. Pa. 1920) 264 Fed. 459.

1919 Supp., p. 216, sec. 34.

Right limited to inspection.—The right to inspect books and papers does not give the

right to seize them. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

1919 Supp., p. 216, sec. 35.

- I. In general.
- II. Recovery of taxes and penalty.
- III. Act as repealing other laws.
 1. In general.
 2. Revenue laws.
 - a. Prior offenses.
 - b. "Provisions of law that are inconsistent."
 - c. Enumeration of revenue laws held repealed.
 - d. Enumeration of revenue laws held not repealed.

I. IN GENERAL

Constitutionality.—The tax imposed by this section in addition to the penalty does not deprive a person of his property without due process of law. *Ketterer v. Lederer*, (E. D. Pa. 1920) 269 Fed. 153.

On a subsequent consideration of the above case the court again said:

"The basis of the cause of action which the plaintiff asserts is that a punishment is being inflicted upon him under the guise of the collection of a tax, and that this subjects him to the exercise of an unlawful power, and that it is none the less unlawful, although sanctioned by the language of the Volstead Act (41 Stat. 305), because this provision of that act is unconstitutional, in that it is prohibited by the 'due process of law' provisions of the Constitution. We adhere to the views already expressed, which may be summarized as follows:

"The act of Congress authorized and directed the defendant to make the assessment against the plaintiff, which was made upon the finding of facts as made. Congress has called this a tax, and directed it to be assessed and collected as such. If Congress had the power to impose this tax, it had the power to declare the occasion for the levy of the tax, and the mode of levy, and upon what fact conditions it should be levied. The bill of complaint calls upon us to make the finding that what Congress has solemnly declared it authorized to be done was not what it authorized to be done but something entirely different. In other and plain words, that although Congress declared it was levying and collecting a tax, it was in fact not levying a tax, but punishing the one who was called a taxpayer for an act which he had committed and which Congress had pronounced to be criminal. We decline to make this finding." *Ketterer v. Lederer*, (E. D. Pa. 1920) 269 Fed. 1010.

It seems that a tax in one sum may be imposed upon one dealing in intoxicating liquors through sales for limited purposes, and another additional tax be imposed upon

him if he exceeds such limit. *Ketterer v. Lederer*, (E. D. Pa. 1920) 269 Fed. 153.

Word "traffic" construed.—The word "traffic," as used in this section, must be given its larger significance. It is a generalization of the more specific terms used in the other parts of the act, such as "sell," "purchase," "barter," "storage," "transport," "import," "export," "prescribe," "deliver," and "furnish" (see sections 3, 6, 7, 10, 13, 14, 26, 33, and 37), and includes every step taken in the commerce in liquor from the manufacturer to its ultimate destination. *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188.

Word "penalty" construed.—"The word 'penalty,' as used in the act, would seem to have been used by Congress in the usual and ordinary legal meaning of this word, which meaning is fairly well-settled law. A penalty is a sum of money which the law exacts by way of punishment for the doing of some act which the law forbids, or for the failure to do some act, which the law requires to be done. It is true, as the definition foreshadows, that sometimes the word 'penalty' is undoubtedly used as a synonym of the word 'fine'; but as used in the Volstead Act it cannot fairly be so construed, because by another provision of the act a fine as such is clearly provided for. Moreover, no authority can be conferred by Congress upon the Commissioner of Internal Revenue to impose a fine in the strict sense of that word (*Wong Wing v. United States*, 163 U. S. loc. cit. 237, 16 Sup. Ct. 977, 41 L. ed. 140); or a *fortiori*, without a trial, or any sort of hearing theretofore had, as here." *Kausch v. Moore*, (E. D. Mo. 1920) 268 Fed. 668.

As to whether the sums named in this section are penalties or taxes it has also been said: "A tax has been defined as:

'An enforced contribution for the payment of public expenses.' *Houck v. Little River Drainage District*, 239 U. S. 254, 265, 36 Sup. St. 58, 61 (60 L. ed. 266).

"And again:

'Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government.' *New Jersey v. Anderson*, 203 U. S. 483, 492, 27 Sup. Ct. 137, 140 (51 L. ed. 284).

"A penalty involves the idea of punishment. *U. S. v. Reisinger*, 128 U. S. 398, 402, 9 Sup. Ct. 99, 32 L. ed. 480; *Huntington v. Attrill*, 146 U. S. 657, 667, 13 Sup. Ct. 224, 36 L. ed. 1123. And its character is not changed by the mode in which it is inflicted, whether by suit or criminal prosecution. *U. S. v. Chouteau*, 102 U. S. 603, 611, 26 L. ed. 246.

"In view of the foregoing tests, and from a careful reading of section 35 of the National Prohibition Act, in connection with the other provisions of that act, it would seem clear that the \$500 and the \$1,000

items mentioned in that section, and one of which is included among the items in the several notices, are clearly penalties, and not taxes. First, they are so named, but this is not conclusive; second, they are for the purpose of punishment, and not for the purpose of revenue; third, they are embodied in a statute which in its most important features is highly penal in nature." *Thome v. Lynch*, (D. C. Minn. 1921) 269 Fed. 995.

The court further said in this case:

"Though some of the exactions under section 35 of the National Prohibition Act are to be measured by double the amounts which were formerly special taxes under section 3244, R. S., and section 1001, Act Feb. 24, 1919, yet these exactions under section 35, by reason of their new character and status under the Eighteenth Amendment, are no longer taxes, but penalties. As persuasive to this conclusion, note the present character and status of the so-called taxes in section 35.

"First. They are no longer exactions for revenue purposes. The whole meaning and aim of the Eighteenth Amendment forbids such construction; and intention to derive revenue from taxes on crime must not be imputed to Congress, if it can be avoided. As was said in the License Tax Cases, *supra*:

"It is not necessary to decide whether or not Congress may, in any case, draw revenue by law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no Legislature is at liberty to disregard; but it is equally undoubted that no court except in the clearest cases can properly impute the disregard of those principles to the Legislature."

"Second. The character of these special taxes is vitally changed in another respect; they no longer imply 'that the licensee shall be subject to no penalties under national law, if he pays.' In fact, the contrary is expressly provided by the language of section 35 of the National Prohibition Act.

"Third. These so-called special taxes are now in section 35, classed with the penalties of \$500 and \$1,000, and appear to partake of the character of these items. Indeed, the \$500 and \$1,000 penalties are called in section 35 'additional' penalties.

"Fourth. These special taxes are to be collected with the \$500 and \$1,000 penalties.

"Fifth. The 'double the amount' feature provided in section 35 as to these special taxes smacks of penalties.

"There is nothing in section 35, except the name 'taxes,' which indicates any difference in character or purpose between the so-called taxes and the penalties. Names are not controlling. While it may not always be easy to distinguish a tax from a penalty, yet where an exaction is made by governmental authority upon an occupation which is expressly prohibited as criminal by the same governmental authority, and where the exaction is not clearly shown to

be made for revenue purposes, it would seem that such exaction must be classed as a penalty, if classification is to have any real meaning."

Judicial notice of internal revenue regulations.—The court will take judicial notice of instructions issued by the Internal Revenue Department to officers of that department in regard to suits for the collection of the taxes and penalties provided for in this section. *Accardo v. Fontenot*, (E. D. La. 1920) 269 Fed. 447.

II. RECOVERY OF TAXES AND PENALTY

Method of recovering of penalty.—It is held that the recovery of the penalty imposed by this section cannot be had by distraint, it being said that to allow a person's property to be thus taken and sold would be to take it and sell it without due process of law. *Kausch v. Moore*, (E. D. Mo. 1920) 268 Fed. 668; *Thome v. Lynch*, (D. C. Minn. 1921) 269 Fed. 995.

Congress has not placed in the hands of the collector of revenue the power to collect, by distress and sale, the penalties provided for in this section of the National Prohibition Act. Collection must be by suit in the District Court. *Kelly v. Lewellyn*, (W. D. Pa. 1921) 274 Fed. 112.

The collection of taxes claimed to be assessed under this act cannot be made by distraint, it being declared that under the provisions of this section taxes cannot be assessed or collected; that the double tax provided for in the act, and the penalties prescribed, are nothing more nor less than punishment for the commission of criminal offenses and that these penalties must be collected by civil actions, or pronounced as judgments in criminal cases. *Ledbetter v. Bailey*, (W. D. N. C. 1921) 274 Fed. 375.

In *Thome v. Lynch*, (D. C. Minn. 1921) 269 Fed. 995, the court, after declaring that the usual method of collecting a penalty is by suit, said:

"Not only is this method expressly authorized and provided by statute (section 3213, R. S.), but the method of procedure by suit is also specifically recognized by the same section 35 of the National Prohibition Act. Furthermore, under section 3187, R. S. the collector of internal revenue, though authorized to collect taxes by distraint, was not authorized to collect penalties in general by that method, but only certain specified penalties, viz., the 5 per cent penalty added under section 3184, and by express provision in section 3176 the penalty therein provided; both of these penalties being added to taxes properly so called—that is, exactions for revenue for government use."

Restraining collection of taxes and penalties.—There is authority that the collection of taxes and penalties under this section will

not be enjoined, *Regal Drug Corp. v. Wardell*, (C. C. A. 9th Cir. 1921) 273 Fed. 182; and other authority which holds that as to a tax injunction will not lie. *Ketterer v. Lederer*, (E. D. Pa. 1920) 269 Fed. 153; *Kausch v. Moore*, (E. D. Mo. 1920) 268 Fed. 668.

There is authority, however, that section 3224 of the Revised Statutes (3 Fed. Stat. Ann. 2d ed. p. 1032) providing that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court, does not apply to a proceeding for the enforcement of a penalty by distraint for a violation of the Volstead Act. *Kausch v. Moore*, (E. D. Mo. 1920) 268 Fed. 668, wherein the court said:

"Upon the motion to dismiss the bill, it is urged that injunction will not lie to restrain the collection of a tax. This contention, so far as it is applicable to the facts, is well taken and must needs be sustained. *Dodge v. Osborn*, 240 U. S. 118, 38 Sup. Ct. 275, 60 L. ed. 557. But this rule applies, in my opinion, only to so much of the amount threatened to be exacted as in fact constitutes a tax; it ought not to apply to a penalty even though such penalty could be paid under protest; and thereupon, if such payment be not warranted by law, be recovered back by an action at law directly against the collector. So much the more so, should injunction be not refused, when, as here, the payment thereof would be impossible without ruining plaintiff in business and property. If, then, the exaction of the penalty claimed should be held to be at this time, and in the mode threatened, unlawful, injunction ought to lie as against so much of the threatened exaction, if any, as is unlawful. As stated, injunction will not lie to prevent the collection of a tax, or even to prevent the collection of such tax, when, as here, the amount thereof is doubled upon the contingency of the violation of the law, by the forbidden sale, or manufacture of liquor. In such case section 3224, R. S. applies and forbids an injunction against the collector. *Dodge v. Osborn*, *supra*. But it would seem to be fairly clear that a statute which merely forbids injunction as against a tax ought not to be so extended as to include injunction against the enforcement of a penalty. Certainly, this ought not to be done in a case wherein the manner of the collection, as here, is not warranted by law. In reaching this conclusion, I start with the assumption that the imposition of the penalty is clearly within the power of Congress under the provisions of the Eighteenth Amendment to the Constitution. So much being conceded, the question arises whether the Commissioner of Internal Revenue has the authority, merely upon reports of investigators to the effect that plaintiff has unlawfully sold liquor at retail, to

assess such penalty, and without notice to the plaintiff, and without an opportunity anywhere given him to be heard, to empower the defendant collector to distrain plaintiff's property to pay the penalty so assessed?" To the same effect see *Thome v. Lynch* (D. C. Minn. 1921) 269 Fed. 995, wherein the court said:

"As to the third question, whether the cases at bar call for preliminary injunctions: If the foregoing conclusion as to the nature of the exactions be correct, then section 3224 is not a bar to the relief sought. And for the same reasons the remedies provided in sections 3225 and 3226, R. S., have no application to the instant cases. Nor is it an adequate remedy at law for the plaintiffs to pay the exactions demanded, and sue for recovery. In some cases it is alleged that it is impossible for plaintiffs to pay the amounts demanded, sums running as high as \$6,500, and that seizure and sale would ruin plaintiffs' business and means of livelihood. The equities in favor of plaintiffs are strong and persuasive." See further to the same effect *Connelly v. Gardner*, (E. D. N. Y. 1921) 272 Fed. 911; *Kelly v. Lewellyn*, (W. D. Pa. 1921) 274 Fed. 108.

In *Accardo v. Fontenot*, (E. D. La. 1920) 269 Fed. 447, the collection of taxes and penalties was enjoined against the plaintiffs where there was no charge at all against one plaintiff; another was charged only with unlawful possession, which carries no penalty under this section, an acquittal therein being shown; and the other was charged with selling unlawfully, an ample bond having been given to secure payment of the assessment, but no trial having been had. The court said:

"Acquittal in all of these cases would be a bar to the collection of the penalties in a civil suit. If an ex parte report of a revenue or prohibition officer is all the evidence required of illegal sale or manufacture, which is very doubtful, there is a strong presumption in these cases that the prohibition officers were not in possession of sufficient evidence of even probable cause on which to base such report.

"Yet payment is demanded in each case, and collection is sought to be enforced by the drastic procedure of distraint. No doubt the Commissioner of Internal Revenue considered himself amply justified in making the assessment, and the collector of internal revenue should not be criticised or censured for attempting to make collection. His duties are purely ministerial, and he is vested with no discretion, once the assessment is placed in his hands. But the system is all wrong, and tends to work great hardship and injustice to the individual, however desirable from an administrative viewpoint it may be.

"I think the bills teem with equity, and present such extraordinary facts as to war-

rant the issuance of preliminary injunctions."

III. ACT AS REPEALING OTHER LAWS

1. In General

Act as repeal of other acts.—"The National Prohibition Act expressly (1) repealed all inconsistent existing law, and (2) provided that the act is but an addition to all other existing law. This renders inapplicable all rules of implied repeal." *Violette v. Walsh*, (D. C. Mont. 1921) 272 Fed. 1014.

This provision is only declaratory of the general law. *U. S. v. Stafoff*, (E. D. Mo. 1920) 268 Fed. 417.

The Alaska Bone Dry Law (1918 Supp. Fed. Stat. Ann. 2d ed. p. 48, *et seq.*) was not repealed by the National Prohibition Act. *Koppitz v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 96.

Wartime Prohibition Act not repealed.—This act did not repeal the provisions of the Wartime Prohibition Act (1919 Supp. Fed. Stat. Ann. 2d ed. p. 199). *Vincenti v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 114.

Under the terms of this provision a person is not relieved from liability for sales of intoxicating liquors in violation of the Wartime Prohibition Act of Nov. 21, 1918. *Ford v. U. S.*, (C. C. A. 5th Cir. 1921) 269 Fed. 609.

2. Revenue Laws

a. Prior Offenses

In the case of a violation of the revenue laws occurring before the National Prohibition Act went into effect, such offense was punishable by the law then in force. *Alexander v. Thurmond*, (C. C. A. 4th Cir. 1921) 272 Fed. 474.

Provisions of the revenue laws were not repealed by the National Prohibition Act so far as relates to punishment for offenses committed previous to the taking effect of that act. *Tisch v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 208.

Where the National Prohibition Act does not expressly repeal the internal revenue laws relating to distilling liquors, there is no implied repeal thereof, so far as relates to violations already committed. Consequently an indictment and conviction may be had under those laws though the indictment is found after the taking effect of the Prohibition Act. *Howard v. U. S.*, (C. C. A. 6th Cir. 1921) 271 Fed. 301.

b. "Provisions of Law That Are Inconsistent"

This section only repealed revenue laws which are inconsistent with this act. *Es p. Lawrence*, (D. C. Mont. 1921) 273 Fed. 876, *distinguishing* *Yuginovich Case*, 256 U. S. —, 41 S. Ct. 551, 65 U. S. (L. ed.) —, and holding that under the facts of the case sections

3258, 3281 and 3286 of the Revised Statutes [4 Fed. Stat. Ann. (2d ed.) 24, 41, 46] were not repealed, the offense charged not involving distillation for beverage purposes.

"The word 'inconsistent' has a broad meaning. Speaking generally, a law which has for its primary purpose the absolute prohibition of the manufacture and sale of spirituous liquors is manifestly inconsistent with the whole body of legislation which found no fault with the business of the manufacture and sale of spirituous liquors, but only sought to derive a revenue for the support of the government from such manufacture and sale by the imposition of taxes, and to prevent persons engaged in such business from defrauding the government out of the taxes imposed. In view, however, of the large volume of legislation enacted for the purpose of revenue collection, and the language of the above-quoted section, it would seem unwise to discuss the question of repeal, except as is necessarily required in disposing of the question before us. No general rule or declaration of law with reference to all revenue legislation could safely be declared, but each case should be decided on its own facts and law." *Ketchum v. U. S.*, (C. C. A. 8th Cir. 1921) 270 Fed. 416.

"This section expressly continued the revenue laws in force and is not contrary to the Eighteenth Amendment. That amendment does not prohibit the manufacture, transportation, and sale of intoxicating liquors for any purpose whatever, but only for beverage purposes. Such liquors may still be made, carried about, and sold for medicinal, sacramental, scientific, and some commercial purposes. The restraints applicable to liquors for such uses do not arise from the amendment, but are justified as reasonable safeguards to prevent the abuse of liberty as to them, and to attain enforcement of the prohibition for beverage purposes. Evidently there is much field left by the amendment for the operation of the revenue laws, which are preserved by section 35. Since that section expressly provides that taxation of illegal acts shall not be had in advance, and that the exaction of the tax afterwards shall not legalize them, there is no contravention, even in spirit, of the prohibitory amendment. The tax operates only as an additional penalty, and tends rather to the enforcement than the defeat of the prohibition scheme." *U. S. v. One Essex Touring Automobile*, (N. D. Ga. 1920) 266 Fed. 138.

As to the effect of this act on provisions of the Internal Revenue Law, it has been said: "It goes without saying that this amendment and the act passed by its authority effected a radical change in the legislative policy and attitude of the country respecting alcoholic beverages. Instead of encouraging, or at least recognizing as legitimate, the production and use of such

beverages, and deriving a very large revenue therefrom, the manufacture and sale of any sort of beverage containing one-half of 1 per centum of alcohol or more is now wholly and strictly forbidden. This being so, it would seem necessarily to follow, under the most familiar rules of statutory construction, that if the Volstead Act is inconsistent with the provisions of section 3296 and also covers the same subject-matter, it supersedes and by implication repeals that section. And to our minds the Volstead Act, in its entire scope and purpose, is plainly inconsistent with the scheme of revenue protection embodied in the Revised Statutes and in the section under review." *Reed v. Thurmond*, (C. C. A. 4th Cir. 1920) 269 Fed. 252.

c. Enumeration of Revenue Laws Held Repealed

In general.—So far as intoxicating liquors intended for beverage purposes are concerned, the provisions of U. S. Rev. Stat. §§ 3257, 3279, 3281, and 3282 [4 Fed. Stat. Ann. (2d ed.) 40, 41, 44], making it a criminal offense to defraud or attempt to defraud the United States of a tax upon spirits distilled by one carrying on the business of a distillery, or to fail to keep the sign "registered distillery" on the outside of a place of business used as a distillery, or to carry on the business of a distillery without bond, or to make or permit mash to be made in any building other than a distillery authorized by law, must be regarded as repealed, although this section, which repeals all prior laws only to the extent of their inconsistency with it, provides that the act shall not relieve any person from any liability, civil or criminal, theretofore or thereafter incurred under existing laws. *U. S. v. Yuginovich*, (1921) 256 U. S. —, 41 S. Ct. 551, 65 U. S. (L. ed.) —, wherein the court said:

"It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty. The concluding phrase of § 35, by itself considered, is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the 18th Amendment, and in view of the provisions of the Volstead Act intended to make that Amendment effective.

"Having in mind these principles, and considering now the first count of the indictment, charging an attempt to defraud and actually defrauding the government of the revenue tax, we do not believe that the

general language used at the close of § 35 evidences the intention of Congress to inflict for such an offense the punishment provided in § 3257 [4 Fed. Stat. Ann. (2d ed.) 23], with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under § 35, enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of \$500 on retailers and \$1,000 on manufacturers. Moreover, the concluding words of the first paragraph of § 35, as to all the offenses charged, must be read in the light of established legal principles governing the interpretation of statutes, and in view of the provisions of the Volstead Act itself, making it unlawful to possess intoxicating liquor for beverage purposes, or property designed for the manufacture of such liquor, and providing for its destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in § 3257 [4 Fed. Stat. Ann. (2d ed.) 23] in addition to the specific provision for punishment made in the Volstead Act.

"We have less difficulty with the other sections of the prior revenue legislation under which the charges, already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words 'Registered Distillery' in a place intended for the production of liquor for beverage purposes which could no longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law."

This decision was distinguished in *Ex p. Lawrence*, (D. C. Mont. 1921) 273 Fed. 876, holding sections, 3258, 3281 and 3286 of the Revised Statutes were not repealed under the facts of the case.

Sections 3242, 3257, 3258, 3260 and 3279 of the Revised Statutes [3 Fed. Stat. Ann. (2d ed.) 1044; 4 Fed. Stat. Ann. (2d ed.) 23, 24, 26, 40] and embodied in the revenue laws are repealed by this act. *Ketchum v. U. S.*, (C. C. A. 8th Cir. 1921) 270 Fed. 416.

This act repealed sections 923 and 3062 of the Revised Statutes [3 Fed. Stat. Ann. (2d ed.) 324; 2 Fed. Stat. Ann. (2d ed.) 1161] in so far as they relate to intoxicating liquors imported into the United States. *U. S. v. One Hudson Touring Car*, (E. D. Mich. 1921) 274 Fed. 473.

Section 3244 of the Revised Statutes [3 Fed. Stat. Ann. (2d ed.) 1045] has been repealed by implication. *Ravitz v. Hamilton*, (W. D. Ky. 1921) 272 Fed. 721.

Sections 3258 and 3282 of the Revised Statutes [4 Fed. Stat. Ann. (2d ed.) 24, 44]

are repealed. *U. S. v. Stafoff*, (E. D. Mo. 1920) 268 Fed. 417.

Sections 3258, 3279, 3281 of the Revised Statutes are repealed. *Sanford v. U. S.*, (C. C. A. 8th Cir. 1921) 274 Fed. 369.

"Taking the new statute as a whole, its provisions would appear to cover and provide for the punishment of every act which could be punished under the former provisions of the Revised Statutes with regard to the manufacture and sale of liquors for beverage purposes. To hold that the old law is continued would therefore be to hold that two inconsistent sets of statutory provisions, punishing the same substantial act, and with differing penalties, were of force, and that a person could be prosecuted and punished under section 3 and section 6 of the new statute for transporting any liquor at all, without the required permit, and at the same time prosecuted and punished under the provisions of section 3296 [4 Fed. Stat. Ann. (2d ed.) 56] for transporting liquor without having previously paid the tax that he is forbidden by law to pay.

"Giving to the repealing clause of the last statute that construction which it would be assumed the legislative department intended—that is, that it should be construed in harmony with existing rules of law and the existing rules of statutory construction—it appears to the court that the sections referred to have been repealed by the last statute, and the indictment will be accordingly quashed." *U. S. v. Windham*, (E. D. S. C. 1920) 264 Fed. 376.

This act repealed section 3450 [4 Fed. Stat. Ann. (2d ed.) 311] of the Revised Statutes in so far as the latter section provides for the forfeiture of vehicles. *U. S. v. One Haynes Automobile*, (C. C. A. 5th Cir. 1921) 274 Fed. 926.

It has been held that this Act repeals by implication section 16 of the Act of Feb. 8, 1875 [3 Fed. Stat. Ann. (2d ed.) p. 1053] relating to the carrying on of the liquor business without paying special tax or with intent to defraud. *Farley v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 721.

Provisions as to penalties in prior revenue laws are held to be repealed by the provisions in this Act. *U. S. v. Puhac*, (W. D. Pa. 1920) 268 Fed. 392; *U. S. v. Fortman*, (W. D. Okla. 1920) 268 Fed. 873.

Distilled spirits for use as beverage.—"In the main the federal courts are taking the view that the laws, so far as distilled spirits for use as a beverage are concerned, are defunct, having been superseded by the Eighteenth Amendment to the Constitution and the legislation enacted by Congress in aid of its enforcement." *Ledbetter v. Bailey*, (W. D. N. C. 1921) 274 Fed. 375.

Operation of distilleries.—It is said that this act operates as a repeal of the previous internal revenue acts governing the operation of distilleries. *U. S. v. Yugini*, (D. C. Ore. 1920) 266 Fed. 746.

d. Enumeration of Revenue Laws Held Not Repealed

The provisions of this act do not operate as a general repeal of the revenue laws. *U. S. v. Sacein Rouhana Farhat*, (S. D. Ohio 1920) 269 Fed. 33, wherein the court said:

"The Volstead Act was designedly made drastic in its provisions. The contention that the revenue laws relating to the manufacture and sale of liquors are repealed does not consist with the provisions of the act that its regulations for the manufacture of intoxicating liquors shall be construed to be in addition to existing laws, that the tax imposed by the revenue laws shall be continued, and that the laws relating to the manufacture or sale of intoxicating liquors shall be enforced. Section 9, title 3, by exempting industrial alcohol plants and bonded warehouses from the requirements of given sections, necessarily implies that manufacturers operating other kinds of liquor producing plants are not thus exempt. If the act repealed the revenue laws as an entirety, that section is superfluous. Such a conclusion is not permissible, if a construction can be legitimately found which will give force to and preserve all the language of the statute." In this case it was held that sections 3258, 3260 and 3279, were not inconsistent with the provisions of the Prohibition Act.

This section did not by implication repeal the provisions of the internal revenue act relative to the taxing of alcoholic liquors or the penalties denounced for violating them. *U. S. v. Freidericks*, (D. C. N. J. 1921) 273 Fed. 188, holding that this act did not repeal section 3296 R. S. [4 Fed. Stat. Ann. (2d ed.) 56] nor section 51 of the Act of August 27, 1894, [4 Fed. Stat. Ann. (2d ed.) 107] nor sections 600 and 604 [1919 Supp. 140, 143] of the Act of Feb. 24, 1919. The court said:

"Manifestly this act was not intended to prescribe the only rules which should govern the manufacture of and traffic in intoxicating liquor. Neither in title nor provision is there warrant for the contention that this act was to supplant in toto the earlier laws dealing with the general subject of manufacture of and traffic in intoxicating liquor. True, it was a prohibitory enactment; but the prohibitions did not go beyond those ordained by the Eighteenth Amendment, which were limited to the manufacture of and traffic in intoxicating liquor for beverage purposes. On the contrary, the act (sections 3, 6, and 12, title 2) contemplates the manufacture of and traffic in alcoholic liquors for nonbeverage purposes. In section 3 it is declared that all the provisions of the act were to 'be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.' And section 35 of the same title . . . gives legislative emphasis and sanction to the well-

supported canon of interpretation of statutes, viz. repeals by implication are not favored, and may be inferred only if the later statute is so repugnant to or inconsistent with the earlier one that it is clear that the legislative body must have so intended."

This act did not repeal section 3250 [4 Fed. Stat. Ann. (2d ed.) 19] of the Revised Statutes making it an offense to remove intoxicating liquor with an intent to deprive the government of the tax thereon. *U. S. v. One Cole Aero Eight Automobile*, (D. C. Mont. 1921) 273 Fed. 934.

This section did not repeal section 3251 of the Revised Statutes [4 Fed. Stat. Ann. (2d ed.) 19] imposing a tax on the manufacturer of distilled spirits. *Violette v. Walsh*, (D. C. Mont. 1921) 272 Fed. 1014.

In *U. S. v. Sohm*, (D. C. Mont. 1920) 265 Fed. 910, the defendants, indicted for alleged violations of R. S. sections 3258, 3260 and 3282 [4 Fed. Stat. Ann. (2d ed.) 24, 26, 44] regarding the manufacture and sale of intoxicating liquors, demurred and moved to quash the indictment on the ground that it charged no offense by reason of the repeal of such sections by this act. Answering this contention, the court said:

"Before the Eighteenth Amendment, prohibiting manufacture of and traffic in 'intoxicating liquors . . . for beverage purposes,' is an elaborate 'code' of federal law governing manufacture of and traffic in distilled spirits and other intoxicating liquors for beverage and other purposes, in the main to provide public revenue. In so far as provisions of this Code apply to and sanction spirits and liquors for beverage purposes only, they are rendered obsolete or repealed by the amendment.

"Subsequent to the amendment is the National Prohibition Act, to effectuate the amendment and also to govern manufacture and traffic in such spirits and liquors for nonbeverage purposes; this latter not only as incidental to prohibition, but also to provide public revenue.

"In title 2, § 35, the act expressly provides that 'all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws,' and in section 9, title 3, the act recognizes the continued existence of many enumerated sections of the Codes, including sections 3258, 3260, and provides these sections shall not apply to industrial alcohol plants only, though the commissioner may so apply them by regulations made by him.

"This express repeal in the act renders all rules of implied repeal inapplicable, demonstrates no implied repeal is intended. 'Expressio unius,' etc. See cases cited in 36 Cyc. 1081, and annual annotations.

"It follows that save for clear and unavoidable inconsistencies, both said Code and

the act, wherein their terms are applicable to spirits and liquors for nonbeverage purposes, are present law, the latter cumulative to the former, however cumbersome and confused the result may be.

"It may be observed that, if the act more lightly penalizes an offense identical as in the Code, the latter is repealed for inconsistency.

"In the act is nothing forbidding, as does section 3282 of the Code, making a mash fit for the production of spirits on premises other than a duly authorized distillery. Hence there is no inconsistency, section 3282 is not repealed, and the first count of the indictment, based thereon, states a public offense.

"It hardly needs be pointed out that, subject to the act, distilleries will continue to exist and mashes to be made, and now, as before, it is essential the latter be made only at the former duly authorized. The object of the act requires this as much as did the object of the Code.

"Section 3, title 2, of the act provides that intoxicating liquor for nonbeverage purposes may be manufactured, etc., 'only as herein provided.' But 'only as herein provided,' by virtue of section 35, includes the provisions of all consistent existing law, to which the act is but an addition.

"So, while said section 3 provides for permits from the Commissioner and in form by him prescribed, and for bonds in his discretion and in form by him prescribed, section 3258 of the Code, requiring registration in statutory form with the collector of stills set up and possessed (upon which section is based the second count of the indictment), and section 3260 of the Code, requiring a bond in statutory form (upon which section is based the third count of the indictment), are not inconsistent with the act, are not repealed, and the said counts state public offenses."

Sections 3258, 3281, and 3282 of the Revised Statutes are not repealed by this act. *U. S. v. Phillips*, (S. D. N. Y. 1920) 270 Fed. 281 [4 Fed. Stat. Ann. (2d ed.) 24, 41, 44].

Section 3258 of the Revised Statutes [4 Fed. Stat. Ann. (2d ed.) 24] relating to the registry of stills and section 3282 of the Revised Statutes [4 Fed. Stat. Ann. (2d ed.) 44] were not repealed by this act. *U. S. v. De Large*, (D. C. Neb. 1921) 269 Fed. 820. The court said: "Notwithstanding the fact that the greater number of cases cited have

held that these portions of the Revised Statutes are no longer in force, as applied to one who seeks to manufacture distilled liquor contrary to the Volstead Act, the conclusions reached in the case of *United States v. Sohm* appear to be the proper interpretation. The intent of Congress is the essential thing, and that intent is not left to conjecture. . . . It is obvious from a reading of the section that the prior internal revenue laws, so far as they provided for paying taxes or charges imposed on the manufacture or traffic in intoxicating liquor, were not entirely superseded, because it is expressly provided that a tax shall be assessed and collected from the person responsible for the illegal manufacture or sale in double the amount previously provided by law, but the payment of such a tax cannot be made in advance; nor does the payment give any right to manufacture or sell such liquor. It is also provided that all provisions of law that are inconsistent with the Volstead Act are repealed only to the extent of such inconsistency. There doubtless may be features of the prior revenue laws that are inconsistent with the Volstead Act, but there is no inconsistency in making it unlawful (section 25, tit. 2, Volstead Act) for one to possess property designed for the manufacture of liquor intended for use in violating that act and in also requiring the one possessing a still or distilling apparatus set up to file a statement seeking registration with the collector (section 3258, Rev. Stats.), or making it unlawful to make or ferment mash in any other premises than an authorized distillery (section 3282, Rev. Stats.).

"If the two offenses were combined in a single section, providing that it should be unlawful to possess property designed for the unlawful manufacture of intoxicating liquor and providing a penalty, and also providing that if one should so possess such property and should also fail to register a distilling apparatus with the collector, or should also possess the mash fit for distillation elsewhere than in an authorized distillery, he should be punished more severely, it would seem quite illogical to say that the two acts were contradictory, mutually destructive, or inconsistent."

Section 3296 of the Revised Statutes (4 Fed. Stat. Ann. (2d ed.) 79) was not repealed by this act. *U. S. v. Turner*, (W. D. Va. 1920) 266 Fed. 248.

JUDGMENTS

Vol. IV, p. 604, sec. 966. [First ed., vol. IV, p. 2.]

Interest in creditors' suit.—Interest in a creditors' suit brought by the United States on a judgment for a penalty recovered in a proceeding begun by criminal indictment is allowable only from the time when judgment was entered in the creditors' suit, since the original judgment does not fall within the terms of the only applicable federal statute, viz., this section, providing that interest shall be allowed on all judgments in civil causes. *Pierce v. U. S.*, (1921) 255 U. S. 398, 41 S. Ct. 365, 65 U. S. (L. ed.) —, *modifying and affirming* (C. C. A. 8th Cir. 1919) 257 Fed. 514, 171 C. C. A. 1.

Judgment for excess charges.—Interest is allowable on a judgment against a carrier for excess charges. *Wabash R. Co. v. Koenig*, (C. C. A. 8th Cir. 1921) 274 Fed. 909.

Vol. IV, p. 608, sec. 1. [First ed., vol. IV, p. 5.]

Effect of state statute.—Where a state statute provides that a judgment or decree of the United States District Court or of the state Supreme Court or chancery court or any state court of a different county shall not be a lien on defendant's property until enrolled in the office of the clerk of the Circuit Court of the county, it has been held that a judgment rendered in a federal court in that state is not a lien until so enrolled. *In re Jackson Light, etc., Co.*, (C. C. A. 5th Cir. 1920) 269 Fed. 223.

1918 Supp., p. 396, sec. 1.

Effect of repeal.—Regarding the effect of this repeal as necessitating the docketing of federal court judgments in the clerk's office of the state court of the county where the judgment was rendered, the court, in *In re Jackson Light, etc., Co.*, (S. D. Miss. 1919) 265 Fed. 389, said: "This case has been fully covered in the briefs and certificate of the referee, and the only new, or additional, view which presents itself to the court is with reference to the effect of the repeal of section 3 of the act of 1888, as amended by the act of 1895. Section 3 was repealed by the Act of August 23, 1916, the repealing act to become effective on January 1, 1917. 39 Stat. at Large, 531.

"It seems to be conceded by counsel for the judgment creditor that, under the act of 1888, he has no lien on any property outside of the county where the judgment was rendered; but it is claimed that in that county, to wit, Hinds county, the enrollment of the judgment in the office of the clerk of the United States District Court was sufficient to create a lien on all property of the defendant situated within that county. This

contention renders meaningless the Act of August 23, 1916, repealing section 3 of the Act of August 1, 1888, as amended by the Act of March 2, 1895. The courts must give effect to section 3, while in force, and attribute to Congress a substantial reason or motive for repealing the same. The said section 3 of the act of 1888 is as follows:

"Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the state of Louisiana in which the judgment * * * is rendered, in order that such judgment or decree may be a lien on any property within such county." 25 Stat. at Large, 357.

"By act approved March 2, 1895 (chapter 180, 28 Stat. at Large, page 813), the said section 3 was amended by an addition thereto which made its effectiveness conditioned upon the clerk of the United States court being required by law to have a permanent office and a judgment record open at all times for public inspection in the county or parish where the judgment or decree was rendered. As amended, section 3 reads as follows:

"That nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or the same parish in the state of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish." 28 Stat. at Large, 814.

"The Act of August 23, 1916, chapter 397, 39 Stat. at Large, 531, repealing section 3, is as follows:

"Section 1. [Docketing in State Court . . . Repeal of Statute.] That an act approved March second, eighteen hundred and ninety-five, entitled "An act to amend section three of an act entitled 'An act to regulate the liens of judgments and decrees of the courts of the United States,' approved August first, eighteen hundred and eighty-eight," be, and the same is hereby, repealed.

"Sec. 2. [Act When Effective.] That this act shall take effect on and after January first, nineteen hundred and seventeen."

"It seems very clear that, under section 3 of the act of 1888, it was not necessary to enroll the federal court judgment in the state circuit clerk's office of the county where the judgment was rendered if the clerk of the United States court had a permanent office and a judgment record open at all times for

public inspection. Section 3 obviated the necessity of such enrollment, but the repeal of section 3, by the act above quoted, which became effective January 1, 1917, rendered the same procedure as to a federal court

judgment necessary in the county where the judgment was rendered as was required in the other counties of the state in order to obtain a lien."

JUDICIAL OFFICERS

Vol. IV, p. 631, sec. 19. [First ed., vol. IV, p. 79.]

Historical.—"While the title of United States commissioner is no older than the act of 1896 (29 Stat. 184), they were then created to 'have the same powers and perform the same duties as are now imposed upon commissioners of the Circuit Courts, * * * and all [existing] acts and parts of acts applicable' to the former Circuit Court commissioners (except as to appointment and fees) were specifically made applicable to United States commissioners.

"Only a year earlier, in 1895, the Supreme Court had reviewed these acts in *United States v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273, and as it is well known to the older bar that the same men continued to perform the same duties after 1896, the effect of the statute of that year may be said to be no more than a change of title and of fee scale, plus the infusion of a supervisory power on the part of the Attorney General. For the essential nature, scope, and legal relation of the office one must look farther back.

"It does not seem useful to tabulate the numerous statutes giving special duties (e. g., matters of extradition) to commissioners, but their development as examining and committing magistrates is relevant to this motion. Since the Judiciary Act of 1789 (1 Stat. 91) every 'justice and judge of the United States' (in the original phrase) has had the power of ordering arrests and holding the accused to prison or bail. This is the essence of magistracy, and the power to commit implies and includes the power to examine and discharge.

"Considering the extent of country and the fewness of judges, the original act empowered practically every state magistrate, and especially justices of the peace, to act in holding offenders for the United States courts. The substance of this part of the old act became R. S. § 727, and is now Judicial Code, § 270.

"The early files of this court contain many commitments by local justices of the peace of the state of New York, and *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151, shows how that system worked (or did not) in revenue cases where search warrants were needed.

"It did not take long for experience to demonstrate the difficulty and inutility of

the borrowed and grudgingly given services of state officials, and in 1793 (1 Stat. 334) the Circuit Courts were authorized to appoint 'discreet persons learned in the law' to take bail in criminal causes.

"So far as I can discover, it was from this seed that 'commissioners' grew; the title was assumed, but was recognized by the act of 1817 (3 Stat. 350), which in enlarging the powers of the 'discreet persons' of 1793, speaks of the 'commissioners who now are or hereafter may be' appointed.

"Next after the original statute of 1789 the most important Judiciary Act of the first century of the republic was the statute of 1842 (5 Stat. 516), which in its first and second sections expressly gives to the commissioners of the Circuit Courts the powers of a justice of the peace in respect of 'arresting, imprisoning or bailing' offenders against laws of the United States, and the substance of this grant is now R. S. § 1014." *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

General powers and duties.—The commissioner is an officer of the court, whose services may be availed of or dispensed with at the option of the court itself. There is no legal obligation on the court to send any part of a case to a commissioner. *United States Willow Furniture Co. v. La Compagnie Générale Transatlantique*, (C. C. A. 2d Cir. 1921) 271 Fed. 184.

Courts in which commissioners sit.—Regarding the question of the court in which commissioners sit, the court said:

"No statute furnishes a direct reply. Undoubtedly the official when taking testimony in equity or assessing damages in admiralty, is sitting in the District Court. In my opinion, when exercising the power of issuing a warrant in extradition, he is not sitting in or holding any court, and, when considering under a special statute the status of an alleged Chinese laborer, he is holding a court of his own, which is by statute inferior to the District Court.

"Remembering that nothing but an act of Congress can make an inferior court of the United States, that no act makes a commissioner's court, and that by tradition an examining and committing magistrate, especially a justice of the peace, holds a court, I am compelled to the conclusion that, when a commissioner issues criminal process, including a search warrant, he does it in and as part of the proceedings of the District Court. But he does the act, not by virtue

of any grant of power to the court as such, but by grant directly to him, and it is the same power which is given by the same statutes, and given personally to Justices of the Supreme Court and Circuit and District Judges, each of whom may sit as magistrates, with the same and no other powers. The view that this entire matter of issuing a search warrant and then directing the return of what was seized thereunder is a District Court proceeding is confirmed by study of the nature and history of the case reported as *Veeder v. United States*, 252 Fed. 414, 164 C. C. A. 338, certiorari refused 246 U. S. 675, 38 Sup. Ct. 428, 62 L. ed. 933. There a District Judge issued the search warrant, held a hearing after seizure made, and refused to direct return of what was seized. A direct writ of error was then taken to the Circuit Court of Appeals, which reversed, whereupon the United States applied for a certiorari, challenging the right of the Circuit Court of Appeals to review—a proposition in my judgment clearly right, unless that which was reviewed and reversed was a final order or judgment of the District Court; for no grant to the Circuit Court of Appeals can be found giving it power to review orders of District Judges merely as such. They must speak for, in, and on behalf of the District Court, and it is the court's action that is reviewed." *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

United States commissioners as justices of the peace, see *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

Review of rulings.—A writ of error lies to the Circuit Court of Appeals from a commissioner's order directing the return of property seized under a search warrant. *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

Vol. IV, p. 651, sec. 824. [First ed., vol. IV, p. 90.]

"On a trial before a jury."—The word "trial" like the word "hearing" connotes a contest and certainly something more aggressive than the mere execution of a consent and therefore a verdict taken by consent is not a "trial before a jury" and the fee provided by this act for such a trial should not be allowed in the case of a verdict by consent. *Warner v. Liquid Carbonic Co.*, (N. D. Ga. 1921) 270 Fed. 294.

Vol. IV, p. 657, sec. 828. [First ed., vol. IV, p. 95.]

I. General matters.

XIV. Receiving, keeping and paying out money.

I. GENERAL MATTERS (p. 659)

Deposit to secure fees.—The right of the district court to make a rule requiring a

deposit to secure the clerk's fees in advance has been recognized and it is not subject to collateral attack on appeal. *King v. Weiss, etc., Mfg. Co.*, (C. C. A. 6th Cir. 1920) 266 Fed. 257, wherein the court said:

"Complaint is also made because the trial court enforced against the defendants the existing District Court equity rule, which requires a defendant to make a deposit to secure clerk fees in advance before his papers in defense may be filed. Such a question cannot be collaterally raised, on such an appeal as this, but must be brought to this court, if at all, only by some direct challenge. While the clerk is compelled to collect his fees at the time the services are performed, and while an advance deposit may be the only practicable method by which he can do so, yet, when we consider that the defendant is brought into court and compelled to defend, and that all services rendered generally in a case by the clerk are chargeable, in the first instance, against plaintiff and his cost deposit, it may well be that only a comparatively small deposit should be required from defendant. However, the power to make a rule on this subject rests with the District Court, and it is to be presumed that due weight has been given to all the considerations affecting the requirements embodied in this rule. If interested counsel or parties think otherwise, doubtless the District Court will entertain a direct application to modify the rule, and if this court has any reviewing power, it can then be invoked in some suitable manner."

XIV. RECEIVING, KEEPING AND PAYING OUT MONEY (p. 675)

Liberty bonds.—By virtue of section 1320 of the Revenue Act of 1919 (1919 Supp. Fed. Stat. Ann. p. 192) giving Liberty Bonds deposited in lieu of surety or sureties the same force and effect as "certified checks, bank drafts, post office money orders or cash" it is held that the clerk is entitled to his fee on bonds so deposited as in other cases for "receiving, keeping and paying out money." *McGovern v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 262.

Vol. IV, p. 678, sec. 829. [First ed., vol. IV, p. 107.]

V. Subpoenas.

XI. Keeping boats, vessels or other property.

V. SUBPOENAS (p. 684)

Subpoenas to witnesses not testifying.—There is no abuse of discretion in taxing as costs the fees and expenses of the marshal in serving subpoenas on witnesses who did not in fact testify where they were subpoenaed in good faith, their testimony being deemed material to the issue involved. *Kirby v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 391.

XI. KEEPING BOATS, VESSELS OR OTHER PROPERTY (p. 685)

Wharfage.—A marshal cannot include in his bill of costs an item for wharfage which he never paid nor authorized, and an attempt by a navigation company to collect its claim for wharfage by having the marshal include it as a disbursement in his bill of costs is improper and will not be allowed. *The St. Paul*, (C. C. A. 2d Cir. 1921) 271 Fed. 265.

Vol. IV, p. 774. [Attorney-general, special counsel, etc.] [First ed., 1909 Supp., p. 283.]

Power of special assistant.—As to the power of a special assistant, to file an information charging a violation of the Volstead Act it has been said that "the power to bring informations which charge crime and on which warrants of arrest issue is a great power, carrying with it possibilities of serious oppression, if improperly used. It involves the exercise of a quasi judicial discretion and the performance of duties widely different from those of an advocate in submitting a matter to the grand jury. The power is lodged in the United States Attorney (by statute as to certain crimes, R. S. § 1022) 2 Fed. Stat. Ann. (2d ed.) 675), and in the Attorney General. No statute au-

thorizes the delegation of it, except the Act of 1906 which limits the "delegation to such matters as are covered by special direction. Both by the statute, therefore, and by general principles of law, a delegation of this power, if intended, must be made in clear and precise terms, and not left to inference or implication; it is not conferred by authority to conduct grand jury proceedings." For these reasons a special assistant to the attorney general is not authorized to bring such informations, and where they are not submitted to or approved by the attorney general they are not legally brought. *U. S. v. Cohen*, (D. C. Mass. 1921) 273 Fed. 620.

Presence of stenographer within grand jury room.—A plea in abatement to an indictment on the ground that a stenographer was present in the grand jury room during the taking of the testimony must affirmatively allege in order to raise an issue, that he was not specifically appointed attorney to conduct the proceeding before the grand jury, or to assist therein, for his presence in the grand jury room at such a time does not negative his right to be present, even as a stenographer, since under this Act the Attorney General or any officer in the Department of Justice, or an attorney specially appointed, may, in certain circumstances, conduct any kind of legal proceedings, including grand jury proceedings. *U. S. v. Silverthorne*, (W. D. N. Y. 1920) 265 Fed. 859.

JUDICIARY

Vol. IV, p. 821, Jud. Code, sec. 9. [First ed., 1912 Supp., p. 134.]

Power of court over judgments and orders after end of term.—*In general.*—The federal authorities broadly hold that, after the term expires at which a case is tried and judgment entered, the trial court cannot set aside or alter its judgment, except as permitted by standing rule or provided for by special order. *Harley v. U. S.*, (C. C. A. 4th Cir. 1920) 269 Fed. 384, holding that there was neither standing rule nor special order, and consequently that an order allowing further time for setting the bill of exceptions did not and could not serve to retain jurisdiction to hear a motion for a new trial.

Vol. IV, p. 832, Jud. Code, sec. 21. [First ed., 1912 Supp., p. 137.]

Affidavit strictly construed.—To the same effect as the original annotations, see *Keown*

v. Hughes, (C. C. A. 1st Cir. 1920) 265 Fed. 572.

Sufficiency of affidavit.—*In general.*—The provision of this section to the effect that "such affidavit shall state facts and reasons for the belief that such bias or prejudice exists" requires the plaintiff, under oath, at least to assert facts from which a sane and reasonable mind may fairly infer bias or prejudice. *Keown v. Hughes*, (C. C. A. 1st Cir. 1920) 265 Fed. 572.

Affidavit on information and belief.—An affidavit upon information and belief satisfies the provisions of this section. *Berger v. U. S.*, (1921) 255 U. S. 22, 41 S. Ct. 230, 65 U. S. (L. ed.) —.

Affidavit based on prejudice resulting from place of nativity.—An affidavit by defendants charged with violating the Espionage Act of June 15, 1917, which avers upon information and belief that the federal district judge before whom they are to be tried has a personal bias or prejudice against them because of the German nativity of some of such de-

fendants, and that the grounds for such belief are certain hostile and derogatory utterances of such judge concerning the attitude of German-Americans during the progress of the World War, and which is accompanied by a certificate of defendants' counsel that the affidavit is made in good faith, satisfies the requirements of this section. *Berger v. U. S.*, (1921) 255 U. S. 22, 41 S. Ct. 230, 65 U. S. (L. ed.) —.

Effect of filing affidavit.—The filing of an affidavit of personal bias or prejudice of the judge who is to preside at the trial, conformably to this section, leaves such judge no duty other than to pass upon the legal sufficiency of the affidavit (subject to appellate review) to show the objectionable inclination or disposition, and, if legally sufficient, compels his retirement from the case without passing upon the truth or falsity of the facts affirmed. *Berger v. U. S.*, (1921) 255 U. S. 22, 41 S. Ct. 230, 65 U. S. (L. ed.) —, wherein the court said:

"There is no ambiguity in the declaration, and seemingly nothing upon which construction can be exerted,—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed, and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and, in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.

"But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the 'affidavit shall state the facts and reasons for the belief' of the existence of the bias or prejudice. It is urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge, and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose; that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and less extensive use, as pointed out by Judge Meek in *Henry v. Spear*, *supra*. (120 C. C. A. 207, 201 Fed. 889.) It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits. Of course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

Vol. IV, p. 842; Jud. Code, sec. 24, par. first. [First ed., 1912 Supp., p. 139.]

I. Jurisdiction in general.

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XIII. Suits between citizens of state and foreign state, citizen or subject.

1. Citizen of state and citizen or subject of foreign state.

- a. In general.

XVI. Suits by assignees.

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- b. Application with regard to persons.

8. Matters relating to jurisdiction.

XVIII. Ancillary proceedings.

2. Jurisdiction in general.

3. Particular proceedings and matters.

- d. Enforcement of liens.

- j. Receivers.

I. JURISDICTION IN GENERAL

1. Definition and Nature (p. 845)

Territorial extent.—"As a general proposition a District Court of the United States has jurisdiction throughout and territorially coextensive with its district, and that a mere multiplication of places of holding court, or the creation of divisions, does not affect this, except to the extent that it may be expressly limited, nor that it is to be regarded as one and the same tribunal, whether sitting in one place or division or in another. * * * Nor is there any question that in the practical exercise and administration of that jurisdiction the court or judge may competently do in one division or at one seat things pertaining to the business in another such as making orders, deciding motions, etc., and that it may for proper reasons transfer cases for trial and disposition from one division of the district to another." *Gopcevic v. California Packing Corp.*, (N. D. Cal. 1921) 272 Fed. 994.

3. Limited Jurisdiction of Courts (p. 847)

To the same effect as the second paragraph of the original annotation, see *U. S. v. Seneca Nation of New York Indians*, (W. D. N. Y. 1921) 274 Fed. 946.

Cases at law and in equity.—The limited or conferred jurisdiction of the district court applies to cases both at law and in equity. *Farmers', etc., Bank v. Federal Reserve Bank*, (W. D. N. C. 1921) 274 Fed. 235.

In a suit to obtain an injunction against the enforcement of rates fixed by a state public utility commission the power of the federal court is limited to an adjudication as to the right to injunctive relief. *St. Joseph R., etc., Co. v. Public Service Commission*, (W. D. Mo. 1920) 268 Fed. 267.

5. Necessity for Pleading Jurisdiction (p. 847)

To the same effect as the original annotation, see *Danks v. Gordon*, (C. C. A. 2d Cir. 1921) 272 Fed. 821; *Farmers', etc., Bank v. Federal Reserve Bank*, (W. D. N. C. 1921) 274 Fed. 235.

The jurisdiction of the federal court is to be determined on the statement by the plaintiff in his complaint. *Northwestern Bell Telephone Co. v. Hilton*, (D. C. Minn. 1921) 274 Fed. 384.

"It is, of course, essential in federal procedure that the right of a plaintiff to institute an action and the jurisdiction of the court to hear it shall appear on the face of the bill by direct and positive averment. * * * It is equally fundamental that a federal appellate court will of its own motion deny its jurisdiction, and that of the court from which the record comes, unless jurisdiction affirmatively appears, although neither party raise the point in the argument." *Garvin v. Kogler*, (C. C. A. 3d Cir. 1921) 272 Fed. 442.

8. Effect of State Legislation (p. 848)

In general.—"It is well settled that the pendency of a suit for the same cause of action in a state court furnishes no ground for plea in abatement to a subsequent action brought by the same plaintiff against the same defendant in a court of the United States, sitting in the same state." *Central Iron, etc., Co. v. Massey*, (C. C. A. 5th Cir. 1920) 268 Fed. 300.

The fact that other courts have concurrent jurisdiction, or if that also be the fact, that the Public Service Commission of a state has a like jurisdiction, affords no grounds for the district court to refuse to grant relief where no other tribunal has exercised its jurisdiction. *Carpenter Steel Co. v. Metropolitan Edison Co.*, (E. D. Pa. 1921) 270 Fed. 255.

II. SUITS OF CIVIL NATURE AT COMMON LAW OR EQUITY

1. In General (p. 849)

While the jurisdiction of the District Court is statutory it extends by express provision of statute to matters at common law and in equity. *Philadelphia, etc., R. Co. v. Berg*, (C. C. A. 3d Cir. 1921) 274 Fed. 534.

4. At Law and Equity

c. "In Equity" (p. 853)

Fraud.—It is within the jurisdiction of the federal courts of equity to grant relief against fraud and an intentional discrimination in taxation is fraudulent. *Grammill Lumber Co. v. Rankin County*, (S. D. Miss.) 274 Fed. 630.

State legislation.—The blending in a state statute of legal and equitable remedies will not affect the equitable jurisdiction of the federal court. *Grammill Lumber Co. v. Rankin County*, (S. D. Miss.) 274 Fed. 630.

6. Administration or Probate (p. 856)

Administration.—To the same effect as the first paragraph of the original annotation, see *City Nat. Bank v. Slocum*, (C. C. A. 6th Cir. 1921) 272 Fed. 11.

Jurisdiction as to decedents' estates in general.—"The High Court of Chancery in England, at the time of the passage of the Judiciary Act of 1789 (1 Stat. 73, c. 20), had jurisdiction of the adjudication and enforcement of trusts. The jurisdiction in equity of the courts of the United States, derived from the federal Constitution and statutes, over controversies between citizens of different states which involve the requisite amounts, is like unto that of the High Court of Chancery of England in 1789, and it includes the adjudication and the enforcement of that adjudication of the claims of citizens of other states as heirs, legatees, and as creditors (where the proper diversity of citizenship exists and the requisite amounts are involved) to interests in estates of decedents in the possession of administrators, executors, or other parties engaged in the administration thereof under the legislation of the states establishing courts of probate and giving them jurisdiction of such administration.

"This jurisdiction of the federal courts, it is true, does not include the power to draw to them administration of estates as such, or to take from the proper officials of the probate court, during their administration of the estates in due course, the possession of the property necessary for that administration. But it confers the power and imposes the duty upon the federal courts sitting in equity to hear, determine, adjudge, and to enforce their adjudications of the claims of the citizens of other states, who invoke their jurisdiction by proper suits to interests as heirs, legatees, distributees, or creditors in estates in possession of officers of probate courts of states other than those of the residence of the claimants engaged in the administration thereof, although such officers may have obtained their possession before such suits were commenced in the federal courts." *Harrison v. Moncravie*, (C. C. A. 8th Cir. 1920) 264 Fed. 776.

Construction of will.—A district court may construe a will but can not determine its contents. *City Nat. Bank v. Slocum*, (C. C. A. 6th Cir. 1921) 272 Fed. 11.

VII. AMOUNT IN CONTROVERSY

1. In General (p. 862)

The formal allegation as to the amount in controversy does not bind the court when the bill or declaration contradicts it. *Marcus Brown Holding Co. v. Pollak*, (S. D. N. Y. 1920) 272 Fed. 137.

3. Cases Requiring Jurisdictional Amount

b. Diverse Citizenship (p. 864)

To the same effect as the first paragraph of the original annotation, see *O'Brien v. Lashar*, (C. C. A. 2d Cir. 1921) 274 Fed. 326.

c. Federal Question Involved (p. 864)

In general.—To the same effect as the original annotation, see *Ingrain Day Lumber*

Co. v. United States Shipping Board Emergency Fleet Corp., (S. D. Miss. 1920) 267 Fed. 283.

4. Necessity of Matter in Dispute Having Pecuniary Value

a. In General (p. 865)

Where the jurisdiction is dependent on the amount in controversy the matter in dispute must be money or some right, the value of which can be calculated or ascertained in money. *Farmers', etc., Bank v. Federal Reserve Bank*, (W. D. N. C. 1921) 274 Fed. 235.

e. Miscellaneous (p. 865)

Good will.—The substantial value of one's property right in the good will in a brand of goods manufactured by him may be sufficient in amount to give jurisdiction. *Royal Baking Powder Co. v. Emerson*, (C. C. A. 8th Cir. 1920) 270 Fed. 429.

5. Ascertainment of Value of Matter in Dispute (p. 865)

Injunction—Unfair Competition.—In a suit to enjoin unfair competition, a wrong which affects the petitioner's good will in business, the value of such good will may be looked to in determining the amount involved. *Coca-Cola Co. v. Brown*, (N. D. Ga. 1921) 274 Fed. 481.

Money demand.—In *Dillon v. Lineker*, (C. C. A. 9th Cir. 1920) 266 Fed. 688, it appeared that the plaintiff made a loan to the defendant of \$2,850 which money she had to borrow from a third person to whom she executed a note and a trust deed of real estate owned by her subject to a life estate in her father. The defendant agreed to cause said debt and interest under the plaintiff's obligation to be paid and discharged and to indemnify and save her harmless from any loss or damage in connection with said note and trust deed, which agreement was not performed and plaintiff sued for damages for breach of such agreement in consequence of which she lost her property. It was held that the required jurisdictional amount was involved.

Quieting title.—The value of the land mortgaged and not the amount of the mortgage is the amount in controversy in a suit to cancel the mortgage and remove a cloud on the title since where the value of the land is over \$3000 the federal court has jurisdiction although the amount due under the mortgage is less than the required jurisdictional amount. *Frontera Transp. Co. v. Abaunza* (C. C. A. 5th Cir. 1921) 271 Fed. 199.

8. Pleading Amount by Plaintiff

a. Necessity and Sufficiency (p. 877)

Injunction.—An allegation in a bill for a mandatory injunction "that the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars"

has been held sufficient. *Du Pont de Nemours v. Temple*, (C. C. A. 4th Cir. 1921) 272 Fed. 456.

VIII. SUITS ARISING UNDER CONSTITUTION, LAWS OR TREATIES

1. *In General*

d. Jurisdiction Independent of Merits (p. 884)

Jurisdiction not defeated by ultimate result.—A federal court has jurisdiction if a claim of a right arising under the federal Constitution is made in good faith and is not frivolous even though in the end it may turn out to be erroneous. *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

j. Original Cases of Mandamus (p. 887)

"In federal jurisprudence mandamus is not available to establish or complete an individual right, even though the right may arise under the Constitution and laws of the United States. It is regarded as auxiliary or assistant to a jurisdiction already existing; not a jurisdiction in the general sense, but one that is actually afoot and is being exercised. Hence it is that, unless specifically authorized by Congress, a right under the Constitution or laws of the United States may not be enforced by an original action in mandamus. The general conferring of jurisdiction of cases arising under such Constitution and laws is not of itself sufficient." *In re Higdon*, (E. D. Mo. 1920) 269 Fed. 150.

The Corrupt Practices Acts give no remedy by original action in mandamus to those injured. *In re Higdon*, (E. D. Mo. 1920) 269 Fed. 150, wherein the court said:

"Enforcement is by indictment and trial in the customary way. No remedy by original action in mandamus is given those injured. The proceeding here is neither an inquiry by a grand jury nor the trial of a criminal case under those acts. Though Congress might provide for federal supervision of all elections, primary, general, and special, relating to nomination and election to office under the Constitution and laws of the United States, and provide for enforcement thereof by mandamus, or any other suitable remedy, it has not done so."

IX. SUITS ARISING UNDER CONSTITUTION.

1. *In General* (p. 905)

Rule stated.—"It might be thought that, since every one is bound to know the law, a claim of unconstitutionality which was based upon mere application of legal principles to the conceded facts, would not support the federal jurisdiction after the claim had been found to be erroneous; but the cases seem to recognize no distinction between questions of constitutionality dependent on disputed facts and those dependent on mere observation of the state laws." *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

"When the existence of a federal question through a claim of unconstitutionality determines the jurisdiction of the federal court, the same principles must apply * * * whether the jurisdiction is invoked by original pleading or by removal petition. In either case, the prima facie jurisdiction of the state court is to be ousted by that of another tribunal which, for this purpose and to this extent, is dominant. The application of the same principles to both these situations was approved in *Missouri Ry. v. Missouri Commissioners*, 183 U. S. 53, 59, 22 Sup. Ct. 18, 46 L. ed. 78." *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

5. Violation of Due Process Clause (p. 918)

State taxation in violation of federal Constitution.—A bill to restrain the collection of a tax imposed by a state statute which states a case of rights arising under the Fourteenth Amendment to the federal Constitution is within the jurisdiction of a federal court. *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

X. SUITS ARISING UNDER LAWS OF UNITED STATES

1. *General Rules*

a. Substantial Controversy Necessary (p. 922)

Rule stated.—"It is, of course, well settled that, if the result of a suit depends upon the construction and effect of a federal statute, such a suit arises under the laws of the United States, within the meaning of the constitutional provision conferring jurisdiction upon the federal courts in such cases. . . . It is equally well settled that, where the plaintiff in a case plants a claim for relief upon a federal law, and such claim is apparently made in good faith, is based upon real and substantial grounds, and is not so unreasonable and wholly destitute of merit as to be merely frivolous and colorable, such a case presents a federal question within the general jurisdiction of the federal court, irrespective of the presence or absence of diversity of citizenship." *Lucking v. Detroit, etc., Nav. Co.*, (E. D. Mich. 1921) 273 Fed. 577.

"A suit arises under a law of the United States whenever its correct solution depends on the construction of that law, and the right set up by a party may be defeated by one construction or sustained by the other." *Accardo v. Fontenot*, (E. D. La. 1920) 269 Fed. 447.

Insufficient allegations in bill.—Federal jurisdiction of a cause as presenting a federal question is not supported by allegations in a bill that are much too casual and meager to give serious color to the claim that the cause of action is one arising under the laws of the United States, and where the contention is plainly an afterthought, not in the mind of the author of the bill.

Niles-Bennet-Pond Co. v. Iron Moulders' Union, etc., (1920) 254 U. S. 77, 41 S. Ct. 39, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 7th Cir. 1918) 258 Fed. 408, 169 C. C. A. 424.

4. Suit by or Against Federal Corporation c. Other Federal Corporations (p. 925)

The Emergency Fleet Corporation being created under the Code of District of Columbia and being regarded as a separate entity notwithstanding all its stock is owned by the United States, a suit against it for more than the jurisdictional amount may be brought in the district court as one arising under the laws of the United States. American Cotton Oil Co. v. U. S. Shipping Board Emergency Fleet Corp., (E. D. La. 1921) 270 Fed. 296.

Federal reserve bank.—A suit against a corporation incorporated under the laws of the United States, to wit, a federal reserve bank, is one arising under those laws, within the meaning of this section, defining the original jurisdiction of the federal district courts. American Bank, etc., Co. v. Federal Reserve Bank, (1921) 256 U. S. —, 41 S. Ct. 499, 65 U. S. (L. ed.) —, *reversing on* other grounds (C. C. A. 5th Cir. 1920) 269 Fed. 4.

28. Laws Relating to Commerce (p. 939)

Suit to restrain discontinuance of service.—A suit to restrain a carrier from discontinuing the operation of steamers over a certain route on the ground that the proposed discontinuance by the defendant of the operation of its steamers over the route referred to would be a violation of the Interstate Commerce Act, presents a case arising under the laws of the United States. Lucking v. Detroit, etc., Nav. Co., (E. D. Mich. 1921) 273 Fed. 577. The court said:

"Considering, then, these provisions of the statute in connection with the allegations in the bill of complaint to the effect that in the conduct of its business as a common carrier the defendant 'has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and property, partly by railroad and partly by water, from various ports and points on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers,' and in view of the allegations in the bill as to the interstate character of the commerce carried by the defendant over its various routes, I cannot avoid the conclusion that plaintiff has stated a claim for relief based upon a federal law, and that such claim is not so unsubstantial and unreasonable as to be frivolous and merely colorable. The bill raises, in my opinion, a real and substantial federal question, which it is the duty of this court to consider and decide. It follows that the objection based upon the supposed lack

of jurisdiction of the court to entertain this suit must be overruled."

A suit in equity against a railroad company and the Director General of Railroads to restrain the threatened action of the defendants to discontinue service to and from the siding at the plant of the plaintiffs, used almost entirely in shipping products of the plaintiff in interstate commerce, is within the jurisdiction of the District Court and the plaintiffs are not required to apply to the Interstate Commerce Commission inasmuch as that body does not have jurisdiction over the subject-matter involved in the controversy. Hines v. Henaghan, (C. C. A. 4th Cir. 1920) 265 Fed. 831. To same effect, see Hines v. Atlantic Refining Co., (C. C. A. 4th Cir. 1920) 265 Fed. 839.

31. Federal Employer's Liability Act (p. 940)

Applicability of act.—The question whether the Federal Employer's Liability Act is applicable to railroads in Porto Rico and excludes the application of the local Workmen's Compensation Act is one arising under the laws of the United States. Camunas v. Porto Rico R., etc., Co., (C. C. A. 1st Cir. 1921) 272 Fed. 924.

35. Suit Involving Federal Farm Loan Bonds [new]

A bill filed by a stockholder to enjoin the corporation from investing the funds of such corporation in farm loan bonds issued under the authority of the Federal Farm Loan Act of July 17, 1916, as amended by the Act of January 18, 1918, on the ground that these acts were beyond the constitutional power of Congress, and that the securities issued thereunder were consequently of no validity, sets forth a cause of action arising under the federal Constitution or laws of which a federal district court has jurisdiction under Judicial Code, § 24, without diversity of citizenship, and from the decree of the district court dismissing the bill a direct appeal lies to the Federal Supreme Court. Smith v. Kansas City Title, etc., Co., (1921) 255 U. S. 180, 41 S. Ct. 243, 65 U. S. (L. ed.) —.

XII. DIVERSE CITIZENSHIP

1. In General (p. 942)

"A controversy is not between citizens of different states so as to give jurisdiction to the federal courts unless all the persons on one side of it are citizens of different states from all the persons on the other side. Gage v. Garraher, 154 U. S. 656, 14 Sup. Ct. 1190, 25 L. ed. 989; Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 30 L. ed. 70. Where one or more of the complainants and one or more of the respondents are citizens of the same state, this is fatal to the jurisdiction of the court if the jurisdiction rests

simply on the ground of diversity of citizenship." *Danks v. Gordon*, (C. C. A. 2d Cir. 1921) 272 Fed. 821.

3. *State as Citizen* (p. 944)

A state cannot be made a party defendant to a suit in a court of the United States by a private litigant. *U. S. Mortg., etc., Co. v. Missouri, etc., R. Co.*, (C. C. A. 5th Cir. 1921) 272 Fed. 458.

4. *Citizenship of Corporation* (p. 945)

Doing business, etc., in another state.—Foreign corporation held to be "doing business" within the state and subject to service of process, see *Cutler v. Cutler-Hammer Mfg. Co.*, (D. C. Mass. 1920) 266 Fed. 388.

11. *Several Parties Plaintiff or Defendant* (p. 952)

To the same effect as the first paragraph of the original annotation, see *Chipman v. West United Verde Copper Co.*, (D. C. Del. 1920) 271 Fed. 91; *Hodgman v. Atlantic Refining Co.*, (D. C. Del. 1921) 274 Fed. 104.

Class suits.—The jurisdiction of the federal courts over the subject-matter of class suits, is limited to cases wherein the parties are purely interstate. *Supreme Tribe of Ben Hur v. Cauble*, (D. C. Ind. 1920) 264 Fed. 247.

12. *Arrangement of Parties as to Adverse Interest* (p. 954)

In general.—Where the jurisdiction of the court is founded only on the fact that the suit is between citizens of different states and both defendants are alleged to have engaged in the challenged transaction, and one of them takes of record a position antagonistic to that of the plaintiffs, the latter may not, for jurisdictional purposes, be realigned, or regarded otherwise than as a defendant. *Hodgman v. Atlantic Refining Co.*, (D. C. Del. 1921) 274 Fed. 104.

The mere fact that a corporation of one state has the same vice-president as a corporation of another state does not show of itself such an identity of interest between the two corporations as will defeat jurisdiction of a cross-bill filed by one against the other, such jurisdiction being based on diversity of citizenship. *Quinlivan v. Dail-Overland Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 56.

In *Gable v. Vonnegut Machinery Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 86, the Vonnegut Machinery Company, which was an Indiana corporation, doing business in that state, claiming to have contracts with a tool company, an Ohio corporation, for the manufacture and sale of a large amount of machinery, whose manufacture and delivery were interfered with by the tool company's strike, filed its bill in equity in the court below. The bill alleges that plaintiff "for many years has been and is now the agent of the defendant Tool Company in that part

of the state of Indiana above described, and it has built up and now has and enjoys a large and extensive business in buying, selling, and dealing in machines and machinery, and particularly a large and profitable business in buying, selling, and dealing in presses, tools and equipment manufactured by the Tool Company." The court held that there was an identity of interest requiring an alignment of both corporations as plaintiffs for purposes of jurisdiction.

14. *Real and Nominal Parties* (p. 958)

Stockholders' suits.—Stockholders of a corporation in whose behalf a bill against the corporation is filed by other stockholders, but who do not join in exhibiting the bill are not parties within the contemplation of equity rule 25, and the jurisdiction of the court is dependent on the citizenship of the parties actually suing and not on that of the other members of the class in whose behalf the suit is brought. *Doan v. Consolidated-Progressive Oil Corp.*, (D. C. Del. 1920) 271 Fed. 12.

15. *Indispensable Parties* (p. 960)

In general.—To the same effect as the first paragraph of the original annotation, see *Jennings v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 399.

Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience are regarded as indispensable parties. *Consolidated Textile Corp. v. Dicky*, (C. C. A. 5th Cir. 1921) 269 Fed. 942.

Indispensable parties are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, (1855) 17 How. 130, 15 U. S. (L. ed.) 158; *Commonwealth Trust Co. v. Smith*, (C. C. A. 9th Cir. 1921) 273 Fed. 1.

It is only the absence of indispensable parties which defeats the jurisdiction of a United States court in equity. *U. S. Mortg., etc., Co. v. Missouri, etc., R. Co.*, (C. C. A. 5th Cir. 1921) 272 Fed. 458.

The test of indispensability is not whether the decree is bound to injuriously affect the rights of the absent party; it is enough that such absence may "leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience." *Rogers v. Penobscot Min. Co.*, (C. C. A. 8th Cir. 1907) 154 Fed. 606; *Davis v. Henry*, (C. C. A. 6th Cir. 1920) 266 Fed. 261.

A corporation completely controlled by another corporation through stock ownership and common officers is an indispensable party to a suit by the dominant corporation to enjoin striking former employees of the subsidiary corporation from molesting workmen employed by the latter corporation to take the places of the strikers, upon the ground that the petitioning corporation had contracts with such subsidiary corporation, the performance of which was delayed by such interference; and the identity of interest of the two corporations requires that the subsidiary corporation be aligned on the side of the petitioner, where its interest lies, with the result that if the subsidiary corporation and the individual defendants are citizens of the same state, jurisdictional diversity of citizenship disappears. *Niles-Bement-Pond Co. v. Iron Moulders' Union, etc.*, (1920) 254 U. S. 77, 41 S. Ct. 39, 65 U. S. (L. ed.) — (affirming (C. C. A. 6th Cir. 1918) 258 Fed. 408, 169 C. C. A. 424), wherein the court said:

"There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not, but a rule early announced and often applied by this court is sharply applicable to the case at bar. In *Shields v. Barrow*, 17 How. 130, 139, 15 L. ed. 158, 160, this language—quoted with approval in *Barney v. Baltimore*, 6 Wall. 280, 284, 18 L. ed. 925, 826, and again in *Waterman v. Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, 48, 54 L. ed. 80, 86, 30 Sup. Ct. Rep. 10—was used to describe parties so indispensable that a court of equity will not proceed to final decision without them, viz:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent, with equity and good conscience."

"The case we are considering is essentially one on the part of the petitioner to protect from interference by striking former employees of the Tool Company, the contract which that company had with the men employed by it to take their places. Petitioner's claim of right, the validity of which we are not called upon to determine, is rested wholly upon the contract of the Tool Company with its employees, and the character and construction of that contract of employment must inevitably be passed upon in any decision of the case; and, obviously, if the petitioner should fail in such a suit as this, with the Tool Company not a party, any decree rendered would not prevent a relitigating of the same questions in the same or in any other proper court, and it would settle nothing."

"Thus, if the Tool Company be considered

as having any corporate existence whatever separate from that of the petitioner, it must have an interest in the controversy, involved in such a case as we have here, of a nature such that a final decree could not be made without affecting that interest, and perhaps not without leaving the controversy in a condition wholly inconsistent with that equity which seeks to put an end to litigation by doing complete and final justice; and therefore it must be concluded that it was an indispensable party, within the quoted long established rule."

Receiver.—Where an attempt is made to take property out of the receiver's possession, then he is a proper party to litigation, and where relief is sought against his acts as such receiver he is the proper party litigant. But where the litigation affects the rights of parties in property not in his hands, or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party, to such litigation. *U. S. Mortg., etc., Co. v. Missouri, etc., R. Co.*, (C. C. A. 5th Cir. 1921) 266 Fed. 497.

Suit to cancel pooling agreement.—Where it is alleged that the purpose of a voting pool consisting of a majority of the stockholders of a corporation was the appointment of one of them as sales agent of the corporation; in a suit to cancel the agreement and enjoin the appointment, it has been held that such person is an indispensable party. *Consolidated Textile Corp. v. Dickey*, (N. D. Ga. 1920) 266 Fed. 587.

Suit to cancel railroad leases.—In a suit to cancel railroad leases a state is not an indispensable party on the ground that if the same are abrogated, in a suit between the parties thereto, these parties become liable to a suit by the state under her laws governing the relations between railroad corporations and the state. Nor is a receiver of another company which is the holder of bonds of the lessor company an indispensable party on the ground that a part of the contract between the lessor and lessee is that the lessee shall pay the interest on said bonds, the payment to be made directly to the bondholders, who are made appointees to receive the same. *U. S. Mortg., etc., Co. v. Missouri, etc., R. Co.*, (C. C. A. 5th Cir. 1921) 272 Fed. 458.

Suit by grantee of oil, gas and mineral rights.—A grantor of his oil, gas and mineral rights in certain lands who has an interest in the profits made and a right of re-entry on condition broken is an indispensable party plaintiff to a suit by the grantee to enjoin third parties from resisting or contesting the complainant's right of entry and use of certain of the premises conveyed. *Associated Oil Co. v. Miller*, (C. C. A. 5th Cir. 1920) 269 Fed. 16.

Dismissal as to dispensable parties.—In the determination of the jurisdiction of the

national courts indispensable parties only should be considered, because all others may be dismissed or disregarded, if their presence would oust the jurisdiction of the court or restrict the right of the plaintiff. Where the court has jurisdiction of the subject-matter and the parties, the bill may be dismissed as to any defendant who is not an indispensable party to the suit and retained as to other defendants. *Jennings v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 399.

If there is any part of the relief sought as to which a person who resides in another state is not an indispensable party the bill will be retained for that purpose. *Consolidated Textile Corp.*, (C. C. A. 5th Cir. 1921) 269 Fed. 942.

17. *Representative Parties* (p. 962)

Rule stated.—To the same effect as the original annotation, see *New York Evening Post Co. v. Chaloner*, (C. C. A. 2d Cir. 1920) 265 Fed. 204; petition for certiorari dismissed, (1920) 252 U. S. 591, 40 S. Ct. 396, 64 U. S. (L. ed.) 731. See also (S. D. N. Y. 1919) 260 Fed. 335.

18. *Interveners and Substituted Parties* (p. 963)

Intervention of resident parties.—The jurisdiction of a federal district court of a suit against a fraternal benefit association and its officers, all residents and citizens of the state, brought and prosecuted by a large number, all nonresidents, of a class of benefit certificate holders, for the benefit of all the members of the class, could not have been defeated by the intervention as plaintiffs of other members of the class, who were citizens of the same state as were defendants. *Supreme Tribe of Ben-Hur v. Cauble*, (1921) 255 U. S. 356, 41 Sup. Ct. 338, 65 U. S. (L. ed.) —, reversing (D. C. Ind. 1920) 264 Fed. 247.

XIII. SUITS BETWEEN CITIZENS OF STATE AND FOREIGN STATE, CITIZEN OR SUBJECT

1. *Citizen of State and Citizen or Subject of Foreign State*

a. In General (p. 971)

A United States court is not deprived of its jurisdiction of a suit to annul a mortgage brought by a citizen of a state against a citizen of a foreign country found in the state, because of the fact that the land subject to the mortgage is located in the foreign country. *Frontera Transp. Co. v. Abaunza*, (C. C. A. 5th Cir. 1921) 271 Fed. 199.

XVI. SUITS BY ASSIGNEES

7. *Applicability*

b. Application with Regard to Persons (p. 982)

Notes payable to broker.—Where notes issued by a county were made payable to one who was employed as a mere broker and

agent to sell the notes and who never advanced any money or credit on them or became at any time a creditor of the county, one who purchased such notes from the broker, though in form an assignee, is in substance an original creditor and as such can maintain a suit against the county. *Commercial Trust Co. v. Laurens County*, (S. D. Ga. 1920) 267 Fed. 901.

8. *Matters Relating to Jurisdiction* (p. 984)

Actual relation of parties controls.—In *Commercial Trust Co. v. Laurens County*, (S. D. Ga. 1920) 267 Fed. 897, a bank executed under its corporate seal a paper as follows:

"The county of Laurens, Georgia, having duly executed its notes aggregating in the sum of seventy-five thousand dollars, under and by virtue of a resolution adopted by the board of commissioners of roads and revenues of said county at regular meeting on January 10, 1918, said notes being executed by the treasurer and commissioners of Laurens county, Georgia, and bearing date of January 10, 1918, and payable to the order of Frank Scarboro Company on December 31, 1918, we hereby agree to honor and charge only warrants of the county of Laurens, Georgia, as drawn by the proper officer of said county, against the proceeds of these notes, and hold all of said warrants, uncanceled, subject to the order of Frank Scarboro Company, or the holder or holders of said notes, until the notes as above mentioned and referred to are fully paid and satisfied, after which, on presentation to us of the notes bearing evidence of due and proper cancellation, we will then cancel and turn over to the proper officer all of said warrants."

The plaintiff purchased of the Scarboro Company \$30,000 of the notes which were accompanied with copies of the above agreement, relying on the faith thereof, and the proceeds of the notes were deposited in the bank and were used as agreed in taking up warrants of the county. It was held that a federal court of equity had jurisdiction of a suit against the county to enforce its liability on the warrants. The court said:

"The plaintiff is suing only in respect of the county warrants, which were never in the name of, nor owned by, Scarboro Company. Its claim is a direct one against the county. The undertaking of the bank as to the payment of the money was not addressed to Scarboro Company, more than to any other holder of the notes, and was never transferred to plaintiff, nor is it the basis of the suit. It is only evidence in the case to define the relation between plaintiff and the bank, and to show the intent with which the warrants were taken up. It is likewise immaterial that this undertaking was never entered on the minutes of the county commissioners as a contract of the county, and that it does not purport to bind the county. Like im-

materiality exists as to the failure to allege that the arrangement with Scarboro Company to sell the notes was entered on the minutes, so as to bind the county. Such failure might affect the right of the Scarboro Company to collect compensation, but touches no right of plaintiff. The bill seeks substantially to enforce liabilities against the county, represented by its warrants, which the county owed independently of any dealings with or through Scarboro Company, and the equity of the plaintiff, so far from being destroyed by, arises out of, the invalidity of the proceedings with and through the Scarboro Company."

XVIII. ANCILLARY PROCEEDINGS

2. Jurisdiction in General (p. 989)

When ancillary relief may be had generally.—Sometimes by means of an ancillary bill or an intervening petition a federal court hears and determines a nonfederal controversy between citizens of the same state; but that occurs only in those cases in which the federal court is already properly in possession of a res and the determination of the intrastate nonfederal controversy is necessary to a just administration of the res. *Supreme Tribe of Ben Hur v. Cauble*, (D. C. Ind. 1920) 264 Fed. 247.

3. Particular Proceedings and Matters

d. Enforcement of Liens (p. 993)

Establishment of lien against property judicially sold.—A bill filed by the grantee of the purchaser of real property at a sale under a federal court decree, which seeks to restrain the enforcement of a judgment of a state court establishing a superior title in another, or any interference with complainant's possession, is not ancillary (so as to be justifiable in the federal courts without diversity of citizenship) to the original suit in the federal court, which was one for the sale of land which a municipal corporation held as trustee to secure the payment of certain drainage warrants, to which suit neither defendant nor any predecessor in interest was a party. *New Orleans Land Co. v. Leader Realty Co.*, (1921) 255 U. S. 266, 41 Sup. Ct. 259, 65 U. S. (L. ed.) —.

j. Receivers (p. 997)

An application for an injunction to restrain interference with the operations of a receiver may be brought as ancillary to the action in which the receiver was appointed. *Westinghouse Electric, etc., Co. v. Richmond Light, etc., Co.*, (E. D. N. Y. 1920) 267 Fed. 493.

Pleading.—Ancillary proceedings to restrain the doing of acts interfering with one as receiver do not require the employment of pleadings such as would be necessary in the institution of an action. *Westinghouse Electric, etc., Co. v. Richmond Light, etc., Co.*, (E. D. N. Y. 1920) 267 Fed. 493.

Vol. IV, p. 999, Jud. Code, sec. 24, par. second. [First ed., 1912 Supp., p. 139.]

Jurisdiction not divested by stay of execution of sentence pending trial in state court.—An order staying execution of a sentence in a federal court and permitting the accused while in the custody of the United States marshal to be tried in the state court for a violation of a state law, does not divest the federal court of jurisdiction. *Ex p. Sichofsky*, (S. D. Cal. 1921) 273 Fed. 694, holding, however, that an order would be entered recalling the commitment and decreeing its amendment, to the effect that the term of imprisonment heretofore adjudged upon petitioner would begin to run as from the date of pronouncement of the aforementioned judgment herein.

Vol. IV, p. 1005, Jud. Code, sec. 24, par. third. [First ed., 1912 Supp., p. 139.]

II. Nature and scope of jurisdiction.

1. In general.

III. Jurisdiction of state courts.

1. Generally.

IV. Saving of common-law remedy.

V. Concurrent jurisdiction.

VIII. Contracts within admiralty jurisdiction.

1. Shipbuilding contracts.

13. Affreightment and charter-parties.

IX. Foreign persons or property.

XII. Salvage.

XIII. Maritime contract.

XV. Mixed contract.

XX. Torts.

1. In general.

2. Locality of injury complained of.

6. Right of action for death.

II. NATURE AND SCOPE OF JURISDICTION

1. In General (p. 1006)

In admiralty a decree awarding affirmative relief in favor of a claimant or respondent, as the case may be, cannot be made in the original action. The answer can go only so far as may reduce or completely set off the award in favor of libellant. *The Jane Palmer*, (S. D. N. Y. 1920) 270 Fed. 609.

III. JURISDICTION OF STATE COURTS

1. Generally (p. 1007)

A suit for personal injury which was sustained while maritime services were being performed may be maintained in the state court. *Ross v. Pacific Steamship Co.*, (D. C. Ore. 1921) 272 Fed. 538.

IV. SAVING OF COMMON-LAW REMEDY (p. 1008)

To the same effect as the first paragraph of the original annotation, see *Crane v. Pacific Steamship Co.*, (D. C. Ore. 1921) 272 Fed. 204. *Ross v. Pacific Steamship Co.*, (D. C. Ore. 1921) 272 Fed. 538.

The jurisdiction conferred by this section gives the district courts, within the limitations expressed, jurisdiction, where the state courts would have jurisdiction, so that causes arising out of maritime rights may be brought in the federal courts in all cases where they may be brought in the state courts, subject to diversity of citizenship and jurisdictional amount, but the rights of the plaintiff may be enforced only according to maritime law. *Berg v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1920) 266 Fed. 591.

One injured by a maritime tort can maintain an action in personam against his employer therefor in a common law court. *Crane v. Pacific Steamship Co.*, (D. C. Ore. 1921) 272 Fed. 204.

V. CONCURRENT JURISDICTION (p. 1010)

To the same effect as the original annotation, see *Proctor v. Dillon*, (1920) 235 Mass. 538, 129 N. E. 265.

Power of equity to enjoin suit.—As to the power of a court of equity to enjoin a suit in the admiralty court it is said:

"It is a well-settled rule of law that, where a lien or claim upon the thing is given by the maritime law, admiralty alone has jurisdiction to enforce it by a proceeding in rem; but this does not deprive a court of equity in a proper case of the power of maintaining the status quo. It makes no difference that the res is beyond the territorial jurisdiction of the tribunal, the parties being before the court, since the defendant may nevertheless be compelled to do all the things required by the *lex loci rei sitæ*." *Hyañill v. Buffalo Marine Constr. Co.*, (W. D. N. Y. 1919) 266 Fed. 553.

VIII. CONTRACTS WITHIN ADMIRALTY JURISDICTION

1. *Shipbuilding Contracts* (p. 1014)

A contract to build a vessel is nonmaritime. *The Susquehanna*, (C. C. A. 2d Cir. 1920) 267 Fed. 811.

Furnishing materials, etc., to launched vessel.—A contract to furnish the materials, work, and labor for the completion of a vessel, made after such vessel was launched, but while not yet sufficiently advanced to discharge the functions for which she was intended, is not within the admiralty and maritime jurisdiction. *Thames Towboat Co. v. The Schooner Francis McDonald*, (1920) 254 U. S. 242, 41 S. Ct. 65, 65 U. S. (L. ed.) —, wherein the court said:

"Under decisions of this court the settled rule is that a contract for the complete construction of a ship, or supplying materials

therefor, is nonmaritime, and not within the admiralty jurisdiction. *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. ed. 961; *Roach v. Chapman*, 22 How. 129, 16 L. ed. 294; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *The Winnebago*, 205 U. S. 354, 363, 51 L. ed. 836, 841, 27 Sup. Ct. Rep. 509; *North Pacific S. S. Co. v. Hall Bros. Marine R. & Shipbuilding Co.*, 249 U. S. 119, 125, 63 L. ed. 510, 512, 39 Sup. Ct. Rep. 221.

"But counsel for appellant insist that there is a broad distinction between such a contract and one for work and material to finish a vessel after she has been launched and is water-borne. In support of this position they rely upon *The Eliza Ladd* (1875) 3 Sawy. 519, Fed. Cas. No. 4,364; *The Revenue Cutter* (1877) 4 Sawy. 143, Fed. Cas. No. 11,714,—both by Judge Deady, in the United States district court for Oregon; *The Manhattan*, district court for Washington (1891) 46 Fed. 797, which followed the district court for Oregon; and *Tucker v. Alexandroff*, 183 U. S. 424, 438, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195. The first three cases are directly in point, but are opposed by many of no less authority. *Tucker v. Alexandroff* must be read in the light of the particular matter under consideration,—detention of a foreign seaman,—and the conclusion announced that after the vessel was launched 'she was a ship within the meaning of the treaty.' The court had no immediate concern with contracts for ship construction, and there was no purpose to lay down any definite rule applicable to them. On the other side, the following cases are cited, and they are entitled to the greater weight: *The Isosco*, 1 Brown, Adm. 495, Fed. Cas. No. 7,060; *The Pacific*, 5 Hughes, 257, 9 Fed. 120; *The Count de Lesseps*, 17 Fed. 460; *The Glenmont*, 32 Fed. 703 and 34 Fed. 403; *The Paradox*, 61 Fed. 860; *McMaster v. One Dredge*, 95 Fed. 832; *The United Shores*, 193 Fed. 552; *The Dredge A*, 217 Fed. 617; *The Winnebago*, 205 U. S. 354, 363, 51 L. ed. 836, 841, 27 Sup. Ct. Rep. 509; *North Pacific S. S. Co. v. Hall Bros. Marine R. & Shipbuilding Co.*, 249 U. S. 119, 125, 63 L. ed. 510, 512, 39 Sup. Ct. Rep. 221.

"Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are nonmaritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. *Edwards v. Elliott*, 21 Wall. 532, 554, 555, 22 L. ed. 487, 491, 492; *The William Windom*, 73 Fed. 496; *Pacific Surety Co. v. Leatham & S. Towing & Wrecking Co.*, 80 C. C. A. 670, 151 Fed. 440. And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the

hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended."

A contract to reconstruct a vessel, such for instance as a contract to lengthen a vessel which has long been employed in navigation is maritime in character. *The Susquehanna*, (C. C. A. 2d Cir. 1920) 267 Fed. 811.

13. *Affreightment and Charter-Parties* (p. 1017)

An informal charter is a contract over which admiralty has jurisdiction. *American Hawaiian Steamship Co. v. Willfuehr*, (D. C. Md. 1921) 274 Fed. 214.

IX. FOREIGN PERSONS OR PROPERTY (p. 1019)

"A sovereign friendly power has no more right to oust the court of jurisdiction than has a private party. If such a sovereign power seeks our courts, it must comply with our substantive law and our procedure and it is protected only to the extent of the immunity discussed in *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341, 162 C. C. A. 411. It must, for instance, give security for costs. *Honduras v. Soto*, 112 N. Y. 310, 19 N. E. 845, 2 L. R. A. 642, 8 Am. St. Rep. 744. It could not raise the point against a set-off, otherwise appropriate, which might be pleaded against it, and therefore the arbitration clause cannot be availed of by or against it to oust our courts of jurisdiction." *The Jane Palmer*, (S. D. N. Y. 1920) 270 Fed. 609.

Vessel belonging to foreign government—manner of making objection.—The objection that a vessel libeled was owned by a foreign government, and, at the time of arrest, was in the possession of such government, should come through official channels of the United States, and not by way of a direct suggestion of the Ambassador of such foreign government, and an accompanying certificate of the Secretary of State that such Ambassador is the duly accredited representative of such foreign government gives no sanction to such suggestion. *The Pesaro*, (1921) 255 U. S. 216, 41 S. Ct. 308, 65 U. S. (L. ed.) —.

XII. SALVAGE (p. 1021)

Vessel under requisition by foreign nation.—In an action in personam against the owner of a vessel for salvage services, such vessel may be attached though she be at the time under charter to a foreign government and in the actual possession of that government. *Maru Nav. Co. v. Societa Commerciale*, etc., (D. C. Md. 1921) 271 Fed. 97.

XIII. MARITIME CONTRACT (p. 1022)

Storage contract.—As a corollary to the rule that an action will not lie in admiralty for breach of a contract leading to the execution of a maritime contract, an admiralty

court has no jurisdiction over a contract to procure permanent storage for all or a part of a cargo after it has been unloaded. *Gowanus Storage Co. v. U. S. Shipping Board Emergency Fleet Corp.*, (E. D. N. Y. 1921) 271 Fed. 528.

XV. MIXED CONTRACT (p. 1024)

Where a contract is separable a court of admiralty has jurisdiction over that part of it which is of a maritime nature, though it would not have such jurisdiction unless the cause of action were separable. *Gowanus Storage Co. v. U. S. Shipping Board Emergency Fleet Corp.*, (E. D. N. Y. 1921) 271 Fed. 528.

XX. TORTS

1. *In General* (p. 1026)

To the same effect as first paragraph of original annotation, see *White v. John W. Cowper Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 423.

When a right to recover for a maritime tort has been created by a state law, the admiralty courts of the United States may enforce it. *Earles v. Howard*, (D. C. Me. 1920) 268 Fed. 94, so holding where a state law gave a right to recover for instantaneous death while employed on a steamship.

Actions arising out of a maritime tort and giving rise to a maritime lien are not subject to the rules of the common law courts or to the statutes of a state. *The Lafayette*, (C. C. A. 2d Cir. 1920) 269 Fed. 917.

Enforcement of claim based on statute both penal and compensatory.—Although it is declared to be doubtful whether courts of admiralty will enforce a claim bottomed on a mere penal statute yet it has been said that they will assume jurisdiction where a statute is both penal and compensatory, as for instance, where it is penal up to the minimum amount of recovery and compensatory thereafter up to the maximum amount of recovery permitted. *In re St. Louis*, etc., *River Packet Co.*, (E. D. Mo. 1920) 266 Fed. 919.

State Workmen's Compensation Law has no application to an injury to a longshoreman injured while unloading a vessel, the amendment of 1917 (Fed. Stat. Ann. 1918 Supp. p. 414) having been held to be invalid. *Lawson v. New York*, etc., *Steamship Co.*, (1921) 148 La. 290, 86 So. 815.

2. *Locality of Injury Complained of* (p. 1027)

In general.—In case of an injury to a seaman arising out of a tort which is maritime, an admiralty court has jurisdiction and the *lex loci delicti* applies. *The Hanna Nielsen*, (C. C. A. 2d Cir. 1921) 273 Fed. 171, modifying *(E. D. N. Y. 1920) 267 Fed. 729*.

Assaults.—A court of admiralty has jurisdiction of an action to recover damages for an assault committed on board a vessel by the master while the boat was being unloaded. *The Whisper*, (C. C. A. 6th Cir. 1920) 268 Fed. 464.

6. Right of Action for Death (p. 1031)

Rule stated.—While a suit in admiralty cannot be maintained to recover damages for death by wrongful act or negligence on the high seas or navigable waters in the absence of a federal or state statute giving a right of action therefor, where a state statute gives such a right of action it is enforceable in the admiralty courts if the facts are such as would bring the case within the maritime jurisdiction if death had not resulted. *White v. John W. Cowper Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 423.

Vol. IV, p. 1034, Jud. Code, sec. 24, par. fifth. [First ed., 1912 Supp., p. 139.]

Jurisdiction—In general.—Under this section the court has jurisdiction of all suits arising under the revenue laws, regardless of amount. *Accardo v. Fontenot*, (E. D. La. 1920) 269 Fed. 447.

Vol. IV, p. 1036, Jud. Code, sec. 24, par. sixth. [First ed., 1912 Supp., p. 139.]

Amount involved.—The question of the amount involved is not important in determining the jurisdiction of the federal court. *Griffith v. W. S. Vick Grocery Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 246.

Injunction against postal authorities.—“It is the duty of the Post Office Department to deliver mail in so far as it is possible to the individual, firm, or corporation for whom it is intended. This is undoubtedly an important, and in some instances a difficult and delicate, duty to perform, and for that reason a court ought not lightly to interfere with the judgment and discretion of the postal authorities, and a court will not do so, unless the party seeking the injunction demonstrates by the evidence that he has a clear right to receive such mail, and that the failure of the postal authorities to deliver it to him impairs a substantial right.” *Griffith v. W. S. Vick Grocery Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 246, so declaring in granting an injunction relating to the delivery of mail similarly addressed to a competing firm.

Pleading.—“The mere allegation that ‘the matter in controversy arises under the postal laws’ is but a conclusion of law. If the facts pleaded are sufficient to show that the controversy does arise under the postal laws, then it follows that it is not necessary

to aver, in addition thereto, the pleaders’ conclusion of law. It also follows that, if the facts stated in the bill of complaint show that the controversy does not arise under the postal laws of the United States, the averment of the legal conclusion that it does so arise would necessarily be wholly disregarded in determining the jurisdiction of the court.” *Griffith v. W. S. Vick Grocery Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 246.

Vol. IV, p. 1037, Jud. Code, sec. 24, par. seventh. [First ed., 1912 Supp., p. 139.]

- I. Suits arising under patent laws.
- II. Suits arising under copyright laws.
- III. Suits arising under trademark laws.

I. SUITS ARISING UNDER PATENT LAWS (p. 1037)

Suit involving title to patent.—“It has been settled that, where the title to a patent or any claim of infringement thereof is the subject of the suit in any form, the federal courts have exclusive jurisdiction, regardless of the citizenship of the parties, for the reason that such cases arise under the patent laws.” *Lowry v. Hert*, (W. D. Ky. 1921) 273 Fed. 698.

Suits on contracts relating to patents.—Where a contract had been made respecting a patent, and out of which contract a suit arose, or where frauds were perpetrated by the parties to the contract, and one of these parties seeks relief on that ground, the state courts have exclusive jurisdiction, except where there is diverse citizenship and a claim exceeding \$3,000. *Lowry v. Hert*, (W. D. Ky. 1921) 273 Fed. 698.

II. SUITS ARISING UNDER COPYRIGHT LAWS (p. 1045)

Suit involving contract.—If the suit is one brought to enforce a right based upon a contract which relates to a copyrighted production, the suit is one which arises out of the contract and is not one arising under the copyright statute, and the federal courts are without jurisdiction. In line with this rule it is held that a suit to compel a defendant to pay over royalties claimed to be due under a contract is not one arising under the copyright laws of which the federal court has jurisdiction. *Danks v. Gordon*, (C. C. A. 2d Cir. 1921) 272 Fed. 821.

III. SUITS ARISING UNDER TRADEMARK LAWS (p. 1047)

Where the parties are corporations of different states, and the value of the thing in controversy exceeds three thousand dollars, the courts of the United States may enforce the common-law rights in a trade-mark as well as against unfair competition. *Coca-*

Cola Co. v. Old Dominion Beverage Corp., (C. C. A. 4th Cir. 1921) 271 Fed. 600.

Vol. IV, p. 1047, Jud. Code, sec. 24, par. eighth. [First ed., 1912 Supp., p. 139.]

Suit against Emergency Fleet Corporation.

— Since the purpose of the Shipping Board Act (Act of Sept. 7, 1916, ch. 451, 1918 Supp. Fed. Stat. Ann. 785) was to promote the commerce of the United States and since it applies only to interstate commerce, a suit against the United States Shipping Board Emergency Fleet Corporation, which was organized under section 11 of such Act, is one arising under a law regulating commerce and within the jurisdiction of a federal court. *Ingram Day Lumber Co. v. United States Shipping Board Emergency Fleet Corp.*, (S. D. Miss. 1920) 267 Fed. 283.

Vol. IV, p. 1048, Jud. Code, sec. 24, par. ninth. [First ed., 1912 Supp., p. 139.]

Penalties under National Prohibition Act.

— Penalties assessed under the terms of the National Prohibition Act must be collected by a suit in the district court as authorized by this section. *Kelly v. Lewellyn*, (W. D. Pa. 1921) 274 Fed. 112.

Vol. IV, p. 1051, Jud. Code, sec. 24, par. fourteenth. [First ed., 1912 Supp., p. 140.]

Right under state law.— This section is inapplicable to a suit in equity by a landlord against his tenant and district attorney of New York county to test the constitutionality of the "Emergency Legislation" of 1920 passed in New York to remedy the housing situation arising during that year. *Marcus Brown Holding Co. v. Pollak*, (S. D. N. Y. 1920) 272 Fed. 137.

Right to practice law.— The federal courts have no power to review the action of a state court in refusing to license an applicant to practice law. *Keeley v. Evans*, (D. C. Ore. 1921) 271 Fed. 520, wherein it was said:

"It is beyond question that this, a federal court, has no power or authority to review, re-examine, or reverse the action of the state Supreme Court in denying a license to practice law in the state. The United States Supreme Court has so declared as to its own authority to re-examine or reverse, as a reviewing body, the action of a state court in disbarring a member of the bar of its own court. *Selling v. Radford*, 243 U. S. 46, 50, 37 Sup. Ct. 377, 61 L. ed. 585, Ann. Cas. 1917D, 569. If that court has no such authority, it follows, by a much stronger reason, that this court possesses none.

"Nor can this court interpose to give complainant affirmative relief, such as to require the Supreme Court of the state to issue him a license to practice law in the state. This follows by reason of the distinct organization of the two courts, one being national and the other state, between which there is no jurisdictional co-ordination as it respects the administration of state polity. A federal court will administer the laws of the state in controversies in which it is given jurisdiction, but it will not interpose to direct or review the administration of state affairs."

Vol. IV, p. 1054, Jud. Code, sec. 24, par. sixteenth. [First ed., 1912 Supp., p. 140.]

Federal reserve bank as "national banking association."— The federal reserve banks created after the Judicial Code was enacted are not "national banking associations" but for jurisdictional purposes, such associations are to be deemed citizens of the states in which they are respectively located. *American Bank, etc., Co. v. Federal Reserve Bank*, (1921) 256 U. S. —, 41 Sup. Ct. 499, 65 U. S. (L. ed.) —, reversing on other grounds (C. C. A. 5th Cir. 1920) 269 Fed. 4.

Vol. IV, p. 1059, Jud. Code, sec. 24, par. twentieth. [First ed., 1912 Supp., p. 140.]

Concurrent jurisdiction of court of claims and district courts.— In every cause of which the court of claims has jurisdiction the district courts have a like jurisdiction, limited only in respect to the sum involved or in controversy, and, of course, the amount of the judgment which can be rendered. *Sochis v. U. S.*, (E. D. Pa. 1920) 266 Fed. 446.

The fact that the court of claims is given jurisdiction over a particular class of claims does not prevent concurrent jurisdiction being exercised by the district courts. *Benedict v. U. S.*, (E. D. N. Y. 1920) 271 Fed. 714.

Collector of port of New York.— Under this section it is held that a suit may be brought in the district court against the collector of the port of New York as an individual to recover money wrongfully exacted while acting under color of office. *Gilmour v. Newton*, (S. D. N. Y. 1920) 270 Fed. 332, wherein it was held that in such an action the complaint must show either that the Constitution and laws of the United States are involved or contain an allegation of diverse citizenship.

The "fees, salary or compensation."— In *Reynolds v. U. S.*, (E. D. Pa. 1921) 273 Fed. 534, the statement of claim was held to be insufficient to enable the court to determine whether the claim of the plaintiff was one "to recover fees, salary or compensation

for official services" as an officer of the United States. The court said:

"The statement of claim carefully avoids, so far as possible, the averment of any facts from which a finding could be made from the statement of claim alone. The plaintiff is averred to have been 'employed'—not to have held an office; the defendant calls him an officer. We do not rule that, by stating the facts as they have been stated, the plaintiff cannot be found to be an officer within the meaning of the act of Congress with which we are now concerned. We rule only that the facts upon which any ruling made must be based do not appear with sufficient certainty to justify summary judgment in favor of the defendant.

"The facts probably are that the plaintiff performed services in a position to which he was appointed by the Secretary of War by authority of an act of Congress conferring power to make such appointments. If the plaintiff is willing to meet now on his own statement of the facts the question which at the trial he must meet, leave is granted him to amend his statement of claim, so as to present the facts fully, and the defendant may then meet it by a motion to dismiss for want of jurisdiction."

Failure to transmit cable message.—In *Hiel v. U. S.*, (S. D. N. Y. 1921) 273 Fed. 729, it was held that a suit for failure to transmit a cable message after the President had taken over the cables could be maintained against the United States. The court said:

"Of course, the Tucker Act is not to be interpreted verbally; nor should I think the fact in any sense determinative that the sender of a cable message might sue the telegraph company *ex contractu*. The reason why it seems to me that the act applies here is that, if the United States had not the immunity of a sovereign, there would for the foregoing reasons have been no breach of positive duty ('subtraction'), and there would have been a breach of contract. That is precisely the situation which the act was drawn to meet. Congress meant to assume liability for the acts of such of its agents as had the power in the discharge of their duties to assume or refuse engagements on the faith of which other citizens should rely. It did not mean to assume liability for the proper discharge of duties which it imposed upon those agents by virtue only of positive law.

"It was urged at the bar that this result might expose the United States to serious loss and impede it in the discharge of its governmental functions. This is, of course, an irrelevant consideration, when the purpose of the act is clear; but here it is out of place in any event. Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this: That in the performance of its voluntary engagements with its citizens it should

conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequences."

Suits to recover for property taken for war purposes.—In the different war measures enacted by Congress power was conferred to take possession of the property of individual citizens for public purposes, and the right to institute proceedings against the United States for compensation for the property taken was also given, Congress thereby gave its consent to such proceedings being instituted in those tribunals which Congress had already provided for the purpose, and had intrusted with power to determine the rights of the claimants and of the United States. This meant that proceedings might be instituted in the Court of Claims, and also that they might be instituted in any District Court of the United States, provided the sum involved did not exceed the limitation above named. *Sochis v. U. S.*, (E. D. Pa. 1920) 266 Fed. 446.

The jurisdiction conferred by section 10 of the Act of Congress of August 10, 1917, to recover compensation for land requisitioned by the government for war purposes was not affected or restricted by the limitation as to amount contained in this section. *U. S. v. McGrane*, (C. C. A. 3d Cir. 1921) 270 Fed. 761.

Suits against Emergency Fleet Corporation.—A state court has no jurisdiction of a suit against the Emergency Fleet Corporation. The corporation is a governmental agency and suit against it can only be brought in a federal court. *Southern Bridge Co. v. U. S. Shipping Board Emergency Fleet Corp.*, (S. D. Ala. 1920) 266 Fed. 747.

A suit against the Emergency Fleet Corporation for a claim in excess of \$10,000 cannot be maintained in the district court. *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, (W. D. Wash. 1921) 272 Fed. 132.

Vol. IV, p. 1062, Jud. Code, sec. 24, par. twenty-fourth. [First ed., 1912 Supp., p. 141.]

This section is limited to allotments of land by the government to the Indians and does not refer to a controversy relating to land which has come to one by a division in severalty among the Seneca Indians of New York from the whole tribe. *U. S. v. Seneca Nation of New York Indians*, (W. D. N. Y. 1921) 274 Fed. 946.

Vol. V, p. 16, Jud. Code, sec. 28.
[First ed., 1912 Supp., p. 144.]

- II. Construction of removal acts.
 - 1. In general.
- III. Right of removal in general.
 - 1. Entirely statutory.
 - 4. Waiver of right of removal.
 - a. In general.
- IV. Removable "suits."
 - 2. "Suit."
 - 10. Within original "jurisdiction by this title."
 - a. In general.
 - d. Proceedings for mandamus.
- V. Removal from and to what court.
 - 1. From what court.
 - 2. To what court.
- VI. Amount in controversy.
 - 1. Same as for original jurisdiction.
 - 4. Amount in dispute, how shown.
 - a. In general.
 - c. In suits for equitable relief.
- VII. Suits under Constitution, laws or treaties.
 - 1. General rules as to removability.
 - 2. Citizenship immaterial.
 - 5. Nonfederal united with federal question.
 - 10. Federal question must appear in plaintiff's pleading.
 - 11. Removable cases.
 - i. Suit by or against federal corporation.
 - j. Miscellaneous cases.
- VIII. Proviso excluding cases arising under federal employers' liability act.
- IX. Citizenship as jurisdictional element.
 - 4. State as citizen.
 - 7. Corporation.
- X. Diverse citizenship, alienage or foreign state as ground for removal.
 - 1. Same as for original jurisdiction.
 - 3. Several parties plaintiff or defendant.
 - a. In general.
 - 4. Fraudulent joinder of defendants.
 - a. As ground for removal in general.
- XI. Separable controversy as ground of removal.
 - 3. Tests of separability.
 - a. In general.
 - 5. Proper or indispensable codefendant.
 - 10. Misjoinder or multifariousness.
 - 41. Action against principal and surety.
- XIII. Who may remove a suit.
 - 4. For federal question.
 - a. In general.
- XIV. Federal jurisdiction to be shown in record on removal.
 - 1. In general.

- XVI. Order of remand not reviewable.
 - 2. Indirect review forbidden.
 - c. Mandamus to take jurisdiction.

CONSTRUCTION OF REMOVAL ACTS

1. In General (p. 27)

Effect of removal.—The removal of a case from the state court does not recreate it, or give any more life to the original complaint which was filed in the state court, than it then had. It merely removes what, if any suit was pending in the state court, and, if that court had no jurisdiction of the suit which was removed, then it would be the duty of the federal court to so declare on the question being properly raised, even though such a suit might have been brought in the federal court in the first instance. *Southern Bridge Co. v. U. S. Shipping Board Emergency Fleet Corp.*, (S. D. Ala. 1920) 266 Fed. 747.

III. RIGHT OF REMOVAL IN GENERAL

1. Entirely Statutory (p. 31)

Dependent on Act of Congress.—To the same effect as the original annotation, see *Gopcevic v. California Packing Corp.*, (N. D. Cal. 1921) 272 Fed. 994; *Hall v. Payne*, (D. C. Mont. 1921) 274 Fed. 237.

Statute must be substantially complied with.—*Gopcevic v. California Packing Corp.*, (N. D. Cal. 1921) 272 Fed. 994.

4. Waiver of Right of Removal

a. In General (p. 38)

Failure to raise objection in state court.—"The failure of plaintiff to appear in the state court and interpose his objection there did not waive his rights in the premises. A motion to remand is the proper and usual method of testing the sufficiency and regularity of removal proceedings. Indeed, had plaintiff appeared in the state court in response to the notice of intended removal, that court would not have been bound to recognize him, since objections to the formality of removal proceedings are usually for the federal court. It is only where the lack of showing is so wanting in substantive merit as to clearly disclose on the face of the application that the order should not be granted that a state court is at liberty to deny it." *Gopcevic v. California Packing Corp.*, (N. D. Cal. 1921) 272 Fed. 994.

IV. REMOVABLE "SUITS"

2. "Suit" (p. 43)

A proceeding under a state road law to fix and collect an assessment of benefits against a property owner is a "suit" within the meaning of this section and is removable where the requisite elements of removability exist. *St. Louis Southwestern R. Co. v. Road Imp. Dist. No. 2*, (C. C. A. 8th Cir. 1920)

265 Fed. 524. Regarding this question, the court said:

"As to the ruling of the trial court in refusing to remand the case to the county court, we are of the opinion that the trial court did not err in this regard. The proceeding under the Alexander Road Law, up to the time that the board of Commissioners certified and filed the assessment of the board of assessors in the county court was an *ex parte* proceeding; but, of course, before the defendant could be compelled to pay the amount of the assessment, it was entitled to defend against its liability therefor, and this right is given by the requirement of the law that the county court shall fix a date, of which public notice shall be given, on which the owner of property may appear and defend. The assessment by the board of assessors, duly certified by the commissioners to the county court, stands in the place of a complaint, and the public notice required by law of the time when the county court will hear objections and exceptions to the assessment is in the nature of process. The exceptions to the defendant, which the law requires to be in writing, take the place of an answer. We are clearly of the opinion that after the filing of the assessment of the board of assessors in the county court the proceeding was a suit, within the meaning of the law regulating the removal of suits from state to federal courts. Section 14 of the Alexander Road Law (Acts 1915, No. 338) reads as follows:

"At the hearing provided for in the preceding section and after the county court shall have considered the assessment of benefits, it shall enter its findings thereon, either confirming the assessment of benefits against said property, increasing or diminishing same, and the order made by the county court shall have all the force and effect of a judgment against all real property in said district, and it shall be deemed final, conclusive, binding and incontestable except by direct attack on appeal."

"The county court in this very case, not recognizing the removal of the cause to the United States District Court, on June 28, 1918, rendered the following judgment:

"It is further considered, ordered, and adjudged by the court that the assessment of benefits made against the St. Louis Southwestern Railway Company and against the Louisiana & Arkansas Railway Company as to the line of railroads of said respective companies in said district by the assessors for said district, be approved and confirmed by the court, and the clerk of this court is hereby instructed and directed to spread same upon the records as a permanent assessment roll for said district."

"We are of the opinion that a proceeding which might result in a judgment against the defendant for the payment of money is a suit at law, and that the assessment of bene-

fits in such a proceeding is an assessment, in the same way that a jury assesses damages in a civil action at law upon breach of contract or any other contested liability, and not a mere fixing of the value of property for the purpose of taxation."

10. *Within Original "Jurisdiction by This Title"*

a. In General (p. 52)

Unless the suit could have originally been brought in the district it is not removable. *Kansas Gas, etc., Co. v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 614.

The facts that there is a controversy between citizens of different states and that the requisite amount is involved do not of themselves give jurisdiction on removal. *Nickels v. Pullman Co.*, (W. D. Va. 1920) 268 Fed. 610, wherein the court said:

"The only court to which removal can be made is that of the district of the plaintiff's citizenship and residence, and removal to that court can be validly made only if the defendant could in that district have been validly served with the process of the federal court in an original action. In other words, original jurisdiction of what I have called the subject-matter and an *in invitum* jurisdiction over the person of the defendant are essential to removal, except when the plaintiff consents or waives objection to the removal."

Doubt as to jurisdiction.—Where after trial in the federal court of a case removed from the state court but before final argument and decision, the defendant presented a verified motion to remand to the state court for the reason that the alleged diversity of citizenship on which it had effected the removal did not in fact exist, it was held that as the jurisdiction of the court appeared so doubtful on the verified motion and the unverified response it should have inquired into the matter fully. *St. Louis Smelting, etc., Co. v. Nix*, (C. C. A. 8th Cir. 1921) 272 Fed. 977.

d. Proceedings for Mandamus (p. 54)

Effect of asking ancillary relief.—A proceeding in mandamus is not rendered removable by the fact that an application for a temporary injunction as an ancillary remedy is made therein. "The application for the restraining order was made in this cause and is merely ancillary, incidental, and auxiliary to the original suit. Its purpose was to maintain the existing status until the legal and statutory rights of the parties could be determined. The action is still a proceeding for a writ of mandamus." *North Carolina Public Service Co. v. Southern Power Co.*, (1921) 181 N. C. 356, 107 S. E. 226.

V. REMOVAL FROM AND TO WHAT COURT

1. *From What Court* (p. 60)

A state court having no jurisdiction of the remedy given by section 16 of the Clayton

Act, jurisdiction cannot be given to the federal court by removal. *General Invest. Co. v. Lake Shore, etc., R. Co.*, (C. C. A. 6th Cir. 1920) 269 Fed. 235.

2. To What Court (p. 61)

Where both plaintiff and defendant non-residents.—To the same effect as original annotation, see *Coalmont Moshannon Coal Co. v. Matthew Addy Steamship, etc., Corp.*, (E. D. Va. 1921) 271 Fed. 114.

Where an action, brought in the court of a state of which neither party is a citizen, is removed by the defendant to the federal court for that district on the ground of diverse citizenship, a motion by the plaintiff to remand it should be denied. *Earles v. Germain Co.*, (S. D. Ala. 1920) 265 Fed. 715. In passing upon this question, the court said: "Some of the courts have discussed the right of the plaintiff, who brought the suit in the state court, to object to the removal to the federal courts, and have held that such right of objection exists. I feel that this condition grows out of a confusion of the venue statutes and the removal statutes. Bearing in mind that the whole question is one of statutory regulation, both as to venue and as to removal, and that the parties have just such rights in each of these questions as the statutes give, and no more, and that it is not necessary that the rights given as to venue by the statute shall conform to the rights as to removal, or vice versa, we can easily see that the Congress may give the defendant a right to remove a suit to a federal court in which the plaintiff could not bring it in the first instance. The question then is: Has the statute done so?"

"Coming back, now to the question of confusion between these two statutes, we see that section 51 of the Judicial Code fixes the venue, where jurisdiction of the federal court is based on varying citizenship, in the following words:

"No civil suit shall be brought in any District Court against any person *by any original process or proceeding* in any other district than that whereof he is an inhabitant; but where the *jurisdiction* is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (Italics mine.)

"It is therefore manifest, from the mere reading of the statute, that the defendant is given the unqualified right to object, where he is sued in a place other than that required by the statute, even though the court in which the suit is brought has jurisdiction to try the case. The right to object is given, not because of want of jurisdiction in the court, but because Congress, in its wisdom, saw fit to give it, after considering the rea-

sons why the place of bringing suit by original process should be limited to certain of the courts having jurisdiction to try the case.

"Here the plaintiff has the right in the first instance to elect to sue either in the state court or in such federal court as Congress has given him the right to file original process in. Should he, however, sue in another federal court, having jurisdiction, but not venue, defendant may, because of the provisions of the venue statute, object, and have the suit dismissed, or he may appear generally, and so waive the right to object. Now, referring to section 28 of the Judicial Code:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given *jurisdiction by this title*, and which are now pending or which may hereafter be brought, in *any state court*, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state." (Italics mine.)

"The words 'any other suit' and 'any state court' are about as broad and general and unlimited in their application as could have been used. We have here a right of removal given to the defendants, being non-residents of that state. There are only two things required by this statute: First, the court to which removal is sought must have jurisdiction; and, second, the defendants seeking the removal must be nonresidents of the state in which the suit is brought. There is no more right given to the plaintiff to object to the removal than there was given by the venue statute to the defendant to object if the suit was brought in the federal court in the state of the plaintiff's residence.

"The plaintiff here has no right not given by the statute, if it be conceded that the right of removal is statutory, as to which there can be no doubt. *Insurance Co. v. Pechner*, 95 U. S. 185, 24 L. Ed. 427. The venue statute gives plaintiff the right to sue by original process in certain courts, while the removal statute gives the defendant the right to remove the suit from certain state courts to certain federal courts.

"If we concede the power of Congress to legislate on the subject, how can we question rights so plainly and unequivocally given? How can we construe a statute giving a defendant certain rights, so as to find the right in the plaintiff to negative those given to the defendant by the statute, when such statute neither qualified the right given to defendant nor grants any such right to the plaintiff? When courts do this, they cease to construe, and begin to legislate."

VI. AMOUNT IN CONTROVERSY

1. Same as for Original Jurisdiction (p. 67)

Original jurisdiction by this title.—To the same effect as the original annotation, see

Ross v. Pacific Steamship Co., (D. C. Ore. 1921) 272 Fed. 538.

4. Amount in Dispute, How Shown

a. In General (p. 68)

In determining whether the jurisdictional requirement as to the sum or value of the matter in controversy is met, there should not be taken into consideration the value of a thing about which, under the issues in the suit, the court is not called on to concern itself in any way. *Wetsel v. Empire Gas, etc., Co.*, (C. C. A. 5th Cir. 1920) 264 Fed. 865.

Allegation as to value.—An allegation in a petition for removal that "the value of the land and the amount in controversy" exceed the sum of \$3,000 has been held to be insufficient to show the required jurisdictional sum. "What was alleged to exceed, exclusive of interest and costs, the sum of \$3,000, was 'the value of the land and the amount in controversy.' The right to remove the suit was dependent upon the matter in controversy exceeding, exclusive of interest and costs, the sum or value of three thousand dollars. Judicial Code, sections 24, 28. Neither the above-quoted averment of the removal petition, nor the quoted clause of the agreed statement of facts, showed that the matter in controversy exceeded exclusive of interest and costs, the sum or value of \$3,000, unless all beneficial interest in the land, or exceeding \$3,000 in amount of the value of it, was in controversy in the suit. Nothing less than 'the value of the land and the amount in controversy' was alleged to exceed, exclusive of interest and costs, the sum of \$3,000." *Wetsel v. Empire Gas, etc., Co.*, (C. C. A. 5th Cir. 1920) 264 Fed. 865.

c. In Suits for Equitable Relief (p. 73)

Suit to cancel lease.—In *Wetsel v. Empire Gas, etc., Co.*, (C. C. A. 5th Cir. 1920) 264 Fed. 865, it was held that there was not sufficient to show jurisdiction where the value of the matter brought into controversy by the suit could not properly be regarded as more than the amount of the difference between the value of the land subject to the lease and its value free of the lease, and there was nothing to show that the value of the land was or could be diminished or increased to the extent of \$3,000 by the existence and enforcement of the instrument.

VII. SUITS UNDER CONSTITUTION, LAWS OR TREATIES

1. General Rules as to Removability (p. 77)

Where the case as formulated in the state court was one arising under the laws of the United States, the removal of the case whether on that ground or not brings into the federal court a case the jurisdiction of which continues for all purposes. *General Invest. Co. v. Lake Shore, etc., R. Co.*, (C. C. A. 6th Cir. 1920) 269 Fed. 235.

2. Citizenship Immaterial

To the same effect as the first paragraph of the original annotation, see *Stark v. Payne*, (D. C. Mont. 1921) 271 Fed. 477.

5. Nonfederal United with Federal Question (p. 79)

If one of several causes of action set up by the plaintiffs in their pleading arises under the Constitution or laws of the United States the jurisdiction of the federal court is not affected by the fact that the others do not so arise. *Lowry v. Hert*, (W. D. Ky. 1921) 273 Fed. 698.

10. Federal Question Must Appear in Plaintiff's Pleading (p. 79)

The rule stated.—"It is well settled that the entry of a federal question into a case by way of defense, although it may present the controlling or the only disputed question, does not justify removal under section 28 of the Judicial Code." *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

11. Removable Cases

i. Suit by or Against Federal Corporation (p. 86)

Federal reserve bank.—A suit in which the principal defendant, to wit, a federal reserve bank, was incorporated under the laws of the United States is removable from a state to a federal district court. *American Bank, etc., Co. v. Federal Reserve Bank*, (1921) 256 U. S. —, 41 S. Ct. 499, 65 U. S. (L. ed.) —, reversing on other grounds (C. C. A. 5th Cir. 1920) 269 Fed. 4.

The United States Shipping Board Emergency Fleet Corporation is a corporation of the United States and a suit against such a corporation is a suit arising under the laws of the United States and as such is removable from a state to a federal court. *Rosenberg v. U. S. Shipping Board Emergency Fleet Corp.*, (D. C. Ore. 1920) 271 Fed. 956.

Corporation acting as agent of United States.—A suit against a corporation is not removable on the ground that the defendant was acting as agent of the United States in the transaction which forms the subject matter of the suit and in which it is sought to hold the defendant personally liable. *Ingram Day Lumber Co. v. United States Shipping Board Emergency Fleet Corp.*, (S. D. Miss. 1920) 267 Fed. 283, wherein it was said: "The right of removal is purely statutory, and I fail to find in the removal statutes any provision permitting the agent or delegate of the United States to remove to the District Court a suit in which it is sought to hold such agent or delegate personally liable on any act or transaction arising out of such agency (where the requisite amount is not involved). Of course, if the agent who

is sued can show that he was not acting, or pretending to act for himself, and did not bind himself personally, but bound only his principal, such facts would constitute a legal defense to the suit.

"Section 33 of the Judicial Code permits any officer appointed under or acting by authority of any revenue law of the United States when sued or prosecuted on account of any act done under color of his office, or of any such law (or any officer of either House of Congress), to remove such civil suit or criminal prosecution to the United States District Court; but there is no right of removal in a case not otherwise cognizable in the District Court, where a suit is brought against an agent instead of against the principal, on the ground that the principal, if sued, would have to be sued in the federal court. Therefore, of and by itself, the mere allegation that the defendant in this case was acting in the transaction out of which the suit arose as the agent of the United States, and that the suit ought to be against the United States, is not sufficient to remove to the federal court on that ground alone a case (of the amount here involved) in which it is sought to hold that agent personally liable on a contract."

j. Miscellaneous Cases (p. 88)

An action brought to have a contract of sale of letters patent made by an administrator set aside on the ground of fraud and asking that the plaintiffs be adjudged to be the owners of said letters patent and the patents granted upon the applications therefor, and that they also be adjudged to recover of the defendant a sum which will reasonably compensate them for the loss of the use of the said patents, is removable to the federal court. In this case the court said: "It is so well settled as to be elementary, that, when the United States grants a patent for a new invention in the arts, it confers upon the patentee an 'exclusive' property in the patented invention, which property nobody can appropriate without the patentee's consent. The inventor's right and title thereto are thus altogether based upon the Constitution and laws of the United States, and, as we have intimated, it would seem to follow, as of course, that any right to any judgment that the plaintiffs (who are the heirs of the patentee) are the owners of the patents or any judgment in their favor for the recovery of money for any infringement of or encroachment upon such exclusive right must be based upon a claim of title in the patents themselves.

"It would seem, therefore, that any action at law or in equity which seeks to remedy such a situation inevitably and necessarily grows out of and is based upon a right created by and claimed under the patents, and therefore upon a right which arises under the patent laws of the United States. And as has been intimated, if one part of the

relief demanded is based upon a claim of title to the patents, it is sufficient notwithstanding other claims are based upon other grounds." *Lowry v. Hert*, (W. D. Ky. 1921) 273 Fed. 698.

VIII. PROVISIO EXCLUDING CASES ARISING UNDER FEDERAL EMPLOYERS' LIABILITY ACT (p. 92)

Amendment after removal.—Where an action for negligence was brought in a state court on the ground of diverse citizenship, the plaintiff cannot amend his complaint in the federal court by adding counts alleged that he was engaged in interstate commerce at the time of the injury and praying for judgment under the Federal Employers' Liability Act. In disallowing the amendment the court said that it was obvious that under this section if the amendment had been a part of the original complaint in the state court, the cause would not have been removable to the federal court, and hence it could not be converted after removal into a new and nonremovable cause of action. *Newberry v. Central of Georgia R. Co.*, (M. D. Ala. 1921) 271 Fed. 117.

IX. CITIZENSHIP AS JURISDICTIONAL ELEMENT

4. State as Citizen (p. 96)

To the same effect as the third paragraph in the original annotation, see *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141; *People v. St. Louis*, (1921) 297 Ill. 199, 130 N. E. 366.

A person who brings a suit on behalf of the state is regarded as the plaintiff for the purposes of removal on the ground of citizenship. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

"A suit by an agent of the state as a nominal party in behalf of the state presents a controversy to which the state is a party, and cannot be removed to the United States court as a controversy between citizens. . . . A state is not a citizen, and a suit in which she is a party to the controversy is not removable on the ground of diverse citizenship." *Robertson v. Jordan River Lumber Co.*, (C. C. A. 5th Cir. 1921) 269 Fed. 606, so holding in the case of a suit by a revenue agent of state.

State as real party in interest.—The interest which the state of Washington has in the result of a suit by the Port of Seattle—a municipal corporation—to quiet the title of the state to tide-lands as against a foreign corporation claiming, as grantee from the state, the right to wharf out to the navigable channel, does not prevent the removal of the cause to a federal district court for diverse citizenship, since the port had both the power and the duty to bring suit to protect the interests involved, and had an independent direct financial interest in the result, a statute providing for the payment by abutting owners, in the nature of a rental, for a per-

mit to use parts of the waterway in the erection of wharves, docks, or other structures, and requiring that a specified portion of such rental be paid to the county for the use of the port. *Seattle v. Oregon, etc., R. Co.*, (1921) 255 U. S. 56, 41 S. Ct. 237, 65 U. S. (L. ed.) —.

State a real or merely nominal party.—The state as the holder of the legal title of lands held in trust for a class of beneficiaries is not a merely nominal party to a suit by an agent of the state as trustee for the use and benefit of the inhabitants of certain designated townships and the suit is not removable. *Robertson v. Jordan River Lumber Co.*, (C. C. A. 5th Cir. 1921) 269 Fed. 606.

7. Corporation (p. 98)

Where the plaintiff and defendant are both corporations and neither one a corporation existing under the laws of the state in which the suit is brought the case is not removable on the ground of diversity of citizenship. *Kansas Gas, etc., Co. v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 614.

Counties have been recognized as corporations and, being such as citizens for the purposes of suits based on diverse citizenship in the federal courts. *Pearl River County v. Wyatt Lumber Co.*, (C. C. A. 5th Cir. 1921) 270 Fed. 28, so holding in an action brought by a county to construe certain timber deeds made by the supervisors of that county to the defendants.

X. DIVERSE CITIZENSHIP, ALIENAGE OR FOREIGN STATE AS GROUND FOR REMOVAL

1. Same as for Original Jurisdiction (p. 102)

An action cannot as a general rule be removed to a district in which it could not originally have been brought. *Centaur Motor Co. v. Eccleston*, (W. D. N. Y. 1920) 264 Fed. 852.

Where neither party is a citizen of the state in which a suit is brought it is not removable unless the parties waive the question of venue. *Perrette v. Illinois Commercial Men's Ass'n*, (W. D. Ky. 1920) 267 Fed. 583.

An action against the Director General of Railroads by a citizen of one state arising out of the alleged negligence of a railroad which was a citizen of another state was held to be removable to the federal court. *Hall v. Payne*, (D. C. Mont. 1921) 274 Fed. 237.

3. Several Parties Plaintiff or Defendant

a. In General (p. 103)

A suit based on negligence brought by a resident of the state against a foreign corporation and resident employees of the corporation, but in which the company only is served, is one against such company which may be removed to a federal court. *Galehouse v. Baltimore, etc., R. Co.*, (N. D. Ohio 1921) 274 Fed. 370.

4. Fraudulent Joinder of Defendants

a. As Ground for Removal in General (p. 113)

In *Gulledge v. Director General of Railroads*, (W. D. N. C. 1921) 270 Fed. 276, the facts were held not to show a fraudulent joinder for the purpose of preventing jurisdiction of the federal court.

XI. SEPARABLE CONTROVERSY AS GROUND OF REMOVAL

3. Tests of Separability

a. In General (p. 123)

In order to justify such removal, on the ground of a separable controversy.—To the same effect as the original annotation, see *Winfield v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 267 Fed. 47; *Atlanta v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 267 Fed. 60; *Morrell v. Lalonde*, (D. C. R. I. 1921) 271 Fed. 19.

5. Proper or Indispensable Codefendant (p. 130)

Indispensable party.—To same effect as second paragraph of original annotation, see *Winfield v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 267 Fed. 47, wherein it was held that a company supplying natural gas to a distributing company, which in turn supplied it to a city, was not an indispensable party to a controversy between the latter company and the city as to whether such company had assumed the obligation of its predecessor under an ordinance contract to supply natural gas to the city and its inhabitants at a certain rate; and that the distributing company was not an indispensable party to a controversy between the company furnishing the gas and the city as to whether such company had assumed the obligations of the grantee of the ordinance contract and its successors, by alleged agreements of assumption separate and distinct from the alleged agreement of assumption by the distributing company. To same effect, see *Atlanta v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 267 Fed. 60.

10. Misjoinder or Multifariousness (p. 131)

Misjoinder.—Where under the laws of a state a railroad company and its employees can not be joined as defendants in a negligence action where an action is commenced by a resident plaintiff against a foreign railroad and resident employees, the latter are improperly joined and the controversy is separable as to the company and its employees and is removable to the federal court. *Galehouse v. Baltimore, etc., R. Co.*, (N. D. Ohio 1921) 274 Fed. 370.

41. Action against Principal and Surety (p. 161)

In an action for personal injury against a tortfeasor and a guaranty company under a

state statute allowing a judgment against both in one action, there is no such separable controversy as will justify the removal of the cause on the ground of the nonresidence of the guaranty company. *Morrell v. Lalande*, (D. C. R. I. 1921) 271 Fed. 19, wherein it was said:

"The substance of the matter is that the liability of the insurance company to pay to the plaintiff must be worked out in favor of the plaintiff through the direct liability of the insured. I am unable to read the statute as permitting a direct suit against the insurance company alone, without joinder of the insured, until after judgment against the insured. If the statute seeks to convert an agreement to indemnify against liability of a certain person into a direct obligation to pay damages, it might result that the absence of the tort-feasor would deprive the insurance company of the ability to defend, and expose it to the danger of paying damages for which judgment could not be obtained against the insured. The statute may reasonably be regarded as designed to give to a plaintiff incidental relief against an indemnitor; to extend it farther would be to disregard the substantial rights of the insurer and the nature of its agreement with the insured. * * * As the liability of the insurance company to the plaintiff must always be incidental to its liability to the tort-feasor, it is obvious that the controversy between the plaintiff and the insurance company as to its liability to pay directly to the plaintiff cannot be fully determined until there is also determined the primary controversy between the plaintiff and the insured."

XIII. WHO MAY REMOVE A SUIT

4. For Federal Question

a. In General (p. 207)

The "project manager" of a United States reclamation project, when sued in a state court for damages on account of his alleged negligence in operating a project canal, can remove the cause to a federal court. The court said:

"In view of the relation of the government to such a project and the administrative status of the manager, a federal question is presumed to be involved; and after all that is the ultimate inquiry, for upon that ground alone defendant predicates his claim of a right to remove. * * * But whether the manager is an 'officer' is not the controlling question. Admittedly he is the governmental representative, through whom the project is managed and carried on, and it is not highly material whether his status be that of an officer or a responsible agent. He is engaged in the administration of a federal law, and he has the right to bring into the federal courts controversies, to which he is made a party, touching the validity or propriety of acts done by him in his representative ca-

capacity." *Whiffin v. Cole*, (D. C. Idaho 1919) 264 Fed. 252.

XIV. FEDERAL JURISDICTION TO BE SHOWN IN RECORD ON REMOVAL

1. In General (p. 213)

Necessity of showing.—In *Buena Vista County v. Title Guaranty, etc., Co.*, (N. D. Ia. 1920) 267 Fed. 477, the court said:

"Neither the petition for removal nor the record in the cause shows any grounds for the removal of this cause from the state court to this court, or that this court has any jurisdiction of this controversy, and the exceptions in the state court to the petition for removal are well taken, and should have been sustained."

Facts pleaded as determining separability.—"It is the controversies, the facts pleaded in the complaint portray, not the legal conclusions the pleader alleges result from those facts, nor his averments of joint liability or joint action, nor his prayer for relief, that determine whether or not the controversies disclosed by the complaint are separable." *Winfield v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 267 Fed. 47. To same effect, see *Atlanta v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 267 Fed. 60.

XVI. ORDER OF REMAND NOT REVIEWABLE

2. Indirect Review Forbidden

c. Mandamus to Take Jurisdiction (p. 233)

Mandamus denied.—Mandamus to vacate an order which improperly remanded a cause removed from a state court is not permitted under this section. *Matter of Matthew Addy Steamship, etc., Corp.*, (1921) 256 U. S. —, 41 S. Ct. 508, 65 U. S. (L. ed.) —.

Vol. V, p. 235, Jud. Code, sec. 29. [First ed., 1912 Supp., p. 145.]

II. Time for filing petition and bond.

2. Necessity of compliance with statute.

7. Time to plead in various states.

o. In Pennsylvania.

9. Computation of time.

IV. Petition for removal.

1. Necessity of petition.

a. In general—mere motion.

b. Removal by stipulation and consent.

4. Title of cause and address.

8. Jurisdictional averments in general.

a. Petition for removal as a pleading.

10. Averments as to citizenship.

a. Individuals.

f. Corporation.

15. Averments as to federal question.

a. In general.

VIII. State court's loss of jurisdiction.

5. Validity of further proceedings.

b. Amendment of pleadings.

IX. Jurisdiction acquired by federal court.

1. Simultaneous with filing of sufficient petition and bond.

X. Time to plead in federal court and further proceedings therein.

II. TIME FOR FILING PETITION AND BOND

2. *Necessity of Compliance with Statute*
(p. 238)

Under this section a party having the right to remove a cause from a state to a federal court must file the required petition and bond therefor in the state court at the time or any time before the defendant is required by the laws of the state, or the rule of the state court, to answer or plead to the petition or complaint of the plaintiff. *Batchelder v. S. C. Quimby Land Co.*, (N. D. Iowa 1920) 267 Fed. 483.

In *Williams v. Delaware, etc., R. Co.*, (M. D. Pa. 1920) 266 Fed. 1003, where it was claimed that the right to removal had been lost by delay the court said: "It may be readily conceded that considerable time has elapsed before the defendant, Williams, filed his petition for removal, yet there is nothing in the statute to deny to him the right of so doing when he came. The Judicial Code (section 29) provides that such petition may be made and filed at 'any time before the defendant is required by the laws of the state or the rule of the state court in which suit is brought, to answer or plead to the declaration' or statement, so that, if the cause should be removed, the validity of any and all of its defenses should be tried and determined in the District Court of the United States. Though tardy, this may all as yet be accomplished in the case before the court.

"The information presented is sufficient to satisfy the court that the cause is within the jurisdiction of the court, and the motion to remand is denied."

7. *Time to Plead in Various States*

o. In Pennsylvania (p. 241)

A defendant after having its petition for removal allowed has a legal right to delay the bringing of the record into the federal court until the last of the thirty days allowed for that purpose, and he also has a like legal right to withhold an affidavit of defense until the end of the thirty days' limit fixed by this section although the limit for filing such affidavit is fixed at fifteen days by the state law. *Anders v. Security Mut. L. Ins. Co.*, (E. D. Pa. 1920) 268 Fed. 677. The court said: "The effect of the removal statute, therefore, is to extend the time, unless what is meant is to treat the filing of the record as if that were the commencement of the action in this court. In a sense, of course, it is; but to conclude that it is such commencement, in the sense of when the time

within which the affidavit must be filed commences to run, is to beg the whole question, because it is the putting of a construction upon section 29 which is decisive of the point involved. If the position of the plaintiff be tenable, it is because a statement of claim, with a rule to answer, was filed when the record was filed in this court. The argument is that, as this court proceeds as a state court would proceed, and as the state court would give judgment after 15 days, this court should give judgment after 15 days, notwithstanding the fact that section 29 gives 30 days before judgment can be entered. This is for the reason that section 29 is to be construed as meaning, not that the defendant may plead within the 30 days, but that he shall plead within 15 days, if the state statute so requires, and in any event within 30 days. Section 29, however, only requires the defendant to plead within 30 days after the filing of the record, and that 'the cause shall then proceed.' If this means, as contended by the defendant, that the cause, after being brought here by removal proceedings, is treated as an action here brought and put at issue, but is not so treated until the time for filing the pleas has expired, the whole argument on behalf of the plaintiff fails.

"The position advanced by the plaintiff, that the cause, when it proceeds, proceeds here in conformity with the state practice, we think is well taken. Section 29, however, undoubtedly gives a defendant 30 days within which to file an affidavit of defense or other plea or answer, which the state practice may require. If it had been intended by Congress not to give a defendant this 30 days' time allowance, when the state practice gave him a less time, this intention could have been expressed in a few words. Not only is there no such expression, but, on the contrary, the expiration of the 30 days is made the beginning of the time when this court can take action."

9. *Computation of Time* (p. 242)

Where under the laws of the state the defendant must plead within a specified number of days after the declaration has been filed by the plaintiff, a defendant's petition for removal must be filed within the same time and if filed thereafter comes too late. And this view is taken where though the declaration is not filed within the specified number of days after process has been issued it is, in accordance with the recognized state practice, filed as of right before a motion to dismiss has been made. *Allen v. Sewanee Fuel, etc., Co.*, (E. D. Tenn. 1917) 268 Fed. 219.

IV. PETITION FOR REMOVAL

1. *Necessity of Petition*

a. In General—Mere Motion (p. 273)

This section does not prescribe the contents of the petition, and it will serve if,

taken in connection with the complaint in the state court and judicial notice, the allegations and facts of which it need not repeat, it discloses a removable case and prays for removal. *Hall v. Payne*, (D. C. Mont. 1921) 274 Fed. 237.

Nature of petition.—The petition for removal is in the nature of process to transfer the case to the federal court on due notice to plaintiff. *Hall v. Payne*, (D. C. Mont. 1921) 274 Fed. 237.

b. Removal by Stipulation and Consent
(p. 274)

Consent of parties cannot confer jurisdiction.—*Robertson v. Jordan River Lumber Co.*, (C. C. A. 5th Cir. 1921) 269 Fed. 606.

"The jurisdiction of the inferior courts of the United States rests wholly upon the acts of Congress. It cannot be conferred by consent of the parties, or by their omission to contest it, or by estoppel." *St. Louis Smelting, etc., Co. v. Nix*, (C. C. A. 8th Cir. 1921) 272 Fed. 977.

4. Title of Cause and Address (p. 276)

An indorsement of title to a complaint giving the names of parties who were citizens of different states would not make the case removable if the essential facts do not appear in the complaint. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

8. Jurisdictional Averments in General.

a. Petition for Removal as a Pleading
(p. 277)

In general.—To the same effect as the original annotation, see *People v. St. Louis*, (1921) 297 Ill. 199, 130 N. E. 366, wherein it was held that a petition for removal solely on the ground of diverse citizenship did not justify a removal on any other ground.

The petition should state facts which taken in connection with such as already appear entitle the petitioner to the transfer. *Nickels v. Pullman Co.*, (W. D. Va. 1920) 288 Fed. 610.

It is well settled that the right to remove on the ground of diverse citizenship is usually to be determined by the removal petition, but the record may be referred to to supplement the petition, where that is incomplete. Certainly the petition to remove prevails, unless distinctly inconsistent with the record. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

Amendments.—Parties in a suit for removal may be allowed to amend their pleadings where they do not conform to the requirements of the equity rules of the court and raise issues of which the court has no jurisdiction. *Benedict v. Hall*, (N. D. Ia. 1920) 267 Fed. 1013.

10. Averments as to Citizenship

a. Individuals (p. 282)

An averment of residence.—To the same effect as the original annotation, see *Batchel-*

der v. S. C. Quimby Land Co., (N. D. Ia. 1920) 267 Fed. 483.

f. Corporation (p. 286)

Where there is nothing in the petition for removal to show that a plaintiff board of supervisors of a certain county, or a drainage district of that county, is a citizen or corporation of any other state than the defendant, and there is no diversity of citizenship between any of the parties to the action the federal court has no jurisdiction. *Buena Vista County v. Title Guaranty etc., Co.*, (N. D. Ia. 1920) 267 Fed. 477.

15. Averments as to Federal Question

a. In General (p. 302)

Where removal is sought on the ground that a question arising under the Constitution and laws of the United States is involved, it must appear on the face of the complaint that such a question is in fact involved. *Kansas Gas, etc., Co. v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 614.

VIII. STATE COURT'S LOSS OF JURISDICTION

5. Validity of further proceedings

b. Amendment of Pleadings (p. 359)

Amendments to plaintiff's pleadings.—The claim as made and standing on the record of the case at the time the removal is effected is what determines the jurisdiction of the United States court, the other jurisdictional facts existing, and such jurisdiction once acquired cannot be taken away by a subsequent amendment reducing the amount claimed below the jurisdictional amount required. *Twin Hills Gasolene Co. v. Bradford Oil Corp.*, (E. D. Okla. 1919) 264 Fed. 440.

IX. JURISDICTION ACQUIRED BY FEDERAL COURT

1. Simultaneous with Filing of Sufficient Petition and Bond (p. 366)

The state court loses its jurisdiction on filing of the petition and bond for removal and a dismissal of the action by the state court subsequent thereto is void. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

A formal order for removal is of no effect. "The right of removal is statutory, and is established immediately on the filing of a proper bond and petition, showing on its face that the case is one which the defendant has a right to remove under the provisions of the statute. No issue of fact raised upon the petition or record can be tried in the state court. *Duff v. Hildreth*, 183 Mass. 440, 67 N. E. 356. Where jurisdictional facts authorizing removal of a cause from a state to a federal court exist and are properly pleaded, and all the requirements of the law are met, the cause is in contemplation of law removed, and further proceedings in the state court are void, for the cause is ipso facto removed. *Miller v. Soule*, (D. C.) 221 Fed.

493. Under the statute (section 29 of the Judicial Code) it is the duty of the state court to accept the petition and bond when tendered in proper form, and certify the case to the federal District Court, which will determine for itself whether the case was wrongfully or improperly removed thereto." *Williams v. Delaware, etc., R. Co.*, (M. D. Pa. 1920) 266 Fed. 1003.

X. TIME TO PLEAD IN FEDERAL COURT AND FURTHER PROCEEDINGS THEREIN (p. 374)

Compliance with statute essential.—The right of removal is purely statutory and one seeking the benefits of the statute must comply with its essential provisions. *Wena Lumber Co. v. Continental Lumber Co.*, (S. D. Miss. 1921) 270 Fed. 795.

Right to plead after thirty days.—"The requirement to plead may not be mandatory or jurisdictional, in the sense that it may not be waived by the parties or extended by the court; but it is an essential step necessary to be taken by the defendant before the cause shall then proceed in the same manner as if it had originally commenced in the said district court. . . . Whether to allow the defendant to plead after the expiration of the 30 days or to remand the cause is a matter that calls for the exercise of a sound legal discretion. Certain it is that the statute may not be disregarded with impunity, and failure to comply with it without any satisfactory excuse renders the cause subject to remand." *Wena Lumber Co. v. Continental Lumber Co.*, (S. D. Miss. 1921) 270 Fed. 795.

Vol. V, p. 376, Jud. Code, sec. 31. [First ed., 1912 Supp., p. 147.]

1. In General (p. 377)

Pleading.—An allegation to the effect that "certain courts" of the state of Ohio have construed the statutes and laws of Ohio so as to permit the seizure and taking of plaintiff's property without due process of law, whereby "petitioner will be unable to enforce its rights under the laws of the United States," comes far short of the full and exact statement of deprivation of civil rights which would be necessary to show a case authorizing removal under this section. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

Vol. V, p. 380, Jud. Code, sec. 33. [First ed., 1912 Supp., p. 148.]

II. Construction.

1. In general.
2. "Revenue law."

III. Right to remove.

4. Cases removable.
5. Cases not removable.

IV. Procedure for removal.

2. Petition for removal.
5. Certiorari.

II. CONSTRUCTION

1. In General (p. 362)

Scope and intent of section.—Referring to section 643 of the Revised Statutes which is embodied in this section it is said:

"This section was originally enacted for the protection of federal officers who are engaged in the enforcement of the federal internal revenue laws and persons assisting such officers in the enforcement of such laws. The act was passed in consequence of an attempt by one of the states to make penal the collection by United States officers within such state of duties under the revenue law. *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648. The scope of this section has since been enlarged, by preventing suits in the state courts, not only against those enforcing the revenue laws, but also officers of either house of Congress in the discharge of their official duties in executing any order of such house, and against any officer of the courts of the United States while engaged in any official act. The purpose of this act is, then, to remove from state courts to the federal courts civil actions or criminal prosecutions against any of these three sets of officers in the performance of their official duties, and against persons assisting the officers in the performance of official acts under the revenue laws. This section was interpreted in *Johnson v. Wells Fargo & Co.*, (C. C.) 98 Fed. 3, 8. The court said:

"The purpose of the statute is to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties; but, further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within the range of the tariff system. The statute must be interpreted with reference to its manifest spirit and general purpose, and a word or phrase should not be extended beyond its proper relation to give jurisdiction where jurisdiction does not appear to have been intended. Moreover, where the question of jurisdiction is doubtful, the rule now is to resolve that doubt against the jurisdiction of the federal courts." *Application of Shumpka*, (N. D. N. Y. 1920) 268 Fed. 686.

"The federal court acquires jurisdiction, on removal from the state court, only after service upon it or its clerk of the appropriate process, whether certiorari or habeas corpus cum causa, by which the clerk is notified of the filing of the petition in the federal court." *Oregon v. Wood*, (D. C. Ore. 1920) 268 Fed. 975.

2. "Revenue Law" (p. 362)

It is said that "while it may be possible to say that the work of erecting a post office

has relation to the revenue of the government, and that the Secretary of the Treasury, by whom the work was ordered, was an officer administering the revenue laws and acting under color of his office, (*Ward v. Construction Co.*, 99 Fed. 605, 606, 39 C. C. A. 669), it does not seem to follow that an appropriation act for the purchase of lands for military purposes can be deemed to be a 'revenue law,' in the sense in which that term is used in section 33 of the Judicial Code." *Underwood v. Dismukes*, (D. C. R. I. 1920) 266 Fed. 559. The court further said:

"To accept the contention of the United States that the term 'revenue laws' includes all laws appropriating money for the expenditure of the revenue of the United States, and that the question of proprietary rights in lands purchased by the United States through an appropriation of moneys of the United States involves a question of revenue law, would result in a great expansion of the scope of section 33, and a great enlargement of the jurisdiction of the federal courts."

III. RIGHT TO REMOVE

4. Cases Removable (p. 383)

Officer enforcing National Prohibition Act.—Cases against officers appointed under the National Prohibition Act are removable from state to federal courts. *In re Higgins*, (D. C. N. H. 1921) 273 Fed. 832.

Federal officers who have been indicted for killing a man while enforcing the National Prohibition Act are entitled to the benefit of this provision as to removal. *Oregon v. Wood*, (D. C. Ore. 1920) 268 Fed. 975.

Although a marshal or deputy marshal is not an officer appointed under a revenue law, yet, when engaged officially in attempts to enforce the revenue law, he is an officer under that law, and entitled to the protection of section 643, and so are persons acting with him for the enforcement of the revenue law. Application of *Shumpka*, (N. D. N. Y. 1920) 268 Fed. 686.

5. Cases not Removable (p. 384)

The following cases were held not removable—Action to restrain naval officer from interfering with plaintiff's alleged rights to enter on and remove sand from lands purchased by the United States. *Underwood v. Dismukes*, (D. C. R. I. 1920) 266 Fed. 559.

An indictment for selling liquor.—Where a person who has been indicted for selling a liquid in violation of a state law an instrument issued by the Prohibition Commissioner to the manufacturer of the liquor approving of its sale "in good faith as a medicine" does not bring the case within the provisions of this section entitling the defendant to a trial of the indictment in the federal court, and he is not entitled to have it removed to such court. Application of *Shumpka*, (N. D. N. Y. 1920) 268 Fed. 686.

IV. PROCEDURE FOR REMOVAL

2. Petition for Removal (p. 385)

Requirements as to petition.—The petition should state facts sufficient to enable the court to decide whether the case is one within the provisions of the Act and it is not enough that it alleges in general terms that the petitioner intends to rely in his defense to the prosecution on the revenue laws of the United States. *Oregon v. Wood*, (D. C. Ore. 1920) 268 Fed. 975, holding the petition under consideration to be sufficient.

Signing of petition.—A petition in which it is stated that it is presented in behalf of the petitioners, naming them, and which is signed by the United States attorney is held to meet the requirement of the statute. *Oregon v. Wood*, (D. C. Ore. 1920) 268 Fed. 975.

Verification.—The provision as to verification by affidavit is complied with in the case of several petitioners by an affidavit signed by one of them. *Oregon v. Wood*, (D. C. Ore. 1920) 268 Fed. 975. The court said:

"The petition is verified by Wood alone. The statute merely requires that it be verified by affidavit. Presumably this means that it shall be verified by the petitioner. Where there are several petitioners, verification is usually made, in common practice, by one of them. Such a verification, I have no doubt, is within the purview of the statute, and is sufficient. While a valid petition, duly verified, is necessary to give jurisdiction to the Federal court on removal, the statute has prescribed no technical form of petition and verification to be observed, and common usage, in legal practice, is probably all that was intended."

5. Certiorari (p. 385)

In *Oregon v. Wood*, (D. C. Ore. 1920) 268 Fed. 975, it is said:

"The statute comprises *capias* or other similar form of proceeding by which a personal arrest is ordered. It is obvious that there are two classes of proceedings which dominate the form of the writ. One is when the suit is commenced by summons or like process, except *capias*, and the other is when commenced by *capias* or other similar form of proceeding. *Certiorari* is appropriate in one class, and *habeas corpus cum causa* in the other; this whether the petitioner is in custody or out on bail. If in custody, then the marshal must take him in his custody, and produce him here; but, if out on bail, the bail answers for his personal appearance in this court. Obviously, however, the writ should be the same in either event. While, by a technical consideration of the two writs, *certiorari* would be the more appropriate when the defendant is out on bail, it is sufficient that the statute has not so regarded it, but has prescribed the writ of *habeas corpus cum causa*."

Vol. V, p. 398, Jud. Code, sec. 37.
[First ed., 1912 Supp., p. 150.]

I. Dismissal of suit.

1. Suit or controversy not properly within federal jurisdiction.

- a. In general.

4. Procedure for dismissal.

- a. In general.

II. Grounds for remand.

1. Want of jurisdiction in general.
3. State court without jurisdiction of subject matter.
5. Where jurisdiction is doubtful.

III. Waiver or amendment of defects.

1. Waiver of objection—estoppel to object.

3. Amendment of petition for removal.

- a. In general.

V. Procedure for remand.

1. Remand on court's own motion.

- a. For want of jurisdiction.

I. DISMISSAL OF SUIT

1. Suit or Controversy not Properly within Federal Jurisdiction

a. In General (p. 400)

Equity rules.—"In the application of equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), abolishing pleas and demurrers, and providing that other defenses in point of law arising on the face of the bill, which previously should have been made by plea or demurrer, shall now be made by motion to dismiss or in answer, the law is settled in numerous adjudged cases that upon the consideration of the motion the court may in its discretion, when promotive of justice, refuse to decide a case on such motion, and that defense by answer may be required. Indeed, he rule goes to the extent that, unless the motion clearly discloses that on the allegations of the bill, which are taken as true, it must be dismissed upon final hearing, the preliminary motion to dismiss must be denied." *O'Keefe v. New Orleans*, (E. D. La. 1921) 273 Fed. 560.

4. Procedure for Dismissal

a. In General (p. 403)

Quashing service of summons.—In a case properly removed the defendant has the right to quash the service of the summons, if at the time the service was effected defendant was not subject to personal process within the state where the service was made. *Centaur Motor Co. v. Eccleston*, (W. D. N. Y. 1920) 264 Fed. 852.

II. GROUNDS FOR REMAND

1. Want of Jurisdiction in General (p. 407)

Where the real question at issue is largely one of fact and the court is unable clearly to conclude that the matter involved exceeds the sum of \$3,000, it will remand the case to the state court. *Farmers', etc., Bank v. Federal Reserve Bank*, (W. D. N. C. 1921) 274 Fed. 235.

"It is undoubtedly the law that the federal courts have a right to determine after removal whether jurisdiction was originally acquired by the state court, and to say what constituted a lawful subjection to the jurisdiction of the state tribunal." *Centaur Motor Co. v. Eccleston*, (W. D. N. Y. 1920) 264 Fed. 852.

If "jurisdiction over the person of the defendant has once been acquired in the state court, within the meaning of the federal decisions, such jurisdiction will remain in the state court if the cause has been improperly removed, or will be transferred to the federal court if the removal was valid." *Centaur Motor Co. v. Eccleston*, (W. D. N. Y. 1920) 264 Fed. 852.

In determining whether the relief sought is of a nature that a federal district court is competent to administer the federal court will, on a motion to remand to the state court, look to the face of the complaint and, on the facts as there set up, decide what relief should be granted. It cannot be expected to anticipate evidence or amendments which will enlarge the scope of the prayer for general relief. *Kellogg v. Schauble*, (S. D. Miss. 1921) 273 Fed. 1012.

3. State Court without Jurisdiction of Subject Matter (p. 411)

To the same effect as the original annotation, see *Earles v. Germain Co.*, (S. D. Ala. 1920) 265 Fed. 718.

5. Where Jurisdiction is Doubtful (p. 411)

To the same effect as the second paragraph of the original annotation, see *Demer v. Pacific Steamship Co.*, (W. D. Wash. 1921) 273 Fed. 567.

III. WAIVER OR AMENDMENT OF DEFECTS

1. Waiver of Objection—Estoppel to Object (p. 414)

Where all of the defendants united in a petition to remove the case, on the ground that it arose under the laws of the United States, and the plaintiff asked for a remand, setting up that no federal question in the jurisdictional sense was involved and no objection was made that some of the defendants had been sued in a district in which they did not reside, it was held that an objection on that ground was waived. *Burke v. Monumental Division, etc.*, (D. C. Md. 1919) 273 Fed. 707.

3. Amendment of Petition for Removal

a. In General (p. 417)

To the same effect as the original annotation, see *Amerson v. Western Union Tel. Co.*, (W. D. Ky. 1920) 265 Fed. 909.

The petition for removal may, like any other process or proceeding, be amended whenever consonant with justice. *Hall v. Payne*, (D. C. Mont. 1921) 274 Fed. 237.

V. PROCEDURE FOR REMAND

1. *Remand on Court's Own Motion*a. *For Want of Jurisdiction* (p. 429)

To the same effect as fourth paragraph of original annotation, see *Morrell v. Lalonde*, (D. C. R. I. 1921) 271 Fed. 19.

Vol. V, p. 446, Jud. Code, sec. 38.

[First ed., 1912 Supp., p. 150.]

II. VALIDITY OF SERVICE OF PROCESS IN STATE COURT

1. *Effect of Petition for Removal as Appearance*b. *Other Cases* (p. 456)

To the same effect as the original annotation, see *Hunt v. Pearce*, (E. D. Okla. 1921) 27 Fed. 498.

Vol. V, p. 468, Jud. Code, sec. 41.

[First ed., 1912 Supp., p. 151.]

New York Quarantine Station.—A person accused of a crime committed on the high seas who was brought into the United States at the port of New York on a vessel which first stopped at the quarantine station, which is in the Eastern District, but who was not arrested until the vessel reached New York city which is in the Southern District, was both "found" and first brought into the Southern District within the meaning of this section. *Pederson v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 187.

Vol. V, p. 470, Jud. Code, sec. 42.

[First ed., 1912 Supp., p. 151.]

II. PARTICULAR OFFENSES (p. 471)

Conspiracy.—To the same effect as the original annotation, see *Grayson v. U. S.*, (C. C. A. 6th Cir. 1921) 272 Fed. 553.

Vol. V, p. 478, Jud. Code, sec. 48.

[First ed., 1912 Supp., p. 153.]

II. Jurisdiction.

1. *Generally.*2. *Both infringement and place of business necessary.*

IV. Service.

II. JURISDICTION

1. *Generally* (p. 480)

Suit for contributory infringement of patent.—One who manufactures an element of an infringing device with the intent that it shall be united with the other elements of such device, and completed by another person, is guilty of contributory infringement, and is liable for infringement in a suit instituted in the jurisdiction where he committed his part of the infringement and had a regular and established place of business. *Dental Co. v. S. S. White Dental Mfg. Co.*, (C. C. A. 3d Cir. 1920) 266 Fed. 524.

2. *Both Infringement and Place of Business Necessary* (p. 481)

Generally.—Where the defendant is not an inhabitant of the district he must have a regular place of business within the district and have committed at least one act of infringement in the district. *I. T. S. Rubber Co. v. Essex Rubber Co.*, (D. C. Mass. 1920) 270 Fed. 593.

IV. SERVICE (p. 482)

Service on buyer.—Where the evidence shows that the only relation between the parties is that of buyer and seller, service on the buyer is of no effect. *Rosenbluth v. Hudson Motor Car Co.*, (E. D. Pa. 1920) 264 Fed. 353.

Service on agents.—A corporation purchasing automobiles outright from the corporation which manufactures them and having the exclusive right to sell them in a certain territory, is not the agent of the manufacturing corporation within the meaning of this section and service of process upon it in a patent infringement suit will be set aside. *Rosenbluth v. Hudson Motor Car Co.*, (E. D. Pa. 1920) 265 Fed. 680.

Vol. V, p. 482, Jud. Code, sec. 50.

[First ed., 1912 Supp., p. 153.]

I. Scope.

IV. Parties.

I. SCOPE (p. 482)

This section deals only with judgments and decrees. *Friede v. Azovsko Donskoi Kommercheske Bank*, (S. D. N. Y. 1920) 266 Fed. 131.

IV. PARTIES (p. 483)

An indispensable party.—To the same effect as the original annotation, see *Jennings v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 399.

Vol. V, p. 486, Jud. Code, sec. 51.

[First ed., 1912 Supp., p. 153.]

IV. Jurisdiction.

5. *Where parties are joined.*c. *Defendants.*

VI. Waiver.

1. *Generally.*2. *Appearance and pleading to the merits.*b. *General appearance.*

IV. JURISDICTION

5. *Where Parties Are Joined*c. *Defendants* (p. 496)

Generally.—The joinder of persons who are residents of the district with one who is not does not give the court jurisdiction of the nonresident. *Consolidated Textile Corp. v. Dickey*, (N. D. Ga. 1920) 266 Fed. 587.

VI. WAIVER

1. *Generally* (p. 511)

An objection to the jurisdiction in equity of a federal court on the ground that there is an adequate remedy at law may be waived. *American Surety Co. v. American Mills Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 67.

2. *Appearance and Pleading to the Merits*b. *General Appearance* (p. 514)

When a waiver.—To the same effect as the original annotation, see *Mankin v. Bartley*, (C. C. A. 4th Cir. 1920) 266 Fed. 466.

Vol. V, p. 518, Jud. Code, sec. 52.

[First ed., 1912 Supp., p. 153.]

Applicability.—This section has been held to be applicable in the case of suits for infringement of letters patent. *Zell v. Erie Bronze Co.*, (E. D. Pa. 1921) 273 Fed. 833.

Vol. V, p. 520, Jud. Code, sec. 53.

[First ed., 1912 Supp., p. 154.]

I. Purpose and scope.

II. Jurisdiction.

I. PURPOSE AND SCOPE (p. 521)

The object in the mind of Congress in enacting the removal provision of this section was for the benefit and convenience of litigants by avoiding removal to a remote division, when a nearer was at hand. *Gopcevic v. California Packing Corp.*, (N. D. Cal. 1921) 272 Fed. 994.

II. JURISDICTION (p. 521)

Making objection to jurisdiction.—If a defendant in a timely manner interposes proper objection to being sued in a wrong district, or in a case of removal promptly and timely moves to remand the cause for want of jurisdiction, such action will prevent the jurisdiction of the court from attaching, and the cause must be dismissed or a remand granted, as the case may be. *Gopcevic v. California Packing Corp.*, (N. D. Cal. 1921) 272 Fed. 994.

Vol. V, p. 523, Jud. Code, sec. 54.

[First ed., 1912 Supp., p. 155.]

Residence in the same state is essential.—*Kansas Gas, etc., Co. v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 614.

Vol. V, p. 523, Jud. Code, sec. 55.

[First ed., 1912 Supp., p. 155.]

Property of fixed character.—This section only applies if the action involves property of a fixed character, which lies partly in one district and partly in another district within the same state, in which case the

action may be maintained in either district where some of the property is situated. *Kansas Gas, etc., Co. v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 614.

Vol. V, p. 525, Jud. Code, sec. 57.

[First ed., 1912 Supp., p. 155.]

- I. Construction and application generally.
- II. Applicability to particular matters, suits and proceedings.

I. CONSTRUCTION AND APPLICATION GENERALLY (p. 525)

Construction generally.—This section necessarily implies that, even though jurisdiction be founded only on the fact that the suit is between citizens of different states, yet if the object of the suit brings it within the class described in this section the court of the district in which the suit is brought may entertain it, notwithstanding none of the parties thereto reside in such district. *Hodgman v. Atlantic Refining Co.*, (D. C. Del. 1921) 274 Fed. 104.

II. APPLICABILITY TO PARTICULAR MATTERS, SUITS AND PROCEEDINGS (p. 529)

Corporate matters.—A bill praying that a voting trust agreement be declared void and surrendered for cancellation and that the members of such agreement be enjoined from performing certain acts thereunder is not a suit to remove a cloud on title under the provisions of this section permitting a joinder of a nonresident. *Consolidated Textile Corp. v. Dickey*, (C. C. A. 5th Cir. 1921) 269 Fed. 942.

Shares of stock in a corporation are personal property under the laws of Delaware, and the provisions of this section as to jurisdiction of absent defendants apply in a suit one of the objects of which is to enforce a claim of a Delaware corporation (made by certain of its shareholders) to the shares of its stock held by a Pennsylvania corporation, or to remove a cloud upon the former's title thereto. And the fact that additional relief is sought is immaterial. *Hodgman v. Atlantic Refining Co.*, (D. C. Del. 1921) 274 Fed. 104.

A suit by a corporation to enjoin a breach of contract by another corporation is not one affecting any right, title or interest to any real or personal property in the district. *Kansas Gas, etc., Co. v. Wichita Natural Gas Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 614.

Setting aside or cancelling instruments.—A suit to cancel a written instrument creating a pooling agreement for the voting of corporate stock is not a suit "to remove any incumbrance or lien or cloud upon the title to real or personal property." *Consolidated Textile Corp. v. Dickey*, (N. D. Ga. 1920) 266 Fed. 587,

The court said: "The suggestion that under section 57 jurisdiction may be exercised over him by treating this suit as one 'to remove any incumbrance or lien or cloud upon the title to real or personal property within the district,' is untenable. The judgment in such a case is, by the language of the section, to—'affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.'

"It would be difficult to fix upon any property as the subject of the suit within the district. The title to none is in dispute. None is sought to be recovered. There is no incumbrance or lien or cloud upon the title to any property of the plaintiff in any ordinary acceptance of the term. While it is a suit to cancel a written instrument, that instrument does not purport to convey or affect the title of plaintiff to the shares it owns. The true cause of complaint is the conduct of the defendants in reference to their own property, which is claimed unlawfully and injuriously to affect the property of plaintiff company, a violation of the maxim 'Sic utere tuo ut alienum non lædas.' The unlawful use of a proxy to vote stock to the injury of another stockholder was treated as a tort in *Witham v. Cohen*, 100 Ga. 670, 28 S. E. 505, and such seems to be its true legal character. So concluding, the question is decided by *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 31 Sup. Ct. 81, 54 L. ed. 1069, where it is held that a bill to abate and enjoin a nuisance against inhabitants of the district and one who was an inhabitant of another state could not be maintained as to the latter under the provisions now found in section 57. This court, therefore, has no jurisdiction over Jefferson, and the suit must be dismissed as to him."

Vol. V, p. 540, Jud. Code, sec. 65.

[First ed., 1912 Supp., p. 159.]

Construction.—This section and section 66 have no constricted meaning, but are to be interpreted broadly to effectuate the operation of business carried on by receivers appointed by the federal courts with as much regard for the safety and protection and general observance of the rights of others both in contract and in tort as would be required of the owners of the property of which as receivers they have possession. *Sullivan v. Hustis*, (Mass. 1921) 130 N. E. 247.

Duty of receiver to comply with state law.

—To the same effect as the original annotation, see *Sullivan v. Hustis*, (Mass. 1921) 130 N. E. 247.

Priorities.—A receiver appointed by a federal court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the state. And where the common-law prerogative right of a state to priority over unsecured creditors in

payment of all the debts due the state out of the assets of the debtor cannot be enforced by levy and seizure because of the appointment of a receiver by a federal court within the state, an application to that court for payment of the debt due is the appropriate remedy. *Marshall v. New York*, (1920) 254 U. S. 380, 41 S. Ct. 143, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1919) 262 Fed. 727.

Vol. V, p. 578, Jud. Code, sec. 97.

[First ed., 1912 Supp., p. 177.]

Jurisdiction of offenses on high seas.—To the same effect as the original annotation, see *Pederson v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 187.

Vol. V, p. 607, Jud. Code, sec. 128.

[First ed., 1912 Supp., p. 195.]

- I. Introductory.
- II. "Appellate jurisdiction to review by appeal or writ of error."
- III. Final decisions.
 1. Necessity.
 2. Definition and nature.
 10. Injunction.
 11. Intervention and interpleader.
 12. Judicial sales.
 15. Patents.
 18. Miscellaneous.
- IV. "District courts," etc., including those of Hawaii and Porto Rico.
- V. Cases reviewable.
 1. In general.
 2. Admiralty.
 4. Contempt cases.
 5. Criminal cases.
 9. Patent cases.
- VI. Cases which "may be taken direct to the supreme court."

I. INTRODUCTORY (p. 609)

The jurisdiction of the Circuit Courts of Appeals is purely appellate and statutory. *Grammer v. Fenton*, (C. C. A. 8th Cir. 1920) 268 Fed. 943.

II. "APPELLATE JURISDICTION TO REVIEW BY APPEAL OR WRIT OF ERROR" (p. 609)

In general.—The Circuit Court of Appeals must take notice of the fact where it has no jurisdiction. *Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 386.

The Circuit Court of Appeals "has power to affirm, modify, or reverse any judgment lawfully brought before it for review, or to direct such judgment to be rendered, or further proceedings to be had, as the justice of the case may require. . . . Whatever may be the rule under the common law, where unmodified by statute, as to the power of a court to grant a new trial in

part, or as to a severable sum involved in the suit, we think there is no doubt as to the power of this court to set aside only a part of a judgment, where embracing different items, some of which are not in question." *Thorpe v. National City Bank*, (C. C. A. 5th Cir. 1921) 274 Fed. 200.

Although nothing is said in the briefs or oral arguments of counsel concerning the jurisdiction of the court to hear the appeal yet since the court must have jurisdiction to hear an appeal or can do nothing except to dismiss the same, it becomes the duty of the court to consider the question of jurisdiction on its own motion. *Cleveland Cliffs Iron Co. v. Kinney*, (C. C. A. 8th Cir. 1920) 266 Fed. 888.

Mandamus in aid of appellate jurisdiction.—An order of a district judge vacating a former order dismissing a suit for the infringement of a patent in no way affects the appellate jurisdiction of the Circuit Court of Appeals over the cause as one arising under the patent laws. Such being the case the appellate court has neither the need nor the power to grant a writ of mandamus to preserve its appellate jurisdiction by compelling the district judge to vacate his order reinstating the suit. *Raritan Copper Works v. Elliott*, (C. C. A. 3d Cir. 1921) 271 Fed. 284.

III. FINAL DECISIONS

1. *Necessity* (p. 611)

To the same effect as the original annotation, see *Gas, etc., Securities Co. v. Manhattan, etc., Traction Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 625; *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713; *Iglesias v. Banco Territorial, etc.*, (C. C. A. 1st Cir. 1920) 268 Fed. 479.

Interlocutory orders are not appealable. *O'Brien v. Lashar*, (C. C. A. 2d Cir. 1920) 266 Fed. 215; *U. S. v. Marquette*, (C. C. A. 9th Cir. 1921) 270 Fed. 214.

2. *Definition and Nature* (p. 611)

Generally.—A final decree is not necessarily the last order in the case, as orders sometimes follow merely for the purpose of carrying out or executing the matters which the decree has determined; but when it finally fixes the rights of the parties it is final and may be reviewed. *Gas, etc., Securities Co. v. Manhattan, etc., Traction Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 625.

10. *Injunction* (p. 614)

An order granting a permanent injunction against a city and all of its public officials from passing a proposed resolution forfeiting or affecting a franchise "pending further order in the action" is a final order and appealable. *Gas, etc., Securities Co. v. Man-*

hattan, etc., Traction Corp., (C. C. A. 2d Cir. 1920) 266 Fed. 625. The court said:

"The order enjoined the persons specified therein 'from moving, considering, voting on, amending, adopting, or in any manner passing' the resolution heretofore referred to. The fact that the order was without prejudice to any further application to the court for the enforcement of any of the rights of the city certainly cannot have the effect of converting what is otherwise a final order into an interlocutory one. The injunction meant the end of the matter so far as the particular judge who issued it was concerned, except that it did not include a change of mind on his part. The order goes just as far and lasts just as long as the District Court is possessed of any authority to issue it, and is therefore 'final,' and therefore appealable within the six months' period."

A denial by the trial court of a petition in equity to enjoin the enforcement of a judgment for the reason that it had been satisfied has been held to be a final judgment and appealable. *Barnett v. Conklin*, (C. C. A. 8th Cir. 1920) 268 Fed. 177. The court said:

"The proceeding which resulted in the order appealed from was in no true sense simply a motion to quash an execution involving the exercise of discretion. The proceeding was equivalent and took the place of a proceeding in equity to enjoin the enforcement of the judgment for the reason that it had been satisfied. The prayer of the petition did ask that the execution then outstanding be quashed; but that was merely incidental to the general relief, which was that the enforcement of the judgment should be enjoined. It was not a matter involving the discretion of the trial court, but a matter in regard to which appellant was entitled to the judgment of the court upon the facts pleaded. The denial of the petition by the trial court finally determined, so far as that court was concerned, the rights of appellant, which were substantial rights, not involving the mere regularity of the execution."

11. *Intervention and Interpleader* (p. 615)

An order of interpleader which aligns the parties, prescribes the method of procedure, and finally denies to one of the parties the right to assert a contract obligation against another is final within the meaning of the statute and appealable. *Taiwan Bank v. Gorgas-Pierrie Mfg. Co.*, (C. C. A. 3d Cir. 1921) 273 Fed. 660.

12. *Judicial Sales* (p. 615)

To the same effect as the first paragraph of the original annotation, see *Felker v. Southern Trust Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 798.

15. *Patents* (p. 616)

Where in a patent infringement suit involving two patents the court below found that one was valid and infringed and expressed no opinion as to the other and the defendant on appeal insisted that the invalidity of the second patent clearly appeared, and that the bill should have been dismissed as to that patent the court said:

"No such question is open on this appeal. No final decree has been made in that case, and, as to this second patent, the interlocutory decree neither granted nor refused an injunction. Although the objection is not made by either party, we must take notice that we have no jurisdiction of this question." *Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 386.

18. *Miscellaneous* (p. 616)

An order removing defendants to another district is interlocutory and not appealable. *Murray v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 522.

Action against several defendants.—Where on the allegations of a bill against several defendants, each defendant is under a separate liability and a separate action at law might have been brought against each, a decree in favor of part of them is a final decree from which an appeal will lie. *Curtis v. Connly*, (C. C. A. 1st Cir. 1920) 264 Fed. 650.

Judgment for specific sums in action for breach of covenant.—A judgment for specific sums in an action for the alleged breach of a covenant for quiet enjoyment contained in a lease is final notwithstanding the fact that two of these sums were represented by specifically described unsatisfied judgments, with a provision in the decree of the Supreme Court of the territory to the effect that in the event the defendants to the action should file in the lower court "a full release of the plaintiff upon the two last-named unsatisfied judgments," the respective amounts thereof should not be included in the judgment directed, in no respect affected the finality of the latter—the provision regarding the filing of the release calling for and admitting of the exercise of no judgment, or even discretion, and manifestly for no exercise of any judicial function. *De Fries v. Scott*, (C. C. A. 9th Cir. 1921) 268 Fed. 952.

Order to return property unlawfully seized.—An order directing the return of liquor which had been unlawfully seized is not appealable where the court below did not assume jurisdiction for the purpose of trying title or right of possession, but merely to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge. *U. S. v. Marquette*, (C. C. A. 9th Cir. 1921) 270 Fed. 214.

Dismissal of bill as to one of items.—

Where in the prayer of the bill it asks that the defendant be enjoined from using certain trade-marks and required to render a full and complete account of all profits derived from the use thereof and of profits derived from unfair trade and competition in connection with such use, and in connection with the use of labels, wrappers, etc., and account for and pay over to the plaintiff all of the damage caused by the infringement complained of and by said unfair trade, the different trade-marks set out as grounds of complaint in the bill are but items entering into the accounting which the plaintiff seeks, and a decree disposing of one of these items is not a final disposition of the controversy between the parties in the sense *Grobowski v. John Chmiell Co.*, (C. C. A. 1st Cir. 1919) 264 Fed. 325.

IV. "DISTRICT COURTS," ETC., INCLUDING THOSE OF HAWAII AND PORTO RICO (p. 618)

Decision of Hawaiian Supreme Court.—Where on appeal to the Supreme Court of Hawaii a decree was entered reciting that "pursuant to the opinion" of that court, the decree appealed from was reversed and the cause remanded to the circuit judge "for such further action compatible to the decision as may be necessary" the decree of the Supreme Court was held not to be a final one from which an appeal would lie to the Circuit Court of Appeals. *Rumsey v. New York L. Ins. Co.*, (C. C. A. 9th Cir. 1920) 267 Fed. 554.

A decree of the Supreme Court of Hawaii directing that a decree appealed from be vacated and set aside, that a permanent injunction be dissolved and that the lower court be instructed to dismiss the complainant's bill is final and appealable to the Circuit Court of Appeals. *Hawaiian Pineapple Co. v. Saito*, (C. C. A. 9th Cir. 1921) 270 Fed. 749.

A judgment of the Supreme Court of Porto Rico dismissing a suit for want of capacity in the plaintiffs to prosecute it is a final judgment from which an appeal will lie to the Circuit Court of Appeals. *Franceschi v. Mercado*, (C. C. A. 1st Cir. 1920) 269 Fed. 954.

Jurisdiction of District Court of Porto Rico.—In the case of a suit in equity in the District Court of the United States for the District of Porto Rico by a citizen of Spain domiciled in Porto Rico against a defendant, also resident in Porto Rico, it is said that the Circuit Court of Appeals must on its own motion inquire as to the jurisdiction. *Diez v. Green*, (C. C. A. 1st Cir. 1920) 266 Fed. 890.

No supervisory jurisdiction in Supreme Court.—The transfer to the appropriate Circuit Court of Appeals of a part of the then existing appellate jurisdiction of the Federal Supreme Court over the United States Dis-

trict Court for Porto Rico, which is made by the Act of January 28, 1915, does not warrant the inference that the Federal Supreme Court may, by virtue of its general jurisdiction over the circuit courts of appeals, review a final decision of such a court, properly appealed to that court from the Porto Rico court. *El Banco Popular, etc. v. Wilcox*, (1921) 255 U. S. 72, 41 S. Ct. 312, 65 U. S. (L. ed.) —, *dismissing* appeal to review (C. C. A. 1st Cir. 1918) 255 Fed. 442, 166 C. C. A. 518.

V. CASES REVIEWABLE

1. In General (p. 618)

"On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Robertson v. Jordan River Lumber Co.*, (C. C. A. 5th Cir. 1921) 269 Fed. 606.

Where the jurisdiction of the district the case was disposed of by a decision of that court was put in issue by the defendant and issue in favor of the defendant, it is held that the action of the court is not subject to be reviewed by the Circuit Court of Appeals. *Slayton v. Jourdanton*, (C. C. A. 5th Cir. 1920) 268 Fed. 965.

Where a suit is dismissed for want of jurisdiction and the plaintiff in error insists that defendant in error by first pleading to the merits waived its plea to the jurisdiction another question besides jurisdiction is involved and the writ of error is rightly in the Circuit Court of Appeals. *Drake v. Tennessee, etc., R. Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 248.

2. ADMIRALTY (p. 618)

Generally.—An appeal does not lie to a federal Circuit Court of Appeals from a decree of a district court in which the jurisdiction of that court as a court of admiralty was in issue, and was decided in favor of the defendant. *The Carlo Poma*, (1921) 255 U. S. 219, 41 S. Ct. 309, 65 U. S. (L. ed.) —, [vacating decree in (C. C. A. 2d Cir. 1919) 259 Fed. 369, 170 C. C. A. 345] applying the rule in a case where a vessel libelled in admiralty was asserted to be immune from seizure because it was the property of a foreign government.

Exclusion of evidence not ground for reversal.—The Circuit Court of Appeals will not reverse a decree because of error in excluding competent testimony in an admiralty case, for that would presuppose that the testimony offered would have actually proved the point sought to the satisfaction of the court. In such a case if counsel felt aggrieved by the exclusion of this testimony, they could have moved before the Circuit

Court of Appeals to take such testimony, for in an admiralty suit on appeal, there is a trial de novo. *Moran Towing, etc., Co. v. Cranford Co.*, (C. C. A. 2d Cir. 1921) 274 Fed. 799.

4. Contempt Cases (p. 619)

An order of commitment for contempt is not appealable where it is merely incidental to a prior order adjudging the person to be in contempt, relief if any being by a review of the prior order. *Pennsylvania Cement Co. v. Bradley Contracting Co.*, (C. C. A. 2d Cir. 1921) 274 Fed. 923.

5. Criminal Cases (p. 619)

In general.—The general rule is that, if the defendant, after denial of his motion to direct a verdict at the close of the government's testimony, introduces testimony in his own behalf, he thereby waives his motion, and it is his duty to again renew his motion after all the evidence is closed. But, notwithstanding this rule, it has been held that, where a plain error has been committed in the trial of a criminal case, it will be considered by the court, although a motion for a directed verdict was never made. *Ayala v. U. S.*, (C. C. A. 1st Cir. 1920) 268 Fed. 296.

Scope of review.—The review that is allowed in criminal cases is limited to questions of law arising at the trial, such as sufficiency of pleadings, admissibility of evidence, and instructions to the jurors. It is also well established that the question whether every material allegation of a pleading is supported by evidence may, by proper motions, rulings, and exceptions, be made a question of law arising at the trial. *Applebaum v. U. S.*, (C. C. A. 7th Cir. 1921) 274 Fed. 43.

9. Patent Cases (p. 622)

A petition to the circuit court of appeals by which defendant in a patent suit seeks, after that court has affirmed a decree below, upholding the patent and directing an accounting, to obtain the benefit of a decree in another circuit as *res judicata*, should be treated by the circuit court of appeals as an application for leave to file in the district court a petition in the nature of a bill of review, invoking the consideration of the effect of such decree. *National Brake, etc., Co. v. Christensen*, (1921) 254 U. S. 425, 41 S. Ct. 154, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 7th Cir. 1919) 258 Fed. 880, 169 C. C. A. 600.

VI. CASES WHICH "MAY BE TAKEN DIRECT TO THE SUPREME COURT" (p. 622)

In general.—A direct writ of error from the federal Supreme Court to a district court, would not lie in a suit brought conformably to the Lever Act of August 10, 1917, § 10, (see 1918 Supp. p. 135) by a person dissatisfied with the President's award of compensation for war supplies

requisitioned by him under that section. *U. S. v. Pitsch*, (1921) 256 U. S. —, 41 S. Ct. 569, 65 U. S. (L. ed.) —, wherein the court said:

"The preliminary question arises whether this court has jurisdiction on direct writ of error. The answer to be given to it depends upon the nature of the jurisdiction conferred upon the district court by § 10 of the Lever Act. If the jurisdiction is to be exercised in the manner provided by § 24, Par. 20, of the Judicial Code, which confers upon the district court jurisdiction concurrent with the court of claims, a direct writ of error lies to this court. *J. Homer Fritch v. United States*, 248 U. S. 458, 63 L. ed. 359, 39 Sup. Ct. Rep. 158. If, however, the jurisdiction is the ordinary jurisdiction of the district court, the writ of error should have gone, in the first instance, to the circuit court of appeals under § 128 of the Judicial Code." It was held that the language of this section showed that the jurisdiction granted is the ordinary jurisdiction.

Review of a question of jurisdiction.—Where the question is as to the jurisdiction of the district court as a federal court it should go by writ of error to the Supreme Court. The Circuit Court of Appeals has no jurisdiction. *Perrett v. Clara Kimball Young Film Corp.*, (C. C. A. 2d Cir. 1920) 269 Fed. 613.

The Circuit Court of Appeals has no jurisdiction to review a decree of the district court dismissing a bill for want of jurisdiction, as under section 238 the question of jurisdiction of the district must be certified by that court to the Supreme Court. *Cleveland Cliffs Iron Co. v. Kinney*, (C. C. A. 8th Cir. 1920) 266 Fed. 888.

If the jurisdiction of the district court as a federal court is the sole question involved, an appeal lies only to the Supreme Court under the very terms of section 238 of the Judicial Code. However, where another question than that of jurisdiction arises, although the question of jurisdiction is also presented, an appeal is properly taken to the Circuit Court of Appeals. *Consolidated Textile Corp. v. Dickey*, (C. C. A. 5th Cir. 1921) 269 Fed. 942.

Where the dismissal of a petition in the state court was not based solely on plaintiff's refusal to acknowledge the jurisdiction of the court but was also based on a consideration of the merits on testimony taken by the court after the plaintiff's refusal to proceed, the Circuit Court of Appeals has jurisdiction of an appeal from the district court as the final decree does not involve only a question of jurisdiction. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

Whether a person is an indispensable party is a question of general jurisdiction, applicable alike to state and federal courts and is reviewable by the Circuit Court of Appeals. *Consolidated Textile Corp. v. Dickey*, (C. C. A. 5th Cir. 1921) 269 Fed. 942.

Review of order dismissing habeas corpus.—To the same effect as the original annotation, see *Grammer v. Fenton*, (C. C. A. 8th Cir. 1920) 268 Fed. 943.

Vol. V, p. 629, Jud. Code, sec. 129. [First ed., 1912 Supp., p. 195.]

V. Injunction.

4. "Refusing, dissolving or refusing to dissolve."

VI. Appointing receiver.

IX. Time of taking appeal.

X. Stay.

V. INJUNCTION

4. "Refusing, Dissolving or Refusing to Dissolve" (p. 634)

Where the action of the court below in refusing to grant an injunction is dependent on controverted facts it is said that it is an extreme case that justifies departure from the rule "that the discretion of the primary court is not to be interfered with." *National Picture Theatres v. Foundation Film Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 208.

VI. APPOINTING RECEIVER (p. 635)

An order appointing a receiver in a suit by a dissatisfied stockholder against the corporate officers and directors, seeking accounting and satisfaction for past wrongdoing as such and for the removal of such officers and directors is appealable. *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

IX. TIME OF TAKING APPEAL (p. 637)

Dismissal of bill as to one of items.—Where in the prayer of the bill it asks that the defendant be enjoined from using the trade-marks and required to render a full and complete account of all profits derived from the use thereof and of profits derived from unfair trade and competition in connection with such use, and in connection with the use of labels, wrappers, etc., and account for and pay over to the plaintiff all of the damage caused by the infringement complained of and by said unfair trade, the different trademarks set out as grounds of complaint in the bill are but items entering into the accounting which the plaintiff seeks and a decree disposing of one of these items is not a final disposition of the controversy, and an appeal therefrom must be taken within the time prescribed in this section. *Groblewski v. John Chmiell Co.*, (C. C. A. 1st Cir. 1919) 264 Fed. 325.

X. STAY (p. 638)

It is said that a reading of the equity rules, the pertinent sections of the Judicial Code, and the decisions of the federal courts make it clear that the granting of a motion to continue an injunction in force pending

an appeal rests in the sound discretion of the court. *Corona Coal Co. v. Southern R. Co.*, (N. D. Ala. 1920) 266 Fed. 726.

Vol. V, p. 643, Jud. Code, sec. 132.

[First ed., 1912 Supp., p. 196.]

The right of appeal in a habeas corpus proceeding is absolute in case a petition for appeal, assignments of error and a suitable bond are presented and filed within the time allowed by law. *In re Graves*, (C. C. A. 1st Cir. 1920) 270 Fed. 181.

Vol. V, p. 650, Jud. Code, sec. 145, par. first. [First ed., 1912 Supp., p. 200.]

II. Jurisdiction.

1. Scope.
6. Claims founded upon contract.
7. Claims sounding in tort.
8. War claims.

II. JURISDICTION

1. Scope (p. 651)

Concurrent jurisdiction of court of claims and district courts.—In every cause of which the Court of Claims has jurisdiction the District Courts have a like jurisdiction, limited only in respect to the sum involved or in controversy, and, of course, the amount of the judgment which can be rendered. *Sochis v. U. S.*, (E. D. Pa. 1920) 266 Fed. 446.

6. Claims Founded upon Contract (p. 655)

Jurisdiction to review decision as to liquidated damages.—Where a contract contains a clause for liquidated damages for delays caused by the contractor and the right to finally determine the cause and extent of such delays is given to the chief engineer, there being no bad faith on the part of such officer, or error so gross as to necessarily imply bad faith, the court has no jurisdiction to review the decision of such officer, whether the United States did or did not suffer actual damages by reason of such delays. *Pelton Water Wheel Co. v. U. S.*, (1919) 55 Ct. Cl. 31.

7. Claims Sounding in Tort (p. 657)

To the same effect as the original annotation, see *Keokuk, etc., Bridge Co. v. U. S.*, (1920) 55 Ct. Cl. 480.

Payments made by steamship company to federal officials under duress.—A claim against the United States which rests upon payments for maintenance and medical care of alien immigrants, alleged to have been made by a steamship company under duress because of wrongful and tortious acts of federal officials, without authority of law, in coercing the claimant to pay the sums demanded, is not justifiable in the court of claims under this section, being a claim

sounding in tort, within the exception made by that section. *U. S. v. Holland-American Line*, (1920) 254 U. S. 148, 41 S. Ct. 74, 65 U. S. (L. ed.) —, reversing (1918) 53 Ct. Cl. 522.

8. War Claims (p. 658)

Suits to recover for property taken for war purposes.—When in the different war measures enacted by Congress power was conferred to take possession of the property of individual citizens for public purposes, and the right to institute proceedings against the United States for compensation for the property taken was also given, Congress thereby gave its consent to such proceedings being instituted in those tribunals which Congress had already provided for the purpose, and had intrusted with power to determine the rights of the claimants and of the United States. This meant that proceedings might be instituted in the Court of Claims, and also that they might be instituted in any District Court of the United States, provided the sum involved did not exceed the limitation above named. *Sochis v. U. S.*, (E. D. Pa. 1920) 266 Fed. 446.

Vol. V, p. 672, Jud. Code, sec. 159.

[First ed., 1912 Supp., p. 204.]

Necessity of proof of plaintiff's allegiance.—Where the loyalty of a plaintiff has been alleged in a petition as required by this section, and it comes to the knowledge of the court that there is doubt as to whether plaintiff has always borne true allegiance to the government of the United States, the court will not hear the case upon its merits until the question of plaintiff's loyalty has been settled. *Vogelstein v. U. S.*, (1920) 55 Ct. Cl. 490.

Vol. V, p. 673, Jud. Code, sec. 162.

[First ed., 1912 Supp., p. 205.]

Ownership at time of seizure.—One who purchased in 1865 cotton which had previously been sold to the Confederate States under a sale treated by the seller as rescinded before delivery, and who, after a seizure of the cotton by the federal Treasury agents, agreed with her vendor that the sale should be rescinded because of his prior transactions in connection with the cotton, was not the owner at the time of the seizure, within the meaning of this section. *Mangan v. U. S.*, (1921) 254 U. S. 494, 41 S. Ct. 157, 65 U. S. (L. ed.) —, affirming (1919) 54 Ct. Cl. 207.

Vol. V, p. 678, Jud. Code, sec. 175.

[First ed., 1912 Supp., p. 207.]

Allowance of motion for new trial as discretionary.—In *Missouri Pac. R. Co. v. U. S.*, (1920) 55 Ct. Cl. 485, the court said regarding motions for new trials under this sec-

tion: "Without going into an extended discussion of the relative rights of the parties under a motion for a new trial under section 175 of the Judicial Code we believe the allowance or refusal of such a motion rests in the sound discretion of the court, and in reaching its conclusion the court is entitled to consider the record presented in support thereof."

Nature of motion.—The motion contemplated by this section is largely analogous to a bill in the nature of a bill of review in equity to set aside a former decree, or a bill impeaching a decree for fraud. *Electric Boat Co. v. U. S.*, (1920) 55 Ct. Cl. 497.

Ground for new trial.—Where the record in a former trial between the same parties, upon which a motion for a new trial under this section is based, does not show that fraud, wrong, or injustice has been done the United States, the burden of proving which is upon the defendants, the court will not grant a new trial. *Missouri Pac. R. Co. v. U. S.*, (1920) 55 Ct. Cl. 485.

Newly discovered evidence.—To same effect as original annotation, see *Electric Boat Co. v. U. S.*, (1920) 55 Ct. Cl. 497, wherein it was held that where facts materially affecting the issues in a case were unknown to the Attorney General or his assistant in charge at the trial thereof, it is good ground for the allowance of a motion to take testimony as to such facts under the rules of the court allowing new trials for after-discovered evidence.

Correction of findings of fact.—Where there are facts in the record which would vitally alter the findings of fact and which have not been brought to the attention of the court either in oral argument or by requests for findings at the trial thereof, the court will of its motion, upon the discovery of such facts, make the proper correction of its findings of fact. *Electric Boat Co. v. U. S.*, (1920) 55 Ct. Cl. 497.

Vol. V, p. 708, Jud. Code, sec. 233.

[First ed., 1912 Supp., p. 229.]

II. State a party.

4. State against state.

IV. Procedure.

II. STATE A PARTY

4. State Against State (p. 710)

Pollution of waters of New York bay.—The state of New York can maintain an original suit in the federal Supreme Court to enjoin the state of New Jersey and its sewerage commissioners from discharging a large volume of sewage into the waters of upper New York bay, which, it is alleged, will cause such pollution of the waters of New York bay as to amount to a public nuisance which will result in grave injury to the health, property, and commercial welfare of the people of the state and city of New York. *New York v. New Jersey*, (1921)

250 U. S. —, 41 S. Ct. 492, 65 U. S. (L. ed.) —, wherein it was further held that the federal government having properly intervened in the suit, it was within the authority of the Attorney General to agree that the United States should retire from the case upon terms stated in a stipulation on behalf of the state of New Jersey, which were plainly approved by the Secretary of War, who afterward embodied them in a construction permit issued to the sewerage commissioners.

IV. PROCEDURE (p. 716)

Restoring suit to docket for supplemental proof.—In *North Dakota v. Minnesota*, (1921) 256 U. S. —, 41 S. Ct. 533 mem., 65 U. S. (L. ed.) —, the original suit was restored to the docket to afford an opportunity for the taking of supplemental proof deemed necessary to an adequate consideration and disposition of the cause.

Vol. V, p. 717, Jud. Code, sec. 234.

[First ed., 1912 Supp., p. 230.]

I. Prohibition.

4. Limitation on right to issue.

II. Mandamus.

1. Power to issue.

I. PROHIBITION

4. Limitation on Right to Issue (p. 719)

Generally.—A writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein, will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure, and has no other remedy, but if the jurisdiction of the lower court is doubtful, or depends upon a finding of fact made upon evidence which is not in the record, or if the complaining party has an adequate remedy by appeal or otherwise, the writ will ordinarily be denied. *Ex p. Chicago, etc., R. Co.*, (1921) 255 U. S. 273, 41 S. Ct. 288, 65 U. S. (L. ed.) —.

In admiralty cases a writ of prohibition goes as a matter of right only where the absence of jurisdiction is plain. Where the jurisdiction is debatable, the granting or refusal is discretionary. *In re Hussein Lutfi Bey*, (1921) 256 U. S. —, 41 S. Ct. 609, 65 U. S. (L. ed.) —.

Prohibition or mandamus will not issue to prevent a federal district court from exercising further jurisdiction, and to compel it to undo what has been done, in a suit in admiralty against a British steamship privately owned, in which a mere suggestion, unsupported by proof, was presented on behalf of the British Embassy by private counsel appearing as *amici curiae*, that the vessel libeled was in the public service and under the control of the British government

as an admiralty transport, where the suit is still in the interlocutory stage, and the status of the vessel is at best doubtful and uncertain, both as matter of fact and in point of law. *Ex p. Muir*, (1921) 254 U. S. 522, 41 S. Ct. 185, 65 U. S. (L. ed.) —, wherein the court said:

"The power of this court, under § 234 of the Judicial Code, to issue writs of prohibition to the district courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable. But this power, like others, is to be exerted in accordance with principles which are well settled. In some instances, as where the absence of jurisdiction is plain, the writ goes as a matter of right. *Ex parte Phenix Ins. Co.*, 118 U. S., 610, 626, 30 L. ed. 274, 280, 7 Sup. Ct. Rep. 215; *Ex parte Indiana Transp. Co.*, 244 U. S. 456, 61 L. ed. 1253, 37 Sup. Ct. Rep. 717. In others, as where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary. *Re Cooper*, 143 U. S. 472, 485, 36 L. ed. 232, 12 Sup. Ct. Rep. 453; *Re New York & P. R. S. S. Co.*, 155 U. S. 523, 531, 39 L. ed. 246, 249, 15 Sup. Ct. Rep. 183; *Re Alix*, 166 U. S. 136, 41 L. ed. 948, 17 Sup. Ct. Rep. 522. And see *Ex parte Gordon*, 104 U. S. 515, 518, 519, 26 L. ed. 814, 815; *The Charkieh*, L. R. 8 Q. B. 197, 42 L. J. Q. B. N. S. 75, 28 L. T. N. S. 190, 21 Week. Rep. 437.

"Here the most that can be said against the District Court's jurisdiction is that it is in doubt; and in other respects the situation is such that we deem it a proper exercise of discretion to refuse the writ. Nothing need be added to show that the request for a writ of mandamus is on no better footing. *Re Morrison*, 147 U. S. 14, 26, 37 L. ed. 60, 65, 13 Sup. Ct. Rep. 246; *Re Oklahoma*, 220 U. S. 191, 209, 55 L. ed. 431, 435, 31 Sup. Ct. Rep. 426; *Ex parte Roe*, 234 U. S. 70, 58 L. ed. 1217, 34 Sup. Ct. Rep. 722."

To prevent assuming jurisdiction of non-resident corporation.—Neither prohibition nor mandamus will be granted by the federal Supreme Court to prevent a district court from assuming jurisdiction of the person of a non-resident corporation against which a personal liability is asserted in a cross bill filed in a suit for the appointment of a receiver of another corporation in default on its bonds, after the nonresident corporation appeared before a special master for the purpose of protecting its interest in such bonds, where the most that can be said against the district court's jurisdiction is that it is in doubt, the return reciting that the order which declared that such nonresident corporation became a party rests upon evidence which has not been embodied in the record, and the district court obviously having jurisdiction to determine in the first instance whether such corporation had entered a general appearance, and to determine whether

the relief sought in the cross bill was in its nature germane to the proceedings theretofore instituted in the suit, so that the rights asserted in the cross bill could be properly litigated in that suit, and to determine whether the fact that such earlier proceeding had been instituted on behalf of such corporation, and that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to further proceedings thereon by way of cross bill as fully as if the earlier action had been taken in its name as well as on its behalf. *Ex p. Chicago, etc., R. Co.*, (1921) 255 U. S. 273, 41 S. Ct. 288, 65 U. S. (L. ed.) —.

Objection to jurisdiction one that could have been raised by appeal.—The fact that the objection to the jurisdiction of the court below might be raised by appeal from the final decree is not, in all cases, a valid objection to the issuance of a writ of prohibition by the federal Supreme Court at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction. *Matter of New York*, (1921) 256 U. S. —, 41 S. Ct. 588, 65 U. S. (L. ed.) —.

II. MANDAMUS

1. Power to Issue (p. 721)

Suits in admiralty.—Mandamus will not issue to prevent a federal District Court from exercising further jurisdiction, and to compel it to undo what has been done in a suit in admiralty in which the question of the jurisdiction of that court is an open one and of uncertain solution. *In re Hussein Lutfi Bey*, (1921) 256 U. S. —, 41 S. Ct. 609, 65 U. S. (L. ed.) —.

To prevent exercise of doubtful jurisdiction.—Neither prohibition nor mandamus will be granted by the federal Supreme Court to prevent a district court from assuming jurisdiction of the person of a nonresident corporation against which a personal liability is asserted in a cross bill filed in a suit for the appointment of a receiver of another corporation in default on its bonds, after the nonresident corporation appeared before a special master for the purpose of protecting its interest in such bonds, where the most that can be said against the district court's jurisdiction is that it is in doubt, the return reciting that the order which declared that such nonresident corporation became a party rests upon evidence which has not been embodied in the record, and the district court obviously having jurisdiction to determine in the first instance whether such corporation had entered a general appearance, and to determine whether the relief sought in the cross bill was in its nature germane to the proceedings theretofore instituted in the suit, so that the rights asserted in the cross bill could be properly litigated in that suit, and to determine

whether the fact that such earlier proceeding had been instituted on behalf of such corporation, and that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to further proceedings thereon by way of cross bill as fully as if the earlier action had been taken in its name as well as on its behalf. *Ex p. Chicago, etc., R. Co.*, (1921) 255 U. S. 273, 41 S. Ct. 288, 65 U. S. (L. ed.) —.

Vol. V, p. 723, Jud. Code, sec. 237.

[First ed., 1912 Supp., p. 230.]

II. General considerations affecting review of judgments of state courts.

7. State practice as determining whether federal question is raised.

V. "Highest court of a state."

VI. Questions reviewable by Supreme Court.

1. Federal questions.

b. Nonfederal question in case in addition to federal question.

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XVIII. Pendency of case in Supreme Court as affecting action of state court.

XIX. Review on writ of certiorari.

Construction of this section as amended, see *infra*, p. 642.

II. GENERAL CONSIDERATIONS AFFECTING REVIEW OF JUDGMENTS OF STATE COURTS

7. State Practice as Determining Whether Federal Question is Raised (p. 727)

There being no pretense that the highest state court adopted its view of a non-federal question in order to evade an issue under the Federal Constitution, and the case having been decided upon grounds that have no relation to any federal question, the federal Supreme Court accepts the decision of the state court, whether right or wrong. *Nickel v. Cole*, (1921) 256 U. S. —, 41 S. Ct. 467, 65 U. S. (L. ed.) —.

V. "HIGHEST COURT OF A STATE" (p. 730)

"Highest" court—*In general*.—To the same effect as the original annotation, see *Duart v. Simmons*, (1920) 236 Mass. 225, 128 N. E. 32.

VI. QUESTIONS REVIEWABLE BY SUPREME COURT

1. Federal Questions

b. Non-federal Question in Case in Addition to Federal Question (p. 733)

The general rule.—A decision of the highest court of a state which rests upon grounds

independent of the only federal question involved that would serve as the basis of a writ of error from the Federal Supreme Court, and which appeared to the state court to preclude any recovery, is not reviewable in the Federal Supreme Court on writ of error, where such independent grounds are broad enough to sustain the judgment, and, if not well taken, are not without substantial support, and, while possibly involving federal questions, are not such as, since the act of September 6, 1916, (see 1918 Supp. p. 411) will support such a writ of error. *Minneapolis, etc., R. Co. v. Washburn Lignite Coal Co.*, (1920) 254 U. S. 370, 41 S. Ct. 140, 65 U. S. (L. ed.) —, dismissing writ of error to review (1918) 40 N. D. 69, 168 N. W. 684, 12 A. L. R. 744.

c. Fictitious, Frivolous, or Moot Federal Question (p. 737)

A writ of error from the federal Supreme Court to a state court must be dismissed where the federal question involved had, when the writ was sued out, become too unsubstantial to support the federal jurisdiction of the federal Supreme Court. *Miller v. Sacramento, etc., Drainage Dist.*, (1921) 256 U. S. 129, 41 S. Ct. 404, 65 U. S. (L. ed.) —, dismissing writ of error to review (1920) 182 Cal. 252, 187 Pac. 1041, and denying writ of certiorari.

The federal Supreme Court will dismiss a writ of error to a state court where the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous. *Quong Ham Wah Co. v. Industrial Acc. Commission*, (1921) 255 U. S. 445, 41 S. Ct. 373, 65 U. S. (L. ed.) —, dismissing writ of error to review (1920 Cal.) 192 Pac. 1021, 12 A. L. R. 1190.

2. Questions of Fact (p. 739)

In general.—The omission of the state courts below to pass upon certain evidence or make findings of fact thereon, doubtless because, under their respective views of the applicable law, the facts referred to were immaterial, does not relieve the federal Supreme Court, on writ of error, of the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court if plaintiff in error's contention upon the question of federal law should be sustained, and the facts thereby shown to be material. *Merchants' Nat. Bank v. Richmond*, (1921) 256 U. S. —, 41 S. Ct. 619, 65 U. S. (L. ed.) —.

3. Local and General Law (p. 742)

Rule stated.—To the same effect as the first paragraph of original annotation, see *Hartford L. Ins. Co. v. Blincoe*, (1921) 255 U. S. 129, 41 S. Ct. 276, 65 U. S. (L. ed.) —, affirming (1919) 279 Mo. 316, 214 S. W. 207, 12 A. L. R. 758.

Construction of local statute.—The construction of a state statute by the highest court of that state must be accepted by the federal Supreme Court when testing the validity of the statute under the Federal Constitution, on writ of error to the state court. *Quong Ham Wah Co. v. Industrial Acc. Commission*, (1921) 255 U. S. 445, 41 S. Ct. 373, 65 U. S. (L. ed.) —, dismissing writ of error to review (1920 Cal.) 192 Pac. 1021, 12 A. L. R. 1190.

Decree of foreclosure of railroad mortgage as binding state.—The ruling of the highest court of a state in a revisory proceeding, that the state is not bound by a decree of foreclosure of a railroad mortgage in a suit to which the state voluntarily makes itself a party, is upon a local question with which the federal Supreme Court has no concern. *Bullock v. Florida*, (1921) 254 U. S. 513, 41 S. Ct. 193, 65 U. S. (L. ed.) —, *affirming* on other grounds (1919) 78 Fla. 321, 82 So. 866, 8 A. L. R. 232.

State long-and-short-haul statute.—The objection, in an action by a shipper against a carrier for overcharges, brought under a state long-and-short-haul statute, that the shipper did not pay freight charges, and therefore was not damaged, raises no substantial federal question, but a question of state law, which the federal Supreme Court has no jurisdiction to review on writ of error to a state court. *Missouri Pac. R. Co. v. McGrew Coal Co.*, (1921) 256 U. S. 134, 41 S. Ct. 404, 65 U. S. (L. ed.) —, *affirming* (1920) 280 Mo. 466, 217 S. W. 984, 13 A. L. R. 283.

Taxation.—A state having power to impose an inheritance tax, the question whether or not a certain interest under the circumstances was correctly subjected to the tax is a purely state question, not reviewable by the federal Supreme Court on writ of error to a state court. *Nickel v. Cole*, (1921) 256 U. S. —, 41 S. Ct. 467, 65 U. S. (L. ed.) —.

4. State Procedure (p. 747)

Federal question first raised at rehearing.—A federal question first raised by a petition to the highest court of the state for a rehearing, which that court overruled without more, will not support a writ of error from the federal Supreme Court. *Wall v. Chesapeake, etc., R. Co.*, (1921) 256 U. S. 125, 41 S. Ct. 402, 65 U. S. (L. ed.) —, *dismissing* writ of error to review (1919) 290 Ill. 227, 125 N. E. 20.

Costs for vexatious appeal.—The proper construction of a state statute providing for the recovery of damages and attorneys' fees for vexatious refusal to pay a loss under a policy of insurance is for the state courts to determine; and their conclusion is not open to review in the federal Supreme Court, although the latter court may consider the application of the statute to the circumstances of the case to be rather hard. *Hartford L. Ins. Co. v. Blincoe*, (1921) 255 U. S. 129, 41 S. Ct. 276, 65 U. S. (L. ed.) —,

affirming (1919) 279 Mo. 316, 214 S. W. 207, 12 A. L. R. 758.

XVIII. PENDENCY OF CASE IN SUPREME COURT AS AFFECTING ACTION OF STATE COURT (p. 793)

Writ of error as not vacating judgment of state court.—The removal of a case by writ of error from a state court to the federal Supreme Court does not vacate the judgment of the state court. It continues in force until reversed. *Duart v. Simmons*, (1920) 236 Mass. 225, 128 N. E. 32.

XIX. REVIEW ON WRIT OF CERTIORARI (p. 794)

Recovery of additional freight charges.—Whether a carrier is entitled to recover from the consignee of an interstate shipment, as a matter of law, under the Interstate Commerce Acts, the difference between the freight rates charged and collected and the larger amount due under the applicable published rates, is a question which the federal Supreme Court can review by certiorari to a state court; not by writ of error. *New York Cent., etc., R. Co. v. York, etc., Co.*, (1921) 256 U. S. —, 41 S. Ct. 509, 65 U. S. (L. ed.) —, *reversing* in part and *affirming* in part (1918) 230 Mass. 206, 119 N. E. 855.

Vol. V, p. 794, Jud. Code, sec. 238. [First ed., 1912 Supp., p. 231.]

- I. Scope of statute and general matters.
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 - a. In general.

4. Exclusiveness of jurisdiction of Supreme Court.
7. Scope of review.

I. SCOPE OF STATUTE AND GENERAL MATTERS

3. *Porto Rico* (p. 797)

Supervisory jurisdiction.—The transfer to the appropriate circuit court of appeals of a part of the then-existing appellate jurisdiction of the federal Supreme Court over the United States district court for Porto Rico, which is made by the Act of January 28, 1915, does not warrant the inference that the federal Supreme Court may, by virtue of its general jurisdiction over the circuit courts of appeals, review a final decision of such a court properly appealed to that court from the Porto Rico court. *El Banco Popular, etc. v. Wilcox*, (1921) 255 U. S. 72, 41 S. Ct. 312, 65 U. S. (L. ed.) —, *dismissing appeal to review* (C. C. A. 1st Cir. 1918) 255 Fed. 442, 166 C. C. A. 518.

5. *Habeas Corpus* (p. 798)

Habeas corpus is a civil proceeding reviewable by appeal and not by writ of error. *In re Graves*, (C. C. A. 1st Cir. 1920) 270 Fed. 181.

8. *Frivolous Grounds and Moot Questions* (p. 799)

Frivolous grounds.—A writ of error will not lie from the federal Supreme Court to a state court in a case in which the only question which the state court was called upon to decide, and did decide, is one which was no longer an open one in the federal Supreme Court, the ruling of the latter court being the basis of the state court's decision. *Minneapolis, etc., R. Co. v. C. L. Merrick Co.*, (1920) 254 U. S. 376, 41 S. Ct. 142, 65 U. S. (L. ed.) —, *dismissing writ of error to review* (1916) 35 N. Dak. 331, 160 N. W. 140.

Moot questions.—A judgment below in favor of plaintiff in an action to recover the possession of real property which, pending review in the federal Supreme Court on writ of error, he has sold, thus causing the case to become moot, will be reversed and the cause remanded for the dismissal of the complaint. *Heitmuller v. Stokes*, (1921) 256 U. S. —, 41 S. Ct. 522, 65 U. S. (L. ed.) — (*reversing* (1920) 49 App. Cas. (D. C.) 391, 266 Fed. 1011), wherein it was further held that the costs incurred upon the writ of error should be paid by the plaintiff.

The federal Supreme Court, though unable to consider the merits of a case, owing to the moot character of the issues involved, is at liberty to make such order as is consonant to justice, in view of the conditions and circumstances of the case. *Heitmuller v. Stokes*, (1921) 256 U. S. —, 41 S. Ct. 522, 65 U. S. (L. ed.) —, *reversing* (1920) 49 App. Cas. (D. C.) 391, 266 Fed. 1011.

III. FINAL JUDGMENT (p. 800)

Holding process to be nugatory.—A decree of a federal district court in a suit in rem in admiralty against a ship, which decree, though not formally dismissing the libel, holds for naught the process under which the ship was arrested, declares that the ship is not subject to any such process, and directs her release, is final for the purpose of an appeal to the federal Supreme Court. *The Pesaro*, (1921) 255 U. S. 216, 41 S. Ct. 308, 65 U. S. (L. ed.) —.

IV. "JURISDICTION OF COURT IN ISSUE"

1. *In General* (p. 801)

The question of the jurisdiction alone of the district court must under this section be certified by that court to the Supreme Court and the Circuit Court of Appeals has no jurisdiction. *Cleveland Cliffs Iron Co. v. Kinney*, (C. C. A. 8th Cir. 1920) 266 Fed. 888.

Foreign sovereignty asserted in bar of jurisdiction.—Whether or not a ship owned by a foreign government, and, at the time of arrest, in the possession of such government, is subject to the process of a federal district court, sitting as a court of admiralty, is a jurisdictional question in the sense of the provision of the Judicial Code, § 238, for an appeal or writ of error from a district court directly to the federal Supreme Court in any case in which the jurisdiction of the lower court may be in issue. *The Pesaro*, (1921) 255 U. S. 216, 41 S. Ct. 308, 65 U. S. (L. ed.) —. See to the same effect *The Carlo Poma* (1921) 255 U. S. 219, 41 S. Ct. 309, 65 U. S. (L. ed.) —.

2. *Separate Appeals and Right of Election Between Supreme Court and Circuit Court of Appeals*

a. General Consideration of Subject (p. 801)

If the jurisdiction of the District Court as a federal court is the sole question involved, an appeal lies only to the Supreme Court under the very terms of this section. However, where another question than that of jurisdiction arises, although the question of jurisdiction is also presented, an appeal is properly taken to the Circuit Court of Appeals. *Consolidated Textile Corp. v. Dickey*, (C. C. A. 5th Cir. 1921) 269 Fed. 942.

b. Jurisdiction Sole Question in Issue (p. 805)

The Circuit Court of Appeals has no jurisdiction to review a judgment of the District Court convicting a person of murder where the only question presented is whether the lower court has jurisdiction of the crime charged and over the person of the defendant. *Sol Louie v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 295.

Where the question is as to the jurisdiction of the District Court as a federal court it

should go by writ of error to the Supreme Court. The Circuit Court of Appeals has no jurisdiction. *Perrett v. Clara Kimball Young Film Corp.*, (C. C. A. 2d Cir. 1920) 269 Fed. 613.

5. *When Jurisdiction Is in Issue* (p. 806)

Objection that an indictment does not charge a crime against the United States.—The contention that a District Court was without jurisdiction of a criminal prosecution for the murder of one Indian by another within the limits of an Indian reservation because, before the time of the alleged crime, the accused had been declared competent, and the land on which the crime was alleged to have been committed had been allotted and deeded to him in fee simple, raises a question not of the jurisdiction of the court, but of the jurisdiction of the United States, and hence furnishes no basis for a direct writ of error from the Supreme Court to the District Court. *Louie v. U. S.*, (1921) 254 U. S. 548, 41 S. Ct. 188, 65 U. S. (L. ed.) —, wherein the court said: "Since defendant's motions in the district court did not raise a question properly of the jurisdiction of the court, but went to the merits, there was no basis for a direct writ of error from this court. *Pronovost v. United States*, 232 U. S. 487, 58 L. ed. 696, 34 Sup. Ct. Rep. 391. He properly sought review in the circuit court of appeals. In *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93, and *United States v. Pelican*, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. Rep. 396, where the defense was similar to that presented here, and in *United States v. Sutton* and *United States v. Soldana*, *supra*, the cases came to this court by direct writ of error to the district court under the Criminal Appeals Act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, 6 Fed. Stat. Anno. 2d ed. p. 149. *Hallowell v. United States*, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587, where a similar question was involved, came here on certificate. In *Clairmont v. United States*, 225 U. S. 551, 554, 56 L. ed. 1201, 1202, 32 Sup. Ct. Rep. 787, it was inadvertently assumed without discussion that the question involved was one of the jurisdiction of the district court."

Proper service of process.—A decree of a federal District Court which set aside the attempted service by publication upon non-resident defendants and dismissed the bill upon consideration of the allegations of such bill, which, upon application of general principles, were held not to show that plaintiff had any such lien upon or interest in the assets within the district sought to be reached as authorized him to invoke the procedure outlined in the Judicial Code, § 57 (see vol. 5, p. 525), is not reviewable in the federal Supreme Court as presenting a question of the jurisdiction of the District Court as a federal court. *De Rees v. Costaguta*, (1920) 254 U. S. 166, 41 S. Ct. 69, 65 U. S. (L. ed.)

—, wherein the court said: "The appellees challenge the jurisdiction of this court to entertain this appeal on the ground that the case does not present a jurisdictional issue properly reviewable by this court."

"Since the decision of *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214, it has been the accepted doctrine that where there is a contention that no valid service of process has been made upon the defendant, and the judgment is rendered without jurisdiction over the person, such judgment can be reviewed by direct appeal to this court. This principle was restated and previous cases cited as late as *G. & C. Merriam Co. v. Saalfeld*, 241 U. S. 22, 26, 60 L. ed. 868, 971, 36 Sup. Ct. Rep. 477.

"It is equally well settled that where the question of jurisdiction presented and decided turns upon questions of general law, determinable upon principle alike applicable to actions brought in other jurisdictions, the jurisdiction of the court as a Federal court is not presented in such wise as to authorize the jurisdictional appeal directly to this court; and the question must be decided as other questions are, by the usual course of appellate procedure, giving review in the circuit court of appeals. *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; *Scully v. Bird*, 209 U. S. 481, 485, 52 L. ed. 899, 901, 28 Sup. Ct. Rep. 597; *Bogart v. Southern P. Co.*, 228 U. S. 137, 57 L. ed. 768, 33 Sup. Ct. Rep. 197.

"That the question of the adequacy of the allegations of the bill to justify the relief sought does not present a jurisdictional question was held in *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Louisville & N. R. Co. v. Western U. Teleg. Co.*, 234 U. S. 369, 372, 58 L. ed. 1356, 1358, 34 Sup. Ct. Rep. 810; *R. J. Darnell v. Illinois C. R. Co.*, 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760; *Public Service Co. v. Corboy*, 250 U. S. 153, 162, 63 L. ed. 905, 909, 39 Sup. Ct. Rep. 440.

"The opinion of the court below, read in connection with the certificate, shows that it was held that the contract set up in the bill gave no lien upon or right in rem in the assets sought to be reached within the district. The question was presented, the court, in the exercise of jurisdiction, after an examination of the contract set forth in the bill, and a consideration of its terms, determined it upon principles which would have been equally applicable had the question been presented in other jurisdictions. Its decision, therefore, did not involve the jurisdiction of the Federal court as such, which, it is settled, is required in order to justify a direct appeal to this court.

"In *Chase v. Wetzlar*, 225 U. S. 79, 56 L. ed. 990, 32 Sup. Ct. Rep. 659, the Act of March 3, 1875, now § 57 of the Judicial Code, was involved, and there was an attempt to have service on alien defendants by publication under the provisions of the statute. The issue made was as to whether there was property of the defendants within the jurisdiction of the court. That issue was held to present a question of jurisdiction properly reviewable in this court under § 238. In the case now presented no question is made as to the presence of property in the district. The attempted service was set aside, and the bill dismissed, upon consideration of the allegations of the bill which, it was held, upon application of general principles, did not show that the plaintiff had any lien upon or interest in the property authorizing him to invoke the procedure outlined in § 57 of the Judicial Code.

"As to the contention that the whole case is here upon a constitutional question because of the procedure in the court below, § 238 provides that when a case comes here upon a question of jurisdiction, that question alone shall be certified. Moreover, we find no merit in the alleged deprivation of constitutional rights, so as to present questions arising under the Constitution."

Validity of federal farm loan bonds.—A bill filed by a stockholder to enjoin the corporation from investing the funds of such corporation in farm loan bonds issued under the authority of the Federal Farm Loan Act of July 17, 1916, as amended by the Act of January 18, 1918, on the ground that these acts were beyond the constitutional power of Congress, and that the securities issued thereunder were consequently of no validity, sets forth a cause of action arising under the Federal Constitution or laws of which a federal District Court has jurisdiction under Judicial Code, § 24, without diversity of citizenship, and from the decree of the District Court dismissing the bill a direct appeal lies to the federal Supreme Court. *Smith v. Kansas City Title, etc., Co.*, (1921) 255 U. S. 180, 41 S. Ct. 243, 65 U. S. (L. ed.) —.

9. Scope of Review

c. Questions of Fact and Findings (p. 827)

Evidence not in record.—A decree of a federal Circuit Court of Appeals will be affirmed on motion where the case turns essentially on questions of fact, and both courts below, on a review of the evidence, have found the facts in the same way, and the record not only fails clearly to disclose error in such concurrent findings, but does not contain all the evidence, since, under these circumstances, to return the cause for oral argument in regular course would result in harmful delay, and serve no useful purpose. *Bodkin v. Edwards*, (1921) 255 U. S. 221, 41 S. Ct. 268, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1920) 265 Fed. 621.

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V. "FINAL SENTENCES AND DECREES IN PRIZE CASES" (p. 828)

Supplementary decree to make effective decree involving constitutional point.—A supplementary decree of a federal District Court in a subordinate proceeding to carry into effect a decree of the federal Supreme Court in the main cause, which supplemental decree brings to effective conclusion, if not vitiated by error, a controversy that arose out of a railway company's attack on constitutional grounds upon freight rates prescribed by state authority, must be treated as involving a federal question, so as to justify, under the Judicial Code, § 238, a direct appeal to the federal Supreme Court, although the only question immediately involved is the proper construction of the tariff prescribed by the state. *St. Louis, etc., R. Co. v. Haasty*, (1921) 255 U. S. 252, 41 S. Ct. 269, 65 U. S. (L. ed.) —.

VI. CONSTITUTIONAL QUESTIONS IN ISSUE

1. "Construction or Application of Constitution of United States" Involved

b. Illustrations (p. 829)

Income tax clause involved.—The Supreme Court has jurisdiction of a writ of error to a District Court to review a judgment which sustained a demurrer to a declaration in assumpsit to recover back federal income taxes, where the claim to recover is based upon the contention that the fund taxed was not income within the scope of the Sixteenth Amendment, and that the effect given by the lower court to the federal legislation under which such taxes were imposed renders it unconstitutional and void. *Merchants' Loan, etc., Co. v. Smietanka*, (1921) 255 U. S. 509, 41 S. Ct. 386, 65 U. S. (L. ed.) —; *Goodrich v. Edwards*, (1921) 255 U. S. 527, 41 S. Ct. 390, 65 U. S. (L. ed.) —; *Walsh v. Brewster*, (1921) 255 U. S. 536, 41 S. Ct. 392, 65 U. S. (L. ed.) —.

2. "Constitutionality of Any Law of United States Drawn in Question."

a. In General (p. 831)

Validity of act established by previous decisions.—The want of merit in the contention that the provision of the Reed Amendment of March 3, 1917, § 5, prohibiting the transportation in interstate commerce of intoxicating liquor into any state whose laws forbid the manufacture or sale therein of such liquor for beverage purposes is repugnant to U. S. Const., art. 1, § 9, cl. 6, prohibiting any regulation of commerce which gives a preference to the ports of one state over those of another, is so plainly established by the decisions of the federal Supreme Court and the authorities which have followed those decisions as to require the affirmance on motion of a conviction for a violation of such statute, brought up directly from a federal District Court for review, on

the theory that the law was unconstitutional for that reason. *Williams v. U. S.*, (1921) 255 U. S. 336, 41 S. Ct. 364, 65 U. S. (L. ed.) —.

3. "Constitution or Law of State Claimed to be in Contravention of Constitution of United States"

a. In General (p. 831)

The federal Supreme Court must accept on writ of error the decision of the highest court of a state as to the meaning of state legislation and the state constitution, as though such meaning was expressed in both legislation and constitution. *Thornton v. Duffy*, (1920) 254 U. S. 361, 41 S. Ct. 137, 65 U. S. (L. ed.) —, *affirming* (1918) 99 Ohio St. 120, 124 N. E. 54.

4. *Exclusiveness of Jurisdiction of Supreme Court* (p. 834)

To the same effect as the first paragraph of the original annotation, see *Grammer v. Fenton*, (C. C. A. 8th Cir. 1920) 268 Fed. 943.

Where the jurisdiction of the District Court is based both on the ground of the construction and application of the Constitution of the United States and that it is a suit arising under a law of the United States the jurisdiction of the Supreme Court to hear an appeal from the judgment below is not exclusive. *Farmers' Grain Co. v. Langer*, (C. C. A. 8th Cir. 1921) 273 Fed. 635.

7. *Scope of Review* (p. 836)

Jurisdiction of a direct writ of error from the federal Supreme Court to a District Court once having attached, because of the presence of a constitutional question, continues for the purpose of disposing of other questions raised in the record, although the constitutional question has since been decided in another case to be without merit. *Jin Fuey Moy v. U. S.*, (1920) 254 U. S. 189, 41 S. Ct. 98, 65 U. S. (L. ed.) —, *affirming* on other grounds (*W. D. Pa.* 1918) 253 Fed. 213.

Vol. V, p. 838, Jud. Code, sec. 239.
[First ed., 1912 Supp., p. 231.]

I. Power and discretion of court to certify.
1. In general.

III. Table of cases where questions were certified.

I. POWER AND DISCRETION OF COURT TO CERTIFY

1. In General (p. 239)

Interlocutory orders.—A certificate to the Supreme Court for instructions does not lie in the case of interlocutory orders. *Cheney v. Hines*, (C. C. A. 2d Cir. 1920) 266 Fed. 310.

III. TABLE OF CASES WHERE QUESTIONS WERE CERTIFIED (p. 848)

In *Gould v. U. S.*, (C. C. A. 2d Cir. 1920) 264 Fed. 839, the following questions were certified to the Supreme Court by the Circuit Court of Appeals:

First. Is the secret taking or abstraction without force by a representative of any branch or subdivision of the government of the United States of a paper writing, of evidential value only, belonging to one suspected of crime, and from the house or office of such person, a violation of the Fourth Amendment?

Second. Is the admission of such paper writing in evidence against the same person, when indicted for crime, a violation of the Fifth Amendment?

Third. Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under sections 37 and 215, C. C., when taken under search warrants issued pursuant to act of June 15, 1917, from the house or office of the person so suspected, seized and taken in violation of the Fourth Amendment?

Fourth. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the Fifth Amendment?

Fifth. If in the affidavit for search warrant under act of June 15, 1917, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?

Sixth. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted, if he then move before trial for the return of said papers, and said motion is denied, is the court at trial bound in law to inquire as to the origin of or method of procuring said papers, when they are offered in evidence against the party so indicted?

Vol. V, p. 854, Jud. Code, sec. 240.
[First ed., 1912 Supp., p. 232.]

VI. TABLE OF CERTIORARI CASES

8. *Patent Cases* (p. 870)

Certiorari, not appeal, is the proper mode of reviewing in the Supreme Court a judgment of the Circuit Court of Appeals upon an application for leave to file in the District Court a petition in the nature of a bill of review in a patent suit, since such proceeding was ancillary to the original jurisdiction

invoked, and was still, in its essence and nature, a suit involving the validity of a patent, which is expressly made final in the Circuit Court of Appeals. The Supreme Court, upon reversing on certiorari the judgment of a Circuit Court of Appeals on a petition which that court should have regarded as an application for leave to file in the District Court a petition in the nature of a bill of review, invoking a consideration of the effect of a decree in another district as *res judicata*, will not pass upon the merits of the petition, but will remand the cause to the Circuit Court of Appeals for a determination of the effect of such decree. *National Brake, etc., Co. v. Christensen*, (1921) 254 U. S. 425, 43 S. Ct. 154, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 7th Cir. 1919) 258 Fed. 880, 169 C. C. A. 600.

Vol. V, p. 887, Jud. Code, sec. 242.

[First ed., 1912 Supp., p. 232.]

Amount in controversy — Consolidation of cases to permit appeal.—The court will not consolidate causes which are separately not appealable in order to create a consolidated case with an amount in controversy sufficiently large to authorize an appeal and thereby defeat the purpose of the statute. *Chicago, etc., R. Co. v. U. S.*, (1920) 55 Ct. Cl. 58, wherein it was said:

"The court by refusing to consolidate does not seek to defeat any right of appeal. It merely refuses to circumvent the statute authorizing appeals. This statute prescribes the amount necessary for that purpose, and as 'it draws the boundary line of jurisdiction it is to be construed with strictness and vigor.' As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful construction."

Amount claimed in petition as amount in controversy.—The amount claimed in a petition in the Court of Claims is the amount in controversy for the purpose of testing the right to appeal to the Supreme Court, although there may be a defense to a part that does not extend to the entire claim, where there is nothing in the nature of the case to prevent a recovery of the entire amount should claimant's view of the law be sustained. *Journal, etc., Co. v. U. S.*, (1921) 254 U. S. 581, 41 S. Ct. 202, 65 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 612.

Amended petition as determining amount in controversy.—The amount in controversy in a suit in the court of claims is to be determined, when testing the right to appeal to the Supreme Court, by the amended petition, where there is one, rather than by the original petition. *Journal, etc., Co. v. U. S.*, (1921) 254 U. S. 581, 41 S. Ct. 202, 65 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 612.

Vol. V, p. 890, Jud. Code, sec. 243.

[First ed., 1912 Supp., p. 232.]

Remanding case to Court of Claims.—

Where a case has been remanded to the Court of Claims for further findings of fact, without an order directly setting aside the judgment or directing the court to set it aside, the order will not be construed as authorizing a new trial, but as limiting the remand to "further findings of fact." *Norris v. U. S.*, (1920) 55 Ct. Cl. 208.

Vol. V, p. 913, Jud. Code, sec. 250.

[First ed., 1912 Supp., p. 235.]

Final judgment or decree subject to review.

—A decision of the Court of Appeals of the District of Columbia on an appeal from the Commissioner of Patents, (see 7 Fed. Stat. Ann. (2d ed.) 202) which reverses the latter's decision not to cancel certain certificates of registration of a trademark, and directs the clerk of the court to certify the court's decision to the Commissioner, as required by law, is not final for the purpose of appeal to or certiorari from the federal Supreme Court. *Baldwin Co. v. R. S. Howard Co.*, (1921) 256 U. S. 35, 41 S. Ct. 405, 65 U. S. (L. ed.) —, (*dismissing* appeal to review (1919) 48 App. Cas. (D. C.) 437), wherein the court said:

"It is true that in *Estate of P. D. Beckwith v. Commissioner of Patents*, 242 U. S. 538, 64 U. S. (L. ed.) 705, 40 S. Ct. 414, this court allowed a writ of certiorari from a decision of the court of appeals of the District of Columbia, affirming a decision of the Commissioner of Patents, in an application to register a trademark. No question of the jurisdiction of the court was considered in that case, and an inadvertent allowance of the writ of certiorari does not establish the jurisdiction of the court. *J. Homer Fritch v. United States*, 248 U. S. 458, 463, 63 U. S. (L. ed.) 359, 39 S. Ct. 158."

Third clause.—A judgment of the Court of Appeals of the District of Columbia in a case in which the constitutional power of Congress to enact a local statute is drawn in question is reviewable in the federal Supreme Court on writ of error or appeal under this clause, which in express terms confers power on the latter court to review judgments of the District of Columbia court "in cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States." The Court of Appeals is therefore without power to certify the question to the Supreme Court. *Heald v. District of Columbia*, (1920) 254 U. S. 20, 41 S. Ct. 42, 65 U. S. (L. ed.) —, wherein the court said:

"But it is suggested that as it was held in *American Secur. & T. Co. v. District of*

Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553, that the power conferred upon this court by paragraph 6 of § 250, to review on error or appeal judgments or decrees of the court below 'in cases in which the construction of any law of the United States is drawn in question by the defendant,' embraced only the construction of laws of general operation, as distinguished from those which were local to the District of Columbia, therefore the grant of power to determine the constitutionality of acts of Congress must be treated as applying only to such acts as are general in character, as to which it is insisted the act involved in this case is not one.

"But the contention disregards the suggestion of a difference between the two subjects which was made in the American Secur. & T. Co. case, and overlooks the implication resulting from a subsequent case directly dealing with the same matter. *United Surety Co. v. American Fruit Product Co.*, 238 U. S. 140, 59 L. ed. 1238, 35 Sup. Ct. Rep. 828.

"In addition, as the paragraphs of § 250 in question but re-enact provisions of prior statutes which had been construed as conveying authority to review controversies concerning the constitutional power of Congress to enact local statutes (*Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Smoot v. Heyl*, 227 U. S. 518, 57 L. ed. 621, 33 Sup. Ct. Rep. 336), the proposition conflicts with the settled rule that where provisions of a statute had, previous to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary. *Latimer v. United States*, 223 U. S. 501, 504, 56 L. ed. 526, 527, 32 Sup. Ct. Rep. 242; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 199, 56 L. ed. 1047, 1053, 32 Sup. Ct. Rep. 626; *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 644, 62 L. ed. 914, 918, 38 Sup. Ct. Rep. 408.

"That a decision below which merely deals with and interprets a local statute is not subject to review by error or appeal affords no basis for saying that the exertion of the infinitely greater power to determine whether Congress had constitutional authority to pass a statute local in character should be necessarily subjected to a like limitation. To the contrary, the elementary principle is that the right to pass upon the greater question, the constitutional power of Congress, draws to it the authority to also decide all the essential incidents, even though otherwise there might not be a right to consider them. *Fields v. Barber Asphalt Paving Co.*, 194 U. S. 618, 620, 48 L. ed. 1142, 1152, 24 Sup. Ct. Rep. 784; *Williamson v. United States*, 207 U. S. 425, 432, 52 L. ed. 278, 284, 28 Sup. Ct. Rep. 163.

"It follows that the certificate must be and it is dismissed for want of jurisdiction."

Vol. V, p. 917, Jud. Code, sec. 251.

[First ed., 1912 Supp., p. 236.]

Table of certiorari cases.—*Harris v. District of Columbia*, (1921) 256 U. S. —, 41 S. Ct. 610, 65 U. S. (L. ed.) — (action against District for injury to employee engaged in sprinkling streets).

Finality of judgment on appeal from decision of Commissioner of Patents.—A decision of the Court of Appeals of the District of Columbia on an appeal from a decision of the Commissioner of Patents (see 7 Fed. Stat. Ann. (2d ed.) 202), which affirms the latter's decision to refuse an application for the registration of a trademark, and directs the clerk to certify the decision of the court to the commissioner, as required by law, is not final for the purpose of certiorari from the federal Supreme Court. *American Steel Foundries v. Whitehead*, (1921) 256 U. S. 40, 41 S. Ct. 407, 65 U. S. (L. ed.) —, *dismissing* writ of certiorari to review (1919) 49 App. Cas. (D. C.) 16, 258 Fed. 160.

Inadvertent allowance of writ of certiorari.—An inadvertent allowance of a writ of certiorari to the Court of Appeals of the District of Columbia does not establish the jurisdiction of the federal Supreme Court. *Baldwin Co. v. R. S. Howard Co.*, (1921) 250 U. S. 35, 41 S. Ct. 405, 65 U. S. (L. ed.) —, *dismissing* appeal to review (1919) 48 App. Cas. (D. C.) 437, and *denying* writ of certiorari.

Certified questions.—The Court of Appeals of the District of Columbia is without power to certify questions to the federal Supreme Court in a case in which the judgment or decree of the District Court would be reviewable by the federal Supreme Court on writ of error or appeal. *Heald v. District of Columbia*, (1920) 254 U. S. 20, 41 S. Ct. 42, 65 U. S. (L. ed.) —.

Vol. V, p. 922, Jud. Code, sec. 256, par. second.

[First ed., 1912 Supp., p. 239.]

See concluding sentence in R. S. sec. 5198, 6 Fed. Stat. Ann. (2d ed.) 747, and annotation at p. 930 of that volume. See further *Claffin v. Housman*, 93 U. S. 130 at p. 137.

Vol. V, p. 923, Jud. Code, sec. 256, par. third.

[First ed., 1912 Supp., p. 239.]

Tort action arising in admiralty.—The District Court has jurisdiction on its common law side of a tort action arising in admiralty when the jurisdictional requisites of citizenship and amount are present. *Philadelphia, etc., R. Co. v. Berg*, (C. C. A. 3d Cir. 1921) 274 Fed. 534.

State jurisdiction of action for injury to seaman.—A state court has jurisdiction of an action for injuries sustained by an employee on a boat from an explosion caused

by the fact that gasoline was put in a can habitually used for kerosene. *Sandanger v. Carlisle Packing Co.*, (1920) 112 Wash. 480, 192 Pac. 1005.

Right to trial by jury.—The common law remedy which the District Court affords is that of trial by jury, and such a remedy is saved to him by the clause conferring on the District Court exclusive admiralty jurisdiction. *Philadelphia, etc., R. Co. v. Berg*, (C. C. A. 3d Cir. 1921) 274 Fed. 534.

Defendant's liability measured by maritime law.—Whether the action is tried at common law or in admiralty the liability of the defendant is measured by the maritime law and not the common law. *Philadelphia, etc., R. Co. v. Berg*, (C. C. A. 3d Cir. 1921) 274 Fed. 534.

Vol. V, p. 928, Jud. Code, sec. 262.

[First ed., 1912 Supp., p. 241.]

II. "All writs not specifically provided for by statutes."

4. Certiorari.

9. Mandamus.

a. Jurisdiction in general.

b. Controlling judicial action or discretion.

c. Not as substitute for appeal or writ of error.

f. Acts of executive officers.

II. "ALL WRITS NOT SPECIALLY PROVIDED FOR BY STATUTE"

4. Certiorari (p. 931)

Limitation on power to issue.—The writ does not lie for the purpose of reviewing an administrative order made by an executive officer of the government as in the case of such an order issued by the Secretary of the Interior. *Mickadiet v. Payne*, (App. Cas. D. C. 1920) 269 Fed. 194.

9. Mandamus

a. Jurisdiction in General (p. 934)

Power to issue.—This provision gives the power to issue a writ of mandamus. *U. S. v. Malmin*, (C. C. A. 3d Cir. 1921) 272 Fed. 785.

Power of United States Supreme Court.—The failure of a Circuit Court of Appeals in its decree to dispose of one of the claims in suit will not be corrected by mandamus, where the relator failed adequately to call the court's attention to such omission during the term, or to seek relief in the federal Supreme Court by petition for a writ of certiorari. *Ex p. National Park Bank*, (1921) 256 U. S. 131, 41 S. Ct. 403, 65 U. S. (L. ed.) —.

To correct record on appeal.—Mandamus does not lie to correct the conclusion of the court below in a criminal case that the record need not be corrected to show that, as the result of an agreement between the accused and the district attorney, the case was tried

before a jury of eleven, since the accused might have saved the point by an exception at the trial, or by a bill of exceptions to the denial of his subsequent motion for correction of the record, setting forth whatever facts or offers of proof were material, and might then have brought a writ of error. *Ex p. Riddle*, (1921) 255 U. S. 450, 41 S. Ct. 370, 65 U. S. (L. ed.) —.

Limitation on power to issue.—The Circuit Court of Appeals has no power to issue the writ of mandamus to a District Court except in aid of its appellate jurisdiction. *U. S. v. Malmin*, (C. C. A. 3d Cir. 1921) 272 Fed. 785.

Directing district judge to resume office.—A writ of mandamus directing a district judge whose appointment has been unlawfully revoked to resume the duties of his office is conclusive only of the government's right to ask the court to compel its servant, under his *prima facie* title, to return to his jurisdiction and to perform the duties of his office. It is not conclusive of subsequent proceedings, if any be had, on different facts to test the title to the office. Nor does it determine any question of the tenure of the respondent's office, the power thereafter to remove him and to appoint another or where such power, if any, resides. *U. S. v. Malmin*, (C. C. A. 3d Cir. 1921) 272 Fed. 785. The court further declared: "If the absence of a lawfully appointed judge of a District Court, from which appeals lie to this court, thereby affects the right of litigants to take appeals and the right of this court to entertain them, confessedly this court has power to restore the orderly proceedings of the trial court by commanding the absent judge to return and transact its business. So also, when the District Court is occupied by a stranger exercising the functions of judge without color of title, questions of the validity of judgments he enters and of appeals taken may conceivably arise; yet they would arise in a way which would leave this court helpless to correct the fundamental trouble; for, unquestionably, the right of the incumbent—even if claimed under color of title to the office—to enter valid judgments could not be collaterally attacked and tried out on appeal, *Hager v. Heyberger*, 7 Watts & S. (Pa.) 104, 105, 42 Am. Dec. 220, and the right of the public to a properly constituted trial court from which appeals can validly lie could not be asserted or brought about in proceedings on appeal or by writ of error.

"It may be that valid appeals would lie from and valid writs of error could be directed to a *de facto* judge with color of title to the office; but as we are deciding this case on the theory of law that the respondent's title to the office *de jure* draws to it the possession *de facto*, there is nothing left in the district court (saving the effect of a possible *ad interim* appointment) on which the appellate jurisdiction of this court

can validly operate. Therefore, it becomes essential to the appellate jurisdiction of this court that orderly proceedings in the district court of the Virgin Islands be restored and to that end we shall enter on order, in the form prayed by the United States, that— 'a writ of peremptory mandamus issue, directed to Lucius J. M. Malmin, Judge of the District Court of the United States, commanding him to proceed forthwith to the Municipality of St. Croix, and there enter upon, undertake and perform the duties appertaining to the office of Judge of the District Court of the Virgin Islands aforesaid, so long as he shall continue hereafter lawfully to hold the office of Judge of the District Court aforesaid.'"

b. Controlling Judicial Action or Discretion
(p. 937)

Execution of mandate of appellate court.—Mandamus is an appropriate remedy in a case where the mandate of an appellate court is disregarded. *U. S. v. U. S. District Ct.*, (C. C. A. 9th Cir. 1921) 272 Fed. 611.

c. Not as Substitute for Appeal or Writ of Error (p. 942)

Generally.—The Circuit Court of Appeals will not issue a mandamus to compel a district judge to vacate an order vacating a previous order by which he dismissed a suit for the infringement of a patent, as that is a matter subject to correction on appeal and the order complained of in no way affected the appellate jurisdiction of the Court of Appeals. *Raritan Copper Works v. Elliott*, (C. C. A. 3d Cir. 1921) 271 Fed. 284.

f. Acts of Executive Officers (p. 947)

Commissioner of patents.—Neither injunction nor mandamus will lie to control the actions of the Commissioner of Patents in matters committed by law to his discretion. *Snelling v. Whitehead*, (App. Cas. D. C. 1921) 269 Fed. 712.

Vol. V, p. 954, Jud. Code, sec. 264.
[First ed., 1912 Supp., p. 241.]

II. GENERAL PRINCIPLES AND PARTICULAR APPLICATION (p. 955)

Judgments.—A federal court may enjoin the enforcement of a judgment fraudulently obtained in a state court. *Chicago, etc., R. Co. v. Callicotte*, (C. C. A. 8th Cir. 1920) 267 Fed. 799.

The fact that the judgment against which relief is sought was rendered in a state court is not material as the injunction acts not on the court rendering the judgment but on the party. *Chicago, etc., R. Co. v. Callicotte*, (C. C. A. 8th Cir. 1920) 267 Fed. 799.

A court of the United States has no power to enjoin the judgment of a state court for errors committed in the trial of a cause, in

construing a statute of another state, not affecting the validity of such statute. *Hartford L. Ins. Co. v. Johnson*, (C. C. A. 8th Cir. 1920) 268 Fed. 30.

Restraining prosecution under unconstitutional statute.—Averments of the unconstitutionality, under U. S. Const., 5th and 6th Amendments, of certain criminal provisions of a federal statute, if well founded, justify equitable relief by injunction against the enforcement of such provisions. *Kennington v. Palmer*, (1921) 255 U. S. 100, 41 S. Ct. 303, 65 U. S. (L. ed.) —.

Vol. V, p. 959, Jud. Code, sec. 265.
[First ed., 1912 Supp., p. 242.]

I. Construction and application.

1. Generally.

II. Jurisdiction.

1. Generally.

2. Court first acquiring jurisdiction retains it.

III. Protection of federal jurisdiction.

1. Proceedings incidental to jurisdiction.

2. General principles as to protecting jurisdiction.

3. Effect of possession of res.

8. Instances when injunction refused.

IV. Proceedings under state statute.

3. Criminal cases.

V. Other particular matters and proceedings.

I. CONSTRUCTION AND APPLICATION

1. Generally (p. 959)

Extent of prohibition.—To the same effect as the original annotation, see *W. E. Stewart Land Co. v. Arthur*, (C. C. A. 8th Cir. 1920) 267 Fed. 184, holding that the prohibition of this section extended to an injunction staying the taking of depositions in a state court.

II. JURISDICTION

1. Generally (p. 962)

Under this section a federal court has no jurisdiction of a bill which seeks to enjoin the attorney general of a state from prosecuting in a state court certiorari proceedings against a telephone company. *Cumberland Telephone, etc., Co. v. Stevens*, (S. D. Miss. 1921) 274 Fed. 745.

In *Holmes County v. Burton Constr. Co.*, (C. C. A. 5th Cir. 1921) 272 Fed. 565, it was said in a case involving the right to enjoin a suit in a state court: "We think that the court should have denied said injunction and sustained the motion to dismiss said bill for want of equity. Even if the suit in the state and federal courts had been between the same parties, being purely an action in personam, involving, neither in its progress nor in the judgment sought, the control or disposition of any property, the pendency of

the suit in the United States court would not, in the absence of special circumstances, furnish ground for an injunction of the state court suit. It has been held that a prior suit in a state or federal court in the same state furnishes no ground for a plea in abatement to a second suit in the court of the other jurisdiction."

2. Court First Acquiring Jurisdiction Retains It (p. 962)

To the same effect as the first paragraph of the original annotation, see *Burke Constr. Co. v. Kline*, (C. C. A. 8th Cir. 1921) 271 Fed. 605.

Where a federal court has first acquired jurisdiction it will retain it in a case where its jurisdiction is broad enough to afford as complete relief at law and in equity as may be obtained in the state court. *Hoffman v. Mathieson Alkali Works*, (D. C. R. I. 1920) 269 Fed. 62.

"The court which first acquired the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit from which it appears that is or will become necessary to a determination of the controversy involved, or to the enforcement of its judgment or decree therein, for that court to seize, to charge with a lien or trust, to sell or exercise like dominion over it, thereby withdraws that property from the jurisdiction of every other court, so far as necessary to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein, free from the interference of every other tribunal." *Berg v. Fidelity, etc., Co.*, (C. C. A. 8th Cir. 1921) 274 Fed. 311.

In a case where the controversy or the parties are the same in different actions pending in courts of concurrent jurisdiction, "the weight of authority seems to be that the court first acquiring jurisdiction of the controversy will retain it, to the exclusion of the other, though possession of the res be not taken. *In re Lasserot*, 240 Fed. 325, 153 C. C. A. 251; *Gluck & Becker on Receivers*, 67, 68 (2d ed., 89, 91); *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *Knudsen v. First Trust & Savings Bank*, 245 Fed. 81, 157 C. C. A. 377; *In re Chetwood*, 165 U. S. loc. cit. 460, 17 Sup. Ct. 385, 41 L. ed. 782; *Moran v. Sturges*, 154 U. S. loc. cit. 273, 14 Sup. Ct. 1019, 38 L. ed. 981. Where the controversy, however, is not the same, the issues being different in one suit from those involved in another, and the subject-matter is not identical, there can be no infringement of jurisdiction as between the courts maintaining cognizance of the cases. This rule rests on the ground that in such a case there is no conflict of jurisdiction as to the question or cause. In such cases the court which first acquires the actual or constructive possession of property is en-

titled to retain the same." *Havner v. Hegnes*, (C. C. A. 8th Cir. 1920) 269 Fed. 537.

III. PROTECTION OF FEDERAL JURISDICTION

1. Proceedings Incidental to Jurisdiction (p. 963)

"This section does not deprive the federal courts, sitting in equity in cases involving any controversies between the citizens of jurisdiction, and which have been adjudged different states, of which such courts have by the state courts, of the power or relieve them of the duty to enjoin the parties to such suits from enforcing judgments of the state courts in their favor where, on account of fraud, mistake, accident, or any other ground of equity jurisprudence, and on account of the threat of imminent and irreparable injury, the rules and principles of equity demand that the parties shall not proceed to enforce such state judgments." *Pierce v. National Bank of Commerce*, (C. C. A. 8th Cir. 1920) 268 Fed. 487.

"A court of the United States, by virtue of its general equity powers, has jurisdiction to enjoin the enforcement of a judgment of a state court, if there is a diversity of citizenship, or a federal question involved, and the amount involved exceeds \$3,000, if the allegations in the complaint state a proper cause of action." *Hartford L. Ins. Co. v. Johnson*, (C. C. A. 8th Cir. 1920) 268 Fed. 30.

2. General Principles as to Protecting Jurisdiction (p. 964)

Rule stated.—To the same effect as the first paragraph of the original annotation, see *Smith v. Missouri Pac. R. Co.*, (C. C. A. 8th Cir. 1920) 266 Fed. 653.

In *Burke Constr. Co. v. Kline*, (C. C. A. 8th Cir. 1921) 271 Fed. 606, it was said:

"When a citizen of one state, in the exercise of the right granted to him by the Constitution and the acts of Congress to an adjudication of a controversy judicable in a federal court between him and a citizen of another state, brings a suit in personam or in rem against the latter in the proper federal court to obtain the adjudication of that controversy by that court, and that court first acquires jurisdiction of that controversy and of the parties thereto, and the plaintiff therein persistently demands the adjudication of the controversy by the federal court, the defendant in that suit may not deprive the plaintiff of his constitutional right to such an adjudication by the federal court, or of the enforcement thereof by that court, by bringing a subsequent suit in a state court against the plaintiff in the federal court or against him and others to obtain an adjudication by the latter court of the same controversy or of that controversy and of other controversies, or by any other action

or proceedings such a defendant may take. . . . Nor may they unduly or unnecessarily postpone the hearings or delay the proceedings in their courts to the disadvantage of suitors vested with the right to a determination of their controversies by such courts by the Constitution and the acts of Congress. *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. ed. 762; *McClellan v. Carland* (8 C. C. A.) 187 Fed. 915, 919, 110 C. C. A. 49. The power is conferred and the duty is imposed on a federal court, which, at the suit of a citizen of one state against a citizen of another state, to secure from it an adjudication of a controversy between them judicable in the federal court and which first acquires jurisdiction of the controversy and the parties, to protect its jurisdiction of and its power to adjudicate the controversy and to enforce its adjudication by its injunction against any subsequent proceedings in a state court or elsewhere by the defendant, his attorneys, agents or representatives which would or might have the effect to defeat or impair its jurisdiction, its adjudication, its orders, judgments, or decrees or its enforcement thereof."

3. Effect of Possession of Res (p. 965)

Generally.—This section does not deprive the federal court of the power to enjoin parties litigant or other persons from proceeding by judicial proceedings or otherwise to interfere with property of which said court had the actual or constructive possession. *Havner v. Hegens*, (C. C. A. 8th Cir. 1920) 269 Fed. 537.

Possession through receiver.—An injunction by a federal court to enjoin a receiver of a state court from interfering with the possession of a receiver appointed by the federal court should not be directed to the judge of the state court but to the receiver appointed by such court. *Havner v. Hegness*, (C. C. A. 8th Cir. 1920) 269 Fed. 537.

8. Instances When Injunction Refused (p. 970)

Action in personam.—An action in a federal court which is in personam and does not involve the protection of the custody of property, does not give the court power to enjoin an action in a state court between the same parties with reference to the same subject matter. *W. E. Stewart Land Co. v. Arthur*, (C. C. A. 8th Cir. 1920) 267 Fed. 184.

IV. PROCEEDINGS UNDER STATE STATUTE

3. Criminal Cases (p. 974)

General doctrine and application.—A federal court will not interfere with the regular processes of justice in a criminal case in a state court where there is no infraction of

the accused's rights or impediment to his asserting any defense that he may think he has under the Constitution of the United States. *Lindsey v. Allen*, (D. C. Mass. 1920) 269 Fed. 656.

V. OTHER PARTICULAR MATTERS AND PROCEEDINGS (p. 976)

Judgments of state courts.—If judgments rendered by a state court be void or if they be void as to the plaintiff in the proceeding before the federal court and the other requisites of jurisdiction are present the federal court has jurisdiction to enjoin their execution. *Mohawk Oil Co. v. Layne*, (W. D. La. 1921) 270 Fed. 841.

Injunction may be granted against enforcement of a state judgment to protect the rights of one under the Fourteenth Amendment prohibiting the taking of one's property without due process of law. *Mohawk Oil Co. v. Layne*, (W. D. La. 1921) 270 Fed. 841.

A suit in a federal court to stay the enforcement of a judgment of a state court, obtained under circumstances that render such enforcement contrary to recognized principles of equity and standards of good conscience, is not forbidden by the prohibition in this section against enjoining proceedings in state courts except in bankruptcy cases. Thus an express company with which an employee in charge of express matter transported by railway stipulated, as a condition of employment, to assume all risk of injuries incident to his employment, from whatever cause arising, is entitled to have such employee restrained from enforcing a judgment which, in violation of his agreement, he wrongfully sought and obtained against the railway company, which judgment, as between the two companies, the express company is bound to pay, and which was rendered in an action to which the express company was not a party, and wherein it could not be heard, the employee being financially irresponsible, so that if the judgment is collected, the express company, which has not been in any wise negligent or at fault, will be remediless. *Wells-Fargo Co. v. Taylor*, (1920) 254 U. S. 175, 41 S. Ct. 93, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 5th Cir. 1918) 249 Fed. 109, 161 C. C. A. 161) wherein the court said:

"Is the suit one to stay proceedings in a state court in the sense of that provision? If it is, the district court erred in not dismissing the bill on that ground. *Haines v. Carpenter*, 91 U. S. 254, 23 L. ed. 345; *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *United States v. Pankhurst-Davis Mercantile Co.*, 176 U. S. 317, 44 L. ed. 485, 20 Sup. Ct. Rep. 423. If it is not, the court rightly entertained the suit and proceeded to an adjudication of the merits for the citizenship of the parties and the amount in controversy were within the jurisdictional requirements.

"The provision has been in force more than a century, and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity, and, like that rule, is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which, of course, is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (*Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Missouri v. Chicago*, B. & Q. R. Co. 241 U. S. 533, 538, 543, 60 L. ed. 1148, 1154, 1156, 36 Sup. Ct. Rep. 715), or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat, or impair it through proceedings in the state courts (*French v. Hay* (*French v. Stewart*) 22 Wall. 250, 22 L. ed. 857; *Julian v. Central Trust Co.* 193 U. S. 93, 112, 48 L. ed. 629, 639, 24 Sup. Ct. Rep. 399; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 219, 53 L. ed. 765, 770, 29 Sup. Ct. Rep. 430; *Looney v. Eastern Texas R. Co.* 247 U. S. 214, 221, 62 L. ed. 1084, 1087, 38 Sup. Ct. Rep. 460), or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience (*Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Ex parte Simon*, 208 U. S. 144, 52 L. ed. 429, 28 Sup. Ct. Rep. 238; *Simon v. Southern R. Co.* 236 U. S. 115, 59 L. ed. 492, 35 Sup. Ct. Rep. 255; *Public Service Co. v. Corboy*, 250 U. S. 153, 160, 63 L. ed. 905, 908, 39 Sup. Ct. Rep. 440; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593)."

Interlocutory judgments.—The equity powers by which a federal court will restrain a person from gathering the fruits of a void judgment obtained in a state court do not extend to judgments which are merely interlocutory. *Essanay Film Mfg. Co. v. Kane*, (C. C. A. 3d Cir. 1920) 264 Fed. 959.

Foreclosure proceedings.—A federal court in which a receiver has been appointed in a creditor's suit has no power to issue a permanent injunction against the foreclosure of a mortgage in proceedings in which the state court has already acquired jurisdiction. In such a case the receiver must apply to the state court for relief. *Dey v. Brenack Stevedoring Co.*, (E. D. N. Y. 1921) 272 Fed. 127.

The court said: "I am constrained to hold that in the case at bar the receiver must apply to the state court for relief, and must invoke the equity powers of that tribunal to obtain a temporary stay of the sale, to permit the receiver to negotiate a sale of the property at a fair price, if possible, in order that the general creditors may not suffer. Permission to make such application is hereby granted."

"In all other actions pending against the defendant in the state courts, the receiver is hereby given leave to apply to such courts for permission to intervene."

In *In re Locust Bldg. Co.*, (E. D. N. Y. 1921) 272 Fed. 988, proceedings commenced in the state court subsequent to bankruptcy to foreclose a mortgage were stayed by the bankruptcy court. The court said:

"If the various parties in interest had been brought into an action under the state statutes, by which all parties having any claim to the title would be cut off, except those whose rights to the proceeds of sale are fixed by the decree in foreclosure, where the title thus made would be easier of investigation, and would clearly and conclusively determine what liens exist against the property and should be transferred to the fund, where their validity might be attacked by the trustee in bankruptcy when they make claim thereto, there would be no reason why the action in foreclosure should not proceed to the entry of the decree, if the state court sees fit to proceed with the action and determine the various issues presented on the pleadings."

"If the state court did not deem it advisable, or was unable to proceed with the liquidation of this claim and the determination of its validity, within a reasonable time, the trustees could nevertheless in due course proceed before the referee or this court to determine how the fund should be distributed. But this court having already ordered the sale of the property, free and clear of all claims, there being sufficient funds admittedly to pay all liens, so that the security of a mortgage is unnecessary for any purpose except to establish the lien, and particularly where there are two prior mortgages, which are disputed, and as to which the same issue will be presented as that to be litigated as to the third mortgage, and where the issues as to these prior mortgages cannot be determined in the present foreclosure action, this court is constrained to continue the stay against the foreclosure suit."

Vol. V, p. 983, Jud. Code, sec. 266.
[First ed., 1912 Supp., p. 242.]

- I. Purpose and scope.
- II. Power of court and single judge.
- III. Word "statute" construed.
- IV. Application generally.
- VI. Effect of amendment of 1913 [new].

I. PURPOSE AND SCOPE (p. 985)

Construction in general.—This section contemplates a stay which will protect against the enforcement of the law the plaintiff who in the federal court is seeking the injunction. *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

The court said: "It is manifest that the stay which only prohibits the attorney general from enforcing the law against another plaintiff in another case cannot protect this plaintiff in this case, and Congress could not have intended to oust the jurisdiction of the federal courts, excepting where the state courts were providing an adequate substitute. The reasons assigned to Congress for the enactment of this amendment, as shown in the report of the House judiciary committee, February 27, 1913, report No. 1584, indicate that it was intended to reach only those cases where the enforcement by the state was through a court action, brought by some administrative body, for specific performance of the law; but, however that may be, and if the amendment might be invoked when its application was based upon some other kind of an action for some other kind of enforcement of a law, there at least must be identity between the party claiming protection in the federal court and the party who is receiving protection in the state court."

The suit must be one brought to enforce the law and brought in a court having jurisdiction to enforce it. *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

The court said: "The action of the federal court is to be superseded or suspended only in case, as we read the statute, a suit to enforce such statute or order shall have been brought in a court of the state having jurisdiction thereof under the laws of such state; and, while it is said that this particular state court has jurisdiction to enforce this law because it is the court in which the state might rightfully bring suit to collect penalties, it is entirely plain that the suit which has been brought was not brought to enforce this law. The attorney-general would escape this conclusion by saying that the clause to enforce such statute or order is dependent upon and defines the word 'court,' and not the word 'suit.' This construction is not only, as it seems to us, awkward and unnatural, but it leaves the word thereof superfluous and without meaning, and leaves the word 'suit' going at large without definition. According to this construction, if only the suit is brought in a

court which has jurisdiction to enforce this law, it makes no difference what kind of a suit it is or what it is about."

When action is taken in the state court to cause a stay of proceedings in the federal court the meaning of this section is that the action must be such in the state court that the same issues can be framed and the same questions considered and decided in the state court as have been raised by the pleadings in the federal court, and pending the determination of that suit in the state court the temporary relief that must be granted by the state court in a stay order must be of as broad a scope as the temporary relief which is asked in the federal court, where the suits have already been started. *Northwestern Bell Telephone Co. v. Hilton*, (D. C. Minn. 1921) 274 Fed. 384.

II. POWER OF COURT AND SINGLE JUDGE
 (p. 985)

Power of judges.—Where it is clear that the right of any intervenor or plaintiff will be the same as the right of the plaintiff in the case before the court the judges may approve the issue of preliminary injunction by the district judge to any such intervenor or plaintiff whose case appears to such district judge not to be essentially distinguishable from that of the plaintiff to whom the injunction is granted, such injunction to be upon the same terms and conditions as prescribed by the judges in the case before them. *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

The court has no power to sustain or deny a motion to dismiss being called into existence for the sole purpose of hearing and deciding the motion for a preliminary injunction. *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

In case of the existence of a serious doubt whether conservancy district officers are state officers in such a sense as to justify a hearing under this section it has been held that the court as constituted under this section will not go further than to deny an injunction. *Silvey v. Montgomery County*, (S. D. Ohio 1921) 273 Fed. 202.

When three judges unnecessary.—Where no attack is made on the constitutionality of any statute of the state, but the attack is made on the effect of an action of a municipal board in insisting upon a maintenance of certain rates, to be charged by a local company for local telephone service, on the ground that the action of such municipal board amounts to prescribing rates so low as to be confiscatory and as such in violation of the Fourteenth Amendment of the Constitution of the United States, the requirement in this section as to three judges does not apply. *Dallas v. Dallas Telephone Co.*, (C. C. A. 5th Cir. 1921) 272 Fed. 410.

Where a temporary injunction has been granted "it may be said that the decision of

a court of three judges is after all but a district court decision, and not binding upon the judge who hears the case at final presentation.

In a sense this is true, for the court hearing the application for injunction pendente lite necessarily acts upon affidavits, the potency of which may largely disappear after consideration of the evidence of witnesses subject to cross-examination." But where no cross-examination or additional evidence has changed the situation presented when the motion for temporary injunction was argued the decision will be adhered to. *Kings County Lighting Co. v. Nixon*, (S. D. N. Y. 1920) 268 Fed. 143.

Discretion not controlled by master's report.—Where a suit is brought to arrest the operation of an ordinance fixing rates on the ground that it is unconstitutional the court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. *Southwestern Telephone, etc., Co. v. Houston*, (S. D. Tex. 1920) 268 Fed. 878.

III. WORD "STATUTE" CONSTRUED (p. 987)

Municipal ordinance as "statute of state."—To the same effect as the first paragraph of original annotation, see *Des Moines v. Des Moines Gas Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 506.

IV. APPLICATION GENERALLY (p. 988)

In *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420, a motion for a preliminary injunction to restrain the collection of a state tax on liquor in bonded warehouses was held to come within the provision of this act requiring a hearing before three judges. The bill in this case was filed against the warehouse company and against the state auditor and the state attorney general, alleging that the warehouse company was unlawfully refusing to make the transfer, and that the state officers were threatening to enforce this law and the penalties thereof against plaintiff and the warehouse company, and asking that the warehouse company be enjoined from further refusing to make the transfer or from further asserting any lien for this 50-cent tax, that the state officers be enjoined from any step attempting to enforce the act or the lien thereof, and that the attorney general be enjoined from instituting any action, civil or criminal, to coerce the payment of this tax, or to collect the penalties or fines prescribed in the act.

The question whether a railroad is threatened by the state authorities with being deprived of one cent per mile per passenger its property under the Federal Transportation Law is a constitutional one and an application for a preliminary injunction must be heard by a court constituted as required by this section. *New York Cent. R. Co. v.*

Public Service Commission, (N. D. N. Y. 1920) 268 Fed. 558.

Where a party confined itself to claiming that the members of a state council of defense during the war with Germany acted outside of and beyond the powers and duties contained in the statute creating it, and did not question the validity of that law there was held to be no constitutional question of the character requiring the three judge court. *Council of Defense v. International Magazine Co.*, (C. C. A. 8th Cir. 1920) 267 Fed. 390.

Conflict between state and federal statute.

—This section applies to cases in which it is sought to restrain the enforcement of a state statute on the ground that it conflicts with a federal statute. *Michigan Cent. R. Co. v. Michigan Public Utilities Commission*, (E. D. Mich. 1921) 271 Fed. 319, wherein it was said: "This injunction is not sought 'upon the ground of the unconstitutionality of such statute,' in the more common sense in which we speak of unconstitutionality. That there is a conflict between state and federal law does not always bring to mind the issue of the unconstitutionality of the former; yet it is prescribed by the federal Constitution that it and the laws and the treaties made in pursuance thereof shall be the supreme law of the land, and it seems to follow that a state statute which is in conflict with a federal statute, when the latter is pursuant to and within the power given by the federal Constitution, is, in a very fair sense, unconstitutional. We think the present situation is fully within the spirit and fairly within the letter of section 266."

VI. EFFECT OF AMENDMENT OF 1913 [new]

A restraining order issued by a state court in purely private litigation between third parties over the validity of a state tax, which leaves those who have already begun suit in a federal court to enjoin the enforcement of the tax statute subject to all the danger of irreparable injury against which they sought the protection of the federal court, is not such a stay as is contemplated by the provision of the Judicial Code, § 266, as amended by the Act of March 4, 1913, that if, before the final hearing of an application to restrain the enforcement of a statute or an administrative order, "a suit shall have been brought in a court of the state having jurisdiction thereof, under the laws of such state, to enforce such statute or order, accompanied by a stay in such court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state." *Dawson v. Kentucky Distilleries, etc., Co.*, (1921) 255 U. S. 288, 41

S. Ct. 272, 65 U. S. (L. ed.) —, *affirming* (W. D. Ky. 1920) 274 Fed. 420. The court said:

"The suit pending in the state court was this: A liquor dealer who owned whisky in a distillery warehouse had, prior to the enactment of the statute here in question, caused it to be bottled in bond, and had paid thereon the 2-cent a gallon state tax imposed under the Law of 1917. He claimed the right to withdraw the whisky from bond without payment of the 50-cent a gallon tax; and brought suit in a county court to enjoin the warehouseman from preventing his doing so. The latter set up this 1920 act. Thereupon, the plaintiff, by amended petition, joined the attorney-general and the auditor as codefendants, and prayed that they be enjoined from compelling the plaintiff or the warehouseman to pay the 50-cent a gallon tax on the plaintiff's whisky. A restraining order to that effect issued.

"Whether this suit in the county court was of such a character as to entitle the state officials to stay the proceedings in the Federal court we do not decide. Strictly speaking, it was not 'brought . . . to enforce' the statute in question; but it is, at least, arguable that it might have been accepted by the state officials as a means to that end, and so have fulfilled in substance the statutory requirement. See House Report No. 1584, 62d Cong. 3d Sess. But whether this is true or not, it was not 'accompanied by a stay in such state court of proceedings under such statute,' within the meaning of the Judicial Code. The stay contemplated by Congress is a general one, which would protect, among others, those who had already sought protection in the Federal court."

Vol. V, p. 989, Jud. Code, sec. 267.

[First ed., 1912 Supp., p. 243.]

- I. Derivation and construction generally.
- II. Jurisdictional matters generally.
- IV. Remedy at law.
 - 1. Adequate remedy at law bars relief in equity.
 - 2. Nature of remedy at law required.
- V. Waiver of objection to jurisdiction.

I. DERIVATION AND CONSTRUCTION GENERALLY (p. 989)

Derivation of rule.—In determining the adequacy of the legal remedy resort must be had to the common law as modified by English statutes at the time of the adoption by Congress of the Judiciary Act of 1789. The fact that a state gives an adequate remedy at law is not sufficient to deprive a federal court of equity of its jurisdiction. *Kellogg v. Schauble*, (S. D. Miss. 1921) 273 Fed. 1012.

This section is merely declaratory of the pre-existing law.—To the same effect as the

original annotation, see *Plews v. Burrage*, (C. C. A. 1st Cir. 1920) 266 Fed. 347.

II. JURISDICTIONAL MATTERS GENERALLY (p. 990)

Concurrent jurisdiction.—A court of equity will not enjoin an action at law on the ground of *res judicata* as a party relying on *res judicata* has a complete and adequate remedy by pleading this defense in a suit at law. *Plews v. Burrage*, (C. C. A. 1st Cir. 1920) 266 Fed. 347.

IV. REMEDY AT LAW

1. Adequate Remedy at Law Bars Relief in Equity (p. 996)

To the same effect as the original annotation, see *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

Legal remedy arising after suit.—Equitable jurisdiction is not lost because, since the filing of the bill, an adequate legal remedy may have become available. *Dawson v. Kentucky Distilleries, etc., Co.*, (1921) 255 U. S. 288, 41 S. Ct. 272, 65 U. S. (L. ed.) —, *affirming* (W. D. Ky. 1920) 274 Fed. 420.

2. Nature of Remedy at Law Required (p. 997)

Remedy at law must be in federal courts.—The adequate remedy at law which is the test of equitable jurisdiction in the federal courts must exist in those courts. The fact of the existence of such a remedy in the state courts is immaterial. *Franklin v. Nevada-California Power Co.*, (C. C. A. 9th Cir. 1920) 264 Fed. 643.

V. WAIVER OF OBJECTION TO JURISDICTION (p. 999)

General principles.—This provision that suits in equity shall not be sustained in the courts of the United States where there is an adequate remedy at law, was enacted to secure a privilege to a defendant which he may waive. *Rosenthal v. Heller*, (M. D. Pa. 1920) 266 Fed. 563.

Vol. V, p. 1009, Jud. Code, sec. 268.

[First ed., 1912 Supp., p. 243.]

- I. Construction.
 - 2. Particular phrases and words.
- II. Contempt generally.
 - 1. What constitutes contempt.
- III. Power to punish for contempts generally.
 - 3. Limitations on power.
- IV. Particular acts or conduct as contempt.
 - 10. Letters relating to litigation.

I. CONSTRUCTION

2. Particular Phrases and Words (p. 1011)

"As to obstruct the administration of justice"—*Criticising decisions of courts.*—"The right to criticize the correctness of the decisions of courts and judges has always

existed under our form of government, and must continue to exist, not merely as a right possessed by the individual, but as a safeguard to our institutions. Such criticism often invites valuable discussion and deliberation, and not infrequently results in correcting error. But such right must not be confused with 'the misbehavior . . . so near' the presence of the court 'as to obstruct the administration of justice.'" *U. S. v. Craig*, (S. D. N. Y. 1920) 266 Fed. 230.

II. CONTEMPT GENERALLY

1. *What Constitutes Contempt* (p. 1013)

Contempt may be committed although the misbehavior is not directed to a definite matter which is to be disposed of by the court's order, judgment or decree dealing with that precise subject-matter. The test really is not whether the "misbehavior" is directed against the decision of a particular question sub judice but whether it is of such a kind as to be obstructive of the administration of justice. *U. S. v. Craig*, (S. D. N. Y. 1920) 266 Fed. 230.

Contempt by public officials.—In a case where a comptroller of the city of New York was held guilty of contempt the court said:

"Nor is the comptroller of the city of New York clothed with any privilege which will protect him for acts committed in contempt of court. He is not a member of the Legislature, even though it may be urged that the board of which he is a member has certain delegated powers in the nature of legislative functions; and, indeed, for that matter, no one would contend that a member of the Legislature would be free to commit contempt of court by misbehavior outside the halls of the legislative body in any manner he pleased as to the act or conduct of any court or judge." *U. S. v. Craig*, (S. D. N. Y. 1920) 266 Fed. 230.

III. POWER TO PUNISH FOR CONTEMPTS GENERALLY

3. *Limitations on Power* (p. 1016)

In general.—"The court must act judicially in all things and cannot transcend the power conferred by the law, and when the court does so in imposing the sentence not merely is an error committed, but the judgment is absolutely void." *Ex p. Craig*, (C. C. A. 2d Cir. 1921) 274 Fed. 177.

IV. PARTICULAR ACTS OR CONDUCT AS CONTEMPTS

10. *Letters Relating to Litigation* (p. 1024)

Where at the time of the writing of a letter referring to a denial of an application to appoint a coreceiver, the matter referred to had been disposed of, it was held that there was no proceeding pending before the court which the letter could affect by obstructing the administration of justice.

Ex p. Craig, (C. C. A. 2d Cir. 1921) 274 Fed. 177. In this case a comptroller of the city of New York was held guilty of contempt by writing and delivering a letter to a public service commissioner of the state in response to an invitation to a conference in respect to the transportation situation in New York city in which letter he falsely stated that "before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible of denying to myself and other members of the board of estimate and apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York." The court said:

"In the case at bar, the information sets forth that two consolidated causes in equity and one bankruptcy proceeding were pending in this court on October 6, 1919. By virtue of the equity causes (the information shows) there came into the custody of the court large and extensive properties of public utilities, subway, elevated, and surface transit lines. It is plain that in the equity causes and the bankruptcy proceeding the court would be called upon from time to time to make orders and decrees. Such orders and decrees would not merely affect the property as such, but necessarily affect the relation of the property to the public.

"The very nature of the properties and the legal proceedings involving them cast upon the court from the beginning a continuing duty, which must necessarily be performed through the agency of orders, instructions, and decrees decided upon from time to time and expressed in such form as may be appropriate. Until, therefore, the property is no longer in the court, and the court by its final decree or proper order has released the property from its custody, and has no further duty to perform, the equity suits and the bankruptcy proceeding are in every sense pending. . . . Finally, examining the information, it appears that it is alleged that the court was falsely charged in effect with a policy or course of conduct by which it denied to public officials access to original sources of information. It will be noted that defendant refers to 'the policy' for which the court is responsible. Indeed, counsel for defendant assert in their brief:

"The information itself discloses on its face that Judge Mayer had adopted a settled policy and a fixed purpose in regard to the character of the information to be accorded by the receivers and the trustee to the city officials."

"But counsel contend that this action of the court was 'presently final.' It must be

plain that 'policy' means a continuing course in a pending cause, and the alleged false statement in respect thereof looked to the present and the future, as well as the past. But it is not necessary to place the decision of this question on either narrow or technical ground. The question is broader and reaches further.

"Such statements as are alleged in the information to be knowingly false have, for their purpose and expected effect, the creation of a fear in the mind of the court that it will invite popular distrust, and perhaps condemnation, if it continues the course which it has pursued. The assault is based on the assumption—fortunately rarely correct—that the court will shape its decisions to meet passing popular approval and to avoid passing popular criticism. It is intended to play on human frailty, and to deflect and deter the court from the performance of its duty, and drive it into a compromise with its own unfettered judgment, by placing it, through the medium of knowingly false assertion, in a wrong position before a public which has little opportunity to investigate the facts and ascertain the truth."

Vol. V, p. 1047, Jud. Code, sec. 269.

[First ed., 1912 Supp., p. 243.]

II. Power of court.

III. Grounds for granting new trial.

1. In general.

6. Instructions.

IV. Effect of state remedies.

Construction of this section as amended, see *infra*, p. 644.

II. POWER OF COURT (p. 1048)

Power to grant.—"Under rule 11 (188 Fed. ix, 109 C. C. A. ix) the court, at its option, may notice a plain error not assigned. Nor will the court refuse to notice a substantial error committed during the trial, when the accused's liberty is involved, although no exceptions were taken, nor included in the assignment of errors. But it is only in a clear case, to prevent a miscarriage of justice, that an appellate court will consider an alleged error, not called to the attention of, and not passed on by, the trial court. *Gillette v. United States*, 236 Fed. 215, 149 C. C. A. 405. If it appears from the entire record that the accused is clearly guilty, errors not excepted to will afford no ground for reversal." *Smith v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 665.

Discretion of court.—To the same effect as the original annotation, see *American Film Co. v. Moye*, (C. C. A. 9th Cir. 1920) 267 Fed. 419; *Bates v. U. S.*, (C. C. A. 6th Cir. 1920) 269 Fed. 563; *Preleau v. U. S.*, (App. Cas. D. C. 1921) 271 Fed. 361; *Tanners' Products Co. v. Nulty*, (C. C. A. 3d Cir. 1921) 272 Fed. 898.

The denial of a motion for a new trial is a matter within the discretion of the court whose action will not be reviewed in the absence of an abuse of discretion. *Ramsey v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 825; *Harley v. U. S.*, (C. C. A. 4th Cir. 1920) 269 Fed. 384.

"The granting of the motion for a new trial was within the discretionary power of the learned District Judge, and, having exercised his discretion, no exception can be sustained to his denial. It has only been in cases where the trial judge has refused to exercise his discretion, and to consider the motion or the affidavits offered in its support, that his ruling has been reviewed." *Katz v. U. S.*, (C. C. A. 1st Cir. 1921) 273 Fed. 157.

It is not assignable as error on appeal that the court erred in overruling a motion for a new trial based on the assumption that the verdict was not sustained by the evidence. *Whelan v. Welch*, (App. Cas. D. C. 1921) 269 Fed. 689.

III. GROUNDS FOR GRANTING NEW TRIAL

1. In General (p. 1050)

Doubt as to issues on which verdict was based.—Where it is doubtful that the verdict of a jury in favor of a plaintiff was rendered on the issue submitted in the court's charge, rather than on a different issue urged by the plaintiff's counsel, a new trial will be granted. *Oriental Textile Mills v. Thompson Worsted Co.*, (E. D. Pa. 1920) 265 Fed. 794.

6. Instructions (p. 1052)

Where a portion of an instruction, which was objected to by the defendant's counsel, was withdrawn by the court and the jury cautioned to disregard it, it does not constitute prejudicial error. *Gross v. U. S.*, (C. C. A. 7th Cir. 1920) 265 Fed. 606.

IV. EFFECT OF STATE REMEDIES (p. 1055)

A restricted new trial where the whole case is not resubmitted to the jury as authorized by a state statute is beyond the power of a federal court to order. *McKeon v. Central Stamping Co.*, (C. C. A. 3d Cir. 1920) 264 Fed. 385.

Vol. V, p. 1059, Jud. Code, sec. 274a.

[First ed., 1916 Supp., p. 137.]

The fact that a complainant in equity has an adequate remedy at law is no longer sufficient ground for the dismissal of the suit. *Pierce v. National Bank of Commerce*, (C. C. A. 8th Cir. 1920) 268 Fed. 487, citing equity rule 22.

Construing equity rules 22 and 23 together with this statute it has been said: "We understand that a suit in equity shall not be tried by piecemeal, but is to be proceeded with on the side in which the suit was properly brought; that is to say, if it should have

been brought as an action at law, under rule 22 the court should make an order of transfer to the law side, to the end that the action may be proceeded with upon the law side. If the suit is one properly to be brought before a court of equity, it should remain upon the equitable side and there tried. On the other hand, if, in the course of the suit begun in equity, matters should arise which would ordinarily have to be determined at law, such matters shall be determined without sending the case to the law side of the court." *Chanslor-Canfield Midway Oil Co. v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 145.

Vol. V, p. 1061, Jud. Code, sec. 274b.

[First ed., 1916 Supp., p. 138.]

This statute is remedial and should be liberally construed. *Plews v. Burrage*, (C. C. A. 1st Cir. 1921) 274 Fed. 881.

Release as bar to action at law.—A release is not a bar to an action at law until set aside in equity since under this section the defendant may plead it as a defense in such an action. *Manchester St. Ry. v. Barrett*, (C. C. A. 1st Cir. 1920) 265 Fed. 557.

Submission to jury.—Whether the issues of fact involved in equitable relief to a plaintiff replying to a legal defense should be submitted to a jury or determined by the court is, a question of judicial discretion. While the verdict of a jury may in the equitable issue be advisory only, yet when such issue is simple and one eminently fit for submission to a jury, it is held that such submission is the preferable practice and the one most consonant with the spirit and purpose of the statute. *Plews v. Burrage*, (C. C. A. 1st Cir. 1921) 274 Fed. 881.

Meeting legal defense by equitable reply.—Under this section when a legal defense is set up in the answer, the plaintiff has by replication the same right to meet such legal defense by equitable reply as a defendant has to set up in his answer an equitable defense to a legal claim set up in the declaration. *Plews v. Burrage*, (C. C. A. 1st Cir. 1921) 274 Fed. 881. The court said:

"We cannot believe that Congress intended to prevent circuitry of action when a defendant, sued at law, has an equitable defense, and did not intend to prevent circuitry of action when a plaintiff needs to interpose a reply grounded on equity in order to meet a legal defense set up in the answer. We are aware that a majority of the Court of Appeals of the second circuit reached a different conclusion in *Keatley v. U. S. Trust Co.*, 249 Fed. 296, 161 C. C. A. 304; but our views as to the scope and meaning of this statute accord with those of Judge Learned Hand, who, dissenting, said:

"It seems to me that we should not construe so narrowly section 274b. The phrase, 'equitable defenses may be interposed by . . . replication without the necessity of

filing a bill on the equity side of the court,' can only mean, I think, this: That where the defendant interposes a bar valid at law, the plaintiff may set up in his next pleading facts avoiding the bar in equity. The suggestion is that it might give the plaintiff the right to plead to the defendant's 'equitable defenses' set up in the answer, but that is independently provided for in the fourth sentence of the act. Besides, the defendant's answer to a suit in equity cannot properly be said to be interposed by 'filing a bill on the equity side of the court,' which is the language of the first sentence.

"So far as we may look to the purpose of the section I cannot think there is any doubt. Congress can hardly be thought to have any predilection for plaintiffs' suits in equity rather than defendants', and we must leave a capricious exception in practice, if we do not include a case like this. I agree that the language of the section is not what a *Mitford* or a *Langdell* would have used; but the purpose seems to me perfectly plain, and we ought, I think, to try to effect it if we can."

"See, also, the *Knickerbocker Trust Case*, 247 Fed. 833, 837, 160 C. C. A. 55.

"Defendant's contention that, so construed, the statute is unconstitutional, is plainly untenable. The decision in *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, so far as now pertinent, is merely to the effect that legal and equitable remedies cannot be so blended in equity suits as to impair the constitutional right to jury trial given by the Seventh Amendment. *Stockbridge v. Mixer*, 215 Mass. 415, 102 N. E. 646, is to the same effect. Compare *State v. Saunders*, 66 N. H. 39, 76 et seq., 25 Atl. 588, 18 L. R. A. 646. There is no constitutional guaranty of permanent circuitry of action."

Vol. V, p. 1061, Jud. Code, sec. 274c.

[First ed., 1916 Supp., p. 138.]

I. PRACTICE UNDER TEXT SECTION 274c.

Amendment of complaint.—An amendment will be permitted under this section only when the existing facts warrant it and there has been a request therefor. *Buena Vista County v. Title Guaranty, etc., Co.*, (N. D. Ia. 1920) 267 Fed. 477.

A petition for removal may be amended even in the Circuit Court of Appeals so as to clear up matters of form. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

Vol. V, p. 1073, Jud. Code, sec. 280.

[First ed., 1912 Supp., p. 246.]

Selection on discharge of panel.—Jurors may be selected in the manner prescribed in this section where there is lack of a jury in consequence of the action of the court in discharging the panel or panels regularly sum-

moned. *Moorehead v. U. S.*, (C. C. A. 5th Cir. 1921) 270 Fed. 210.

Vol. V, p. 1098, sec. 9. [First ed., 1914 Supp., p. 377.]

Mode of review—*Certiorari*.—The mode of review by the Circuit Court of Appeals of the final decrees or judgments of the District Court of the Canal Zone is limited by this section to "the same manner and under the same regulations, and by the same procedure as is done in reviewing the final judgments and decrees of the district courts of the United States." The jurisdiction conferred is brought into play by writ of error or appeal and a suggestion that an order of the District Court prevented the petitioner from taking an appeal does not authorize the issuance of a writ of *certiorari* as a judge of the Circuit Court of Appeals could have allowed an appeal if application therefor had been duly made. *Simkins v. Simkins*, (C. C. A. 5th Cir. 1921) 271 Fed. 87.

Finality of decree.—"If no final judgment or decree has been rendered in the case, the proceedings in it are not now subject to be reviewed by this court, whose jurisdiction is limited as indicated by the plain terms of the statute. This court has not been vested with power to superintend or control action of the District Court of the Canal Zone in a case or proceeding in which no final judgment or decree has been rendered." *Simkins v. Simkins*, (C. C. A. 5th Cir. 1921) 271 Fed. 87.

Vol. V, p. 1108, Jud. Code, sec. 207.

[*Venue of suits to enforce, etc.*]

[First ed., 1914 Supp., p. 230.]

See *supra*, annotation under sec. 16 [B] of INTERSTATE COMMERCE at p. 514.

Vol. V, p. 1110, Jud. Code, sec. 208.

[First ed., 1914 Supp., p. 230.]

Enforcement of order to cease and desist enjoined.—In *National Tube Co. v. U. S.*, (N. D. Ohio 1918) 272 Fed. 735, an injunction was issued restraining the enforcement of an order requiring trunk line defendants to cease and desist from making allowance to a terminal railroad for a service rendered to certain shippers.

Vol. V, p. 1112. [*Application for interlocutory injunction, etc.*]

[First ed., 1914 Supp., p. 231.]

Enjoining enforcement of order.—The execution of an order made by the commission under section 402 (15) of the Act of Feb. 28, 1920, as amended by the Act of June 5, 1920, ch. 235 ("Transportation Act") 72 [1920

Supp. Fed. Stat. Ann. p. 97], can be enjoined only by three judges as provided in this section. *Baltimore, etc., R. Co. v. Lambert Run Coal Co.*, (C. C. A. 4th Cir. 1920) 267 Fed. 776.

Vol. V, p. 1117, sec. 4. [First ed., vol. II, p. 84.]

Torts of officers and agents.—The United States has not consented to be sued in the Court of Claims for the torts of its officers or agents. *Journal, etc., Co. v. U. S.*, (1921) 254 U. S. 581, 41 S. Ct. 202, 65 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 612.

Vol. V, p. 1118, sec. 5. [First ed., vol. II, p. 84.]

Procedure in actions against United States on war risk insurance certificates, see supplemental annotation to vol. IX, p. 1305, sec. 13, *infra*, this volume.

Vol. V, p. 1123, sec. 721. [First ed., vol. IV, p. 517.]

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40. Title and incidents of realty generally
 - a. Rule stated.
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41. Wills.
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I. GENERAL RULES AND PRINCIPLES

2. Federal Questions (p. 1126)

Federal courts in a suit to enjoin the construction of a dam in an alleged navigable river of the United States need not follow a decision of the highest court of the state within which the stream lies, that such stream in its natural condition is not navigable. *Economy Light, etc., Co. v. U. S.*, (1921) 256 U. S. 113, 41 S. Ct. 409, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 7th Cir. 1919) 256 Fed. 792, 168 C. C. A. 138.

5. Questions of Unwritten or Common Law

b. Present Rule (p. 1129)

In general.—To the same effect as the second paragraph of the original annotation, see *In re Roth*, (N. D. Ohio 1920) 272 Fed. 516; *Petition of National Discount Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 570.

Decision of Supreme Court of Hawaii.—A decision of the Supreme Court of the Territory of Hawaii construing prior decisions of the Supreme Court relating to the common law doctrine of the presumption of a grant has been held to be binding on the Circuit Court of Appeals. *Hawaii v. Hutchinson Sugar Plantation Co.*, (C. C. A. 9th Cir. 1921) 272 Fed. 856.

c. Local Law; Rules of Property (p. 1130)

Local law.—To the same effect as the third paragraph of the original annotation, see *Pickens v. Merriam*, (C. C. A. 9th Cir. 1921) 274 Fed. 1.

Priority of state over other unsecured creditors.—Whether the priority of a state over other unsecured creditors in payment of debts due the state out of the assets of the debtor is a prerogative right or merely a rule of administration is a matter of local law, and the decision of the highest court of the state as to the existence of the right and its incidents will be accepted by the federal Supreme Court as conclusive. *Marshall v. New York*, (1920) 254 U. S. 380, 41 S. Ct. 143, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1919) 262 Fed. 727.

6. Constitutional and Statutory Questions Generally.

a. General Rule Stated (p. 1133)

To the same effect as fifth paragraph of original annotation, see *Wight v. Police Jury*, (C. C. A. 5th Cir. 1919) 264 Fed. 705; *In re Fox*, (D. C. Kan. 1920) 266 Fed. 134; *U. S.*

r. Briggs, (W. D. Pa. 1920) 266 Fed. 434; *Lederer v. Pearce*, (C. C. A. 3d Cir. 1920) 266 Fed. 497; *Chicago v. S. Obermayer Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 237; *Woodstock Operating Corp. v. Young*, (C. C. A. 5th Cir. 1920) 268 Fed. 278; *Brewer-Elliott Oil, etc., Co. v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 100; *Ahlberg v. U. S.*, (C. C. A. 8th Cir. 1921) 271 Fed. 661; *Murray v. Payne*, (C. C. A. 3d Cir. 1921) 273 Fed. 820; *McNichol v. Consumers' Power Co.*, (E. D. Mich. 1921) 274 Fed. 478; *Noble v. Douglas*, (W. D. Wash. 1921) 274 Fed. 672.

Decisions of the state courts that a local statute is not violative of the state constitution are controlling. *Hannan v. Council Bluffs First Nat. Bank*, (C. C. A. 8th Cir. 1920) 269 Fed. 527.

The construction of the California Code made by the Supreme Court of California is binding on the federal courts. *In re Hansen*, (S. D. Cal. 1919) 268 Fed. 904.

The contemporaneous and practical construction of a statute by an administrative tribunal, whose duty it is to carry it into effect, is entitled to great respect. Though not absolutely controlling, it is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Ginnocchio v. Hydraulic Press Brick Co.*, (S. D. Ohio 1920) 266 Fed. 564.

c. Conflicting Decisions of State Courts Generally (p. 1138)

To the same effect as first paragraph of original annotation, see *Midway Irrigation Co. v. Snake Creek Min., etc., Co.*, (C. C. A. 8th Cir. 1921) 271 Fed. 157.

"In those cases in which the effect of the state decisions is in doubt, the federal court may be under the necessity of making a decision without reference to expressions from the state court." *Wight v. Police Jury*, (C. C. A. 5th Cir. 1919) 264 Fed. 705.

"Where unequivocal dicta are in conflict with prior unequivocal decisions, no definite rule defines the duty of the federal court." *Wight v. Police Jury*, (C. C. A. 5th Cir. 1919) 264 Fed. 705.

d. Change of State Decisions After Accrual of Rights (p. 1138)

"Where state decisions have been followed under conditions making them rules of property rights, changes in the decisions may substantially constitute the taking of property without due process of law, in which event the courts of the United States may feel obliged to adhere, with reference to rights arising prior to the change, to the old rulings." *Wight v. Police Jury*, (C. C. A. 5th Cir. 1919) 264 Fed. 705.

"When transactions have been had, contracts, grants, or conveyances have been made, and rights have thereby accrued and vested in a state of the laws and under the rules of property under which such rights are valid and enforceable, and the claim is

asserted that by decisions of state tribunals subsequent to the accrual of such rights a different rule of property and state of the law has been created, which, if applied to the determination of the effect of such prior transactions, contracts, grants, or conveyances, would invalidate them and destroy the vested rights under them, the federal courts are not bound by such later rule of property or state of local law, the power is conferred and the duty is imposed upon them to hear and determine the claims of the parties in interest as in right and reason they ought to determine them according to the dictates of their own opinions as independent tribunals." *Brewer-Elliott Oil, etc., Co. v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 100.

II. APPLICATION OF RULES TO PARTICULAR SUBJECTS

7. *Contracts Generally* (p. 1163)

Construction of contracts.—In *American Trading Co. v. Steele*, (C. C. A. 9th Cir. 1921) 274 Fed. 774, it was held in the case of a contract entered into in California that its construction would be governed by what the courts of that state had decided on the subject but that if they had not spoken then the federal court would exercise its judgment in the premises.

8. *Corporate Existence* (p. 1166)

Corporate powers.—The question of the powers of a corporation is one for the courts of the state in which it was organized to determine, and where the highest courts of that state have decided the question and it has become a rule of property, their decision is binding on the federal court sitting in that state. *Kelley v. West Braddock Bridge Co.*, (C. C. A. 3d Cir. 1921) 273 Fed. 163.

11. *Damages, Measure of* (p. 1169)

The rule established by state decisions as to the measure of damages in an action for a breach of contract and the burden of proof to show any instigation will be followed by the federal courts. *Isleworth Hotel Co. v. Ward*, (C. C. A. 3d Cir. 1921) 270 Fed. 86.

Decisions of the state court that when profits are the direct and immediate fruit of the contract they may be recovered as damages for the breach thereof will be followed. *Heyward v. Goldsmith*, (C. C. A. 3d Cir. 1921) 269 Fed. 946.

Damages for appropriating public lands.—In a suit to recover against a trespasser for oil taken from public lands in which it was contended that the law of the state controlled as to the amount recoverable, it has been said: "It is not necessary to determine the import of the state statutes and decisions relied on, as in this suit in equity by the government for redress for an alleged unlawful appropriation of part of the public domain the relief grantable is not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in federal courts,

wherever those courts are sitting as courts of equity. The public domain is not at the mercy of state legislation or decisions." *Mason v. U. S.*, (C. C. A. 5th Cir. 1921) 273 Fed. 135; *Norvell v. U. S.*, (C. C. A. 5th Cir. 1921) 273 Fed. 142.

14. *Deeds, Mortgages and Leases of Realty* b. *Mortgages* (p. 1175)

In general.—Where the question relating to a mortgage is one of general jurisprudence the federal courts are not bound by the state decisions but will require and determine what is the correct rule. *In re Roth*, (N. D. Ohio 1920) 272 Fed. 516.

d. *Effect of State Statute* (p. 1176)

The decision of the highest court of a state as to the effect of a statute relating to the right of redemption from a foreclosure sale is held to govern a decision in federal court. *McCutchen v. Union Trust Co.*, (C. C. A. 8th Cir. 1921) 271 Fed. 586.

16. *Evidence and Witnesses*

b. *Effect of State Statutes Generally* (p. 1177)

To the same effect as the first paragraph of the original annotation, see *Crittenden v. Widrevitz*, (C. C. A. 2d Cir. 1921) 272 Fed. 871.

n. *Commercial Paper* (p. 1188)

The provisions of the Negotiable Instruments Law of New York as to the burden of proof in the case of a person claiming to be a holder in due course has been held applicable in the federal courts. *Crittenden v. Widrevitz*, (C. C. A. 2d Cir. 1921) 272 Fed. 871.

19. *Guaranty Contracts* (p. 1191)

In an action by the United States on a bond given by a contractor, the recovery is limited to the penalty named in the bond and cannot include interest where by the law of the state where the bond and contract were made, interest is not recoverable. *U. S. v. Garland*, (D. C. Del. 1921) 271 Fed. 14.

26. *Limitation of Actions*

b. *Suits in Equity* (p. 1204)

General rule stated.—To the same effect as the original annotation, see *Tilden v. Barber*, (D. C. N. J. 1920) 268 Fed. 587.

While the statute of limitations prescribed by a state do not apply to suits in equity in the federal courts yet such statutes are generally followed by analogy in cases in equity where there is no showing on either side that to follow or not to follow the statute would be inequitable. *Warner v. Citizens' Nat. Bank*, (C. C. A. 8th Cir. 1920) 267 Fed. 661.

Suits by trustee in bankruptcy.—A suit by a trustee in bankruptcy to avoid an alleged fraudulent transfer by the bankrupt is held to be subject to the state statute of limitation. *Davis v. Willey*, (C. C. A. 9th Cir. 1921) 273 Fed. 397.

c. Proceedings in Admiralty (p. 1206)

A state statute limiting the time for bringing an action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check, has no application to a libel filed in an admiralty court for the recovery of civil damages, it being declared that the foregoing provision has no application to a libel filed in an admiralty court, containing the plaintiff's allegations as a basis for the recovery of civil damages, in so far as the word "libel" therein mentioned is concerned, but to libels based upon defamatory remarks or acts intended or which tend to bring one into disrepute. *Flynn v. Christenson*, (C. C. A. 9th Cir. 1921) 273 Fed. 385.

29. Mortgages, Sales and Bailments of Personality (p. 1210)

"The federal courts necessarily adopt the views of the state court with respect to title to personal property." *In re Irwin*, (W. D. Pa. 1920) 268 Fed. 162.

The validity of a chattel mortgage is determined by the decision of the state court. *In re Bonk*, (E. D. Mich. 1920) 268 Fed. 1012; *In re Mitchell Motor, etc., Co.*, (W. D. Wash. 1921) 274 Fed. 492.

The decisions of a state court as to what constitutes a sufficient delivery followed by an actual and continued change of possession of property covered by a chattel mortgage where the mortgage is not filed for record, are controlling in the federal court. *In re Bonk*, (E. D. Mich. 1920) 270 Fed. 657.

30. Municipal and Quasi Municipal Corporations (p. 1211)

Construction of ordinance.—The decision of the highest court of a state construing a municipal ordinance is binding on the federal courts. *Schoenfeld v. Seattle*, (W. D. Wash. 1920) 265 Fed. 726.

31. Negligence Questions

a. In General (p. 1215)

Where a state statute gives a mother the right to recover for the homicide of a child on whom she is dependent and who contributes to her support, the construction given by the state court to the statute that partial dependency and contribution is sufficient to authorize recovery by the mother of the full value of the life of the deceased child, even though the child's earnings are legally due to the father, is binding on the federal courts. *Woodstock Operating Corp. v. Young*, (C. C. A. 5th Cir. 1920) 268 Fed. 278.

Doctrine of "attractive nuisance."—The attractive nuisance doctrine is one of general law as to which the federal courts are not bound to follow the decisions of the state

courts. *New York, etc., R. Co. v. Fruchter*, (C. C. A. 2d Cir. 1921) 271 Fed. 419.

38. Taxation

a. In General (p. 1226)

To the same effect as the second paragraph of the original annotation, see *Lederer v. Pearce*, (C. C. A. 3d Cir. 1920) 266 Fed. 497.

g. Exemptions from Taxation (p. 1229)

Widow's interest in husband's estate.—

The question as to what extent a widow's interest in her husband's estate is taxable, if at all, under the Federal Estate Tax Law, is to be determined by the statutes and rules of decision in the state where the decedent's property is located. *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993.

Where under the laws of the state a widow's right to support is not limited to a case of actual dependency on the decedent a charge therefor should be deducted as a "charge against the estate" under the Federal Estate Tax Law. *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993. The court said: "While it would apparently be true that in so far as the Federal Estate Tax itself is concerned, she would not be entitled to support during the administration of the estate—whatever the period—unless dependent upon the decedent, under the terms of clause a (1) of section 203, nevertheless her claim for a year's support should in any event be deducted as a charge against the estate allowed by the laws of Tennessee; there being nothing in the Tennessee statutes or decisions in reference to a year's support which limits the widow's right to a year's support to cases of actual dependency upon the decedent."

Where under the laws of the state the widow does not receive either her homestead, dower or year's support in succession to her husband or by transfer from him, but takes them under the statutory provisions vesting these rights in her independently of her husband and adversely to his estate, the property assigned to her as dower, homestead and year's support, not being transferred to her from her husband, is not a part of his estate upon which the tax is imposed by the Federal Estate Tax. *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993.

39. Telegraph Companies (p. 1232)

To the same effect as the first paragraph of the original annotation, see *Friedlander v. Postal-Tel.-Cable Co.*, (N. D. Ohio 1921) 271 Fed. 954.

Mental anguish as damages.—To the same effect as the original annotation, see *Western Union Tel. Co. v. Speight*, (1920) 254 U. S. 17, 41 S. Ct. 11, 65 U. S. (L. ed.) —, reversing on other grounds (1919) 178 N. C. 146, 100 S. E. 351.

40. Title and Incidents of Realty Generally
a. Rule Stated (p. 1233)

To the same effect as the original annotation, see *Guzzi v. Delaware, etc., Co.*, (C. C. A. 3d Cir. 1920) 266 Fed. 513; *Pickens v. Merriam*, (C. C. A. 9th Cir. 1921) 274 Fed. 1.

"Federal courts accept as conclusive the decisions of the highest court of the state with respect to the meaning and effect of the state Constitution and statutes upon state matters—such as holding realty within the state." *Chicago v. S. Obermayer Co.*, (C. C. A. 7th Cir. 1920) 268 Fed. 237.

c. Application of Rule Generally (p. 1234)

The general rule as to the duty of the federal courts to follow the decisions of the highest court of the state in matters relating to the title and incidents of real property has been applied in numerous instances as follows: as to the title to the surface of a lot as against the owner of coal underlying such lot. *Guzzi v. Delaware, etc., Co.*, (C. C. A. 3d Cir. 1920) 266 Fed. 513.

d. Water Rights (p. 1235)

Riparian rights.—Whether a conveyance made by a state of land abutting upon navigable water confers upon the grantee any right of interest in those waters or in the land under the same is a matter wholly of local law, upon which question the provisions of the constitution and statutes of the state and the decisions of its highest court are accepted by the federal Supreme Court as conclusive. *Seattle v. Oregon, etc., R. Co.*, (1921) 255 U. S. 56, 41 S. Ct. 237, 65 U. S. (L. ed.) —.

e. State Statutes Concerning Realty Generally (p. 1235)

The general rule as to following state decisions construing state statutes has been applied in case of a statute as to the transfer of homestead rights. *Chisholm v. Creek, etc., Development Co.*, (E. D. Okla. 1921) 273 Fed. 589.

41. Wills

b. Decisions Constituting Rule of Property (p. 1238)

The construction given by the state courts to the community property laws of that state is binding on the federal court. *Blum v. Wardell*, (N. D. Cal. 1920) 270 Fed. 309.

Vol. VI, p. 18, sec. 913. [First ed., vol. IV, p. 561.]

Discontinuance of libel in personam.—A libellant may of right discontinue a suit in personam where although the pleadings have been filed no further steps have been taken and no interlocutory orders affecting rights have been made. *Erie R. Co. v. Boston, etc., Canal Co.*, (D. C. Mass. 1921) 270 Fed. 876.

A replication is not entitled to be filed not being allowed under the fifty-first rule in admiralty. *The Claveresk*, (C. C. A. 2d Cir. 1920) 264 Fed. 276.

Impleading parties.—Equity rule 59 permitting the impleading of a third party in collision cases has been applied in almost numberless cases other than collision cases, and third parties have been thus impleaded, not necessarily at the instance of the libellant by way of amendment, but at the instance of the original respondent. *The Minerva*, (E. D. Pa. 1920) 266 Fed. 598.

Vol. VI, p. 21, sec. 914. [First ed., vol. IV, p. 563.]

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I. CONSTRUCTION GENERALLY

4. Clauses in Act Construed

c. "As Near as May Be" (p. 26)

General doctrine.—"Undoubtedly this section provides substantial rights for the litigants upon both sides of an action at law. That general proposition probably has never been questioned, though sometimes the courts may differ as to what the practice and modes of proceeding of a particular state may be; but, when they are ascertained, the result is cared for, as near as may be, by the statute just cited, and known as the Conformity Act, as modified by section 918." *Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co.*, (W. D. Ky. 1920) 267 Fed. 934.

Discretion given to courts.—This section "expressly grants to the federal trial court power to make rules to 'regulate their own practice as may be necessary or convenient for the advancement of justice and the pre-

vention of delays in proceedings.' There seems no way of reconciling these seemingly inconsistent provisions, unless through the effect of the 'as near as may be' clause. There is ample room to say that where, in the judgment of the federal nisi prius court, the adoption of a particular practice is necessary or convenient to meet the particular needs of that court, and when there is reasonable basis for that judgment, the 'as near as may be' clause will take effect, precise conformity will not be required, and the particular federal practice or rule will prevail." *Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co.*, (C. C. A. 6th Cir. 1920) 267 Fed. 945.

III. EFFECT ON JURISDICTION OF FEDERAL COURTS

2. Equity Courts

a. General Doctrine (p. 30)

Where under state decisions it is a rule that in boundary cases, where the answer prays for affirmative relief by way of asking that the line described in the answer be adopted, the defendant waives any objection that he might have urged against the right of a court of equity to establish the controverted boundary, it has been declared that regarding the subject matter as belonging to a class where equity has jurisdiction, the federal court can conform to the rule of the state cases. *Muck v. Weyerhaeuser Timber Co.*, (C. C. A. 9th Cir. 1921) 273 Fed. 469.

IV. APPLICABILITY IN GENERAL (p. 32)

In common law actions the conformity statutes require the practice, pleadings and procedure to follow the state practice. *Anders v. Security Mut. L. Ins. Co.*, (E. D. Pa. 1920) 268 Fed. 677.

The state practice does not obtain in bankruptcy proceedings. *In re Puget Sound Engineering Co.*, (W. D. Wash. 1920) 270 Fed. 353.

Manner in which judge performs duties.—The conformity statute does not apply to the manner in which the judge shall perform his personal duties on the bench. *Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co.*, (C. C. A. 6th Cir. 1920) 267 Fed. 945, so declaring in a case involving the signing of the journal.

Regulations to be observed by clerk.—A regulation to be observed by the clerk in doing his work and which requires the minutes of the court as kept by him to be written out, read in an audible voice and signed by the judge on the order book is entirely outside of the practice and proceedings in a case inter partes. "The parties to the action would have no control over these things. Our view was and clearly is that these provisions are not and were not intended to be embraced in the Code of Practice, which regulates the 'practice and pleadings in civil cases,' as between the parties thereto, within the contemplation of section 914, R. S." *Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co.*, (W. D. Ky. 1920) 267 Fed. 934.

V. APPLICABILITY IN PARTICULAR INSTANCES

10. Costs and Fees

a. In General (p. 34)

In the federal courts, in cases at law, the state allowances may be followed where no rule has been established by Congress. *Warner v. Liquid Carbonic Co.*, (N. D. Ga. 1921) 270 Fed. 294.

13. Criminal Cases (p. 36)

In general.—To the same effect as the original annotation, see *Holmes v. U. S.*, (C. C. A. 5th Cir. 1920) 269 Fed. 96.

24. Judgments and Proceedings Subsequent to

a. In General (p. 40)

Signing of judgments by judge.—The signing of a judgment on a separate paper which is then passed to the clerk by the judge to be entered on the order book has been held to be "as near as may be" in conformity with the Kentucky "practice, pleadings and forms and modes of proceeding" in civil cases. *Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co.*, (W. D. Ky. 1920) 267 Fed. 934.

c. Motions for New Trials (p. 42)

A restricted new trial where the whole case is not resubmitted to the jury as authorized by a state statute is beyond the power of a federal court to order. *McKeon v. Central Stamping Co.*, (C. C. A. 3d Cir. 1920) 264 Fed. 385.

d. Bill of Exceptions (p. 42)

"Bills of exceptions in the federal courts are not governed by the rules governing appeals in the courts of record of the state within which the federal courts are held. The Act of Conformity of June 1, 1872, c. 255, § 5, has no application to bills of exceptions." *Rothman v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 31.

e. Vacating or Modifying Judgments (p. 43)

In *West Side Irrigating Co. v. U. S.*, (E. D. Wash. 1920) 264 Fed. 538, it was held that where under the statute of a state a judgment may be vacated within one year, the decision of the state courts that the party must act with diligence even within the year, while not absolutely controlling are fundamental.

28. Limitation of Actions (p. 48)

The state statute of limitations has been held to apply in an action under the Sherman Anti-Trust Act. *Jones v. West Pub. Co.*, (C. C. A. 5th Cir. 1921) 270 Fed. 563.

32. Nonsuit

a. Voluntary Nonsuit (p. 49)

In the Eastern District of Michigan it has been held that in an action at law in a federal court sitting within the State of Michigan a plaintiff has the same right to take a nonsuit as he has in the courts of that state.

McNichol v. Consumers' Power Co., (E. D. Mich. 1921) 274 Fed. 478.

33. Parties

a. Parties Plaintiff (p. 50)

The question in whose name an action is to be brought is one of procedure in which the federal courts will follow the local state practice. *New York Evening Post Co. v. Chaloner*, (C. C. A. 2d Cir. 1920) 285 Fed. 204. Petition for writ of certiorari dismissed. (1920) 252 U. S. 591, 40 S. Ct. 396, 64 U. S. L. ed. 731. See also (S. D. N. Y. 1919) 260 Fed. 335.

State as party.—The decision of the state court to the effect that the state is the party plaintiff would bind the federal courts in so far as it was a construction of the statutes or of practice or pleadings, but the defendant may where removal is sought challenge such decision in the federal courts through invoking the Fourteenth Amendment. *Ohio v. Swift*, (C. C. A. 6th Cir. 1921) 270 Fed. 141.

36. Pleadings

b. Construction of Pleadings (p. 53)

The construction of pleadings is a matter of state law. *Connolly v. Standard Oil Co.*, (D. C. R. I. 1920) 264 Fed. 383.

g. Demurrers to Pleadings (p. 56)

Where under state practice general grounds of demurrer are insufficient in law in a state court, they will be so regarded in the federal court. *Randolph v. Craig*, (M. D. Tenn. 1920) 267 Fed. 993.

49. Writs and Process

b. Mode and Sufficiency of Service (p. 61)

General doctrine.—To the same effect as the third paragraph of the original annotation, see *Esteve v. Harrell*, (C. C. A. 5th Cir. 1921) 272 Fed. 382.

Vol. VI, p. 80, sec. 921. [First ed., vol. IV, p. 587.]

Power of court.—To the same effect as the original annotation, see *Mankin v. Bartley*, (C. C. A. 4th Cir. 1920) 266 Fed. 466; *Chicago, etc., R. Co. v. U. S.*, (1920) 55 Ct. Cl. 58.

Purpose.—"In its conception that statute was designed for the sole purposes of saving the time of the court and the costs to the litigants. As originally enacted in 1813 (3 Stat. 21) it was one of three sections in an act dealing with costs. Under its beneficent provisions, not only may cases affecting the same property, title, res, or fund be thus brought together and tried at one time, but cases unrelated in right or liability, but connected by some common controlling issues or facts, which can conveniently be heard and determined by a jury or a chancellor at one hearing." *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

The propriety of any consolidation order must be determined by the situation of the cases at the time the order is made. *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

Consolidation discretionary.—The power to consolidate two cases pending in the same court rests in the sound discretion of the court. *Woodstock Operating Corp. v. Young*, (C. C. A. 5th Cir. 1920) 268 Fed. 278.

"Consolidation is in no wise mandatory, but the advisability of such an order is based upon the practical administration of justice and the economical and convenient disposition of the cases in the trial court. It is therefore a matter of judicial discretion. But the statute has in terms limited the exercise of this discretion to cases 'of a like nature or relative to the same question'; also this discretion, even within the above limits, is judicial, not arbitrary, and there must be some indication of 'avoiding unnecessary costs or delay in the administration of justice,' and some basis that such action is 'reasonable' as required by the statute. Since consolidation of independent cases is lawful only under this statute, litigants are deprived of legal rights if their causes are consolidated outside the terms of the statute, to their injury, and the appellate courts of the United States have often examined orders of consolidation." *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

When consolidation proper.—If the two suits are "of a like nature, or relative to the same question," the court might simply consolidate them, unless it is clearly and conclusively evident that such action would not avoid unnecessary costs or delay and would be unreasonable as affecting rights of some of the parties. To determine these matters requires, first, examination and comparison of the two actions; and, second, an examination of the status of each at the time the order of consolidation was made. *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

Effect of consolidation.—"Although the result of consolidation is merely to try cases together, necessitating separate verdicts and judgments or separate decrees (*Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; *Toledo, etc., R. R. Co. v. Trust Co.*, 95 Fed. 497, 36 C. C. A. 155 [C. C. A. 6th Circuit, opinion by Judge Lurton]), yet it is true that sometimes independent suits bear a relation to each other, such that, when they are properly consolidated, the several controversies assume certain natural attitudes toward each other, such as 'in the nature of' a cross-bill or intervention, and it is then convenient to so regard them in the subsequent conduct of the litigation (*Sioux City Terminal R. R. and Warehouse Co. v. Trust Co.*, 82 Fed. 124, 27 C. C. A. 73 [C. C. A. 8th Circuit]; *Lant v. Kinne*, 75 Fed. 636, 637, 21 C. C. A. 466 [C. C. A. 6th Circuit]; *Central Trust Co. v.*

Bridges, 57 Fed. 753, 6 C. C. A. 539 [C. C. A. 6th Circuit]; *McBee v. Ry. Co.*, [C. C.] 48 Fed. 243, 245; but this is purely a rule of convenience, and does not result in actually making such parties defendants or interveners in the other suit." *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

Separate actions by separate plaintiffs.—Where separate actions are brought under a state statute to recover damages for the homicide of a son and they arise out of the same transaction and involve in a large measure the same evidence it is within the discretion of the court to consolidate them. *Woodstock Operating Corp. v. Young*, (C. C. A. 5th Cir. 1920) 268 Fed. 278.

Trials for contempt.—A court may order separate actions for repeated violations of an injunction to be consolidated for trial and to direct the trial of all the charges against the defendant to a single jury. *Jennings v. U. S.*, (C. C. A. 8th Cir. 1920) 264 Fed. 399.

Consolidation improper.—A consolidation was held to be error under the following conditions. One was a proceeding by a dissatisfied stockholder against the corporate officers and directors, seeking accounting and satisfaction for past wrongdoing as such, the prevention of future wrongdoing or action prejudicing the corporate welfare by the removal of such officers and directors and election of a new board, and escape from onerous contracts fraudulently consummated by such persons. If necessary to protect the corporation from harm during this proceeding, a receiver was sought. The other prayers for receiver were purely as an aid in executing a decree found in complainant's favor. The other case was a bill by a bondholder under a junior mortgage. It alleged default in payment of a senior mortgage on part of the railway system, insolvency of defendants, threatened foreclosure or improper increase of indebtedness prior to complainant's lien, default under another prior mortgage and danger of foreclosure, danger of dismemberment of a harmonious street railway system, resulting in large loss in value in the security behind complainant's bonds and injury to the public. The prayer was for a receiver, a marshaling of assets, and a declaration of rights of respective lien holders and creditors. The court declared: "No application by the receiver or by any one else to have him made party to the Seaman suit has been ruled upon or even filed in the Adler suit. Therefore, as to this proceeding for unlawful waste brought by Seaman, the status of the two cases at the time of the order of consolidation was that a stockholder had a suit against certain corporate directors for unlawful waste of corporate funds, and in another proceeding a creditor had obtained a general receivership of that corporation. The only place where the two cases in any wise touch is that, if Seaman can legally continue the

prosecution of his suit after the qualification of the Adler receiver, any sum recovered by him would be for the benefit of the corporation, and would pass as assets thereof to the receiver. This is no basis for any consolidation of the two cases. No economy of expense or of time, and no convenience in the conduct of the suits, can arise from such combination. If the receiver is not made a party to the Seaman suit, that suit is outside the scope of the Adler receivership, which is in no wise affected thereby, unless and until Seaman successfully terminates his action and has a fund to turn over to the receiver. The receiver has not been made a party, and as yet Seaman has no such fund; therefore there was no ground to connect the suits, and no proper purpose is served thereby." *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

Order as appealable.—Although it is not said that as a general rule an order of consolidation is not appealable yet the right of appeal has been recognized where the consolidation would tend to deprive one of the parties of his rights of the ordinary litigant. *Adler v. Seaman*, (C. C. A. 8th Cir. 1920) 266 Fed. 828.

Vol. VI, p. 93, sec. 953. [First ed., vol. IV, p. 594.]

- I. In general.
- II. What constitutes bill of exceptions.
- III. Signature.
 2. Agreement of counsel.
 3. Time of signing.
 5. How signed.
- VI. Disability.
- VII. Observance of rules of court.

I. IN GENERAL (p. 94)

The power to amend a bill of exceptions, like the power to allow the bill in the first instance, cannot be exercised after the court below has lost its power over the case, as when the term has expired without control of the case having been reserved. *Ulmer v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 176.

II. WHAT CONSTITUTES BILL OF EXCEPTIONS

To the same effect as the second paragraph of original annotation, see *Hanson v. Cole*, (C. C. A. 8th Cir. 1920) 266 Fed. 67.

III. SIGNATURE

2. Agreement of Counsel (p. 95)

Where a bill of exceptions was not signed by the judge no exception at the trial as to which error was assigned is brought before the court in appeal though the parties stipulated that the transcript of record had been agreed on as true. *Allemanni v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 523.

3. Time of Signing (p. 95)

The bill of exceptions must be signed within the term at which the judgment is entered unless during the term the time is extended or unless it is signed thereafter by consent of the parties previously given. *Ulmer v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 176.

Signing after expiration of term.—In *Ulmer v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 176, it was said: "Consent of the parties, given during the term, may be sufficient authority for the signing of the bill after the term expired. *Waldron v. Waldron*, 156 U. S. 361, 378, 15 Sup. Ct. 383, 39 L. ed. 453. But in *Blisse v. United States*, supra, we stated our opinion to be that consent of the parties, even if expressly given, would be ineffective if given after the writ of error had removed the case into this court."

The power to settle the evidence which is a statement of the evidence and not a bill of exceptions is not lost by the district court in an equity appeal although there has been an approval of the bond on appeal and a citation has been signed. *Struett v. Hill*, (C. C. A. 9th Cir. 1920) 269 Fed. 247.

5. How Signed (p. 96)

Signing by other than trial judge.—Where a bill of exceptions is signed by one who was not the trial judge he should in doing so expressly state in his certificate the reason why he, and not the trial judge, allowed and signed the bill. Unless this is done the court on appeal does not know by what right one who did not try the case came to allow the bill. *Ulmer v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 176.

VI. DISABILITY (p. 97)

Absence from district.—The absence of the trial judge from the district is not a disability within the meaning of the statute so as to allow the bill to be allowed and signed by another judge who is within the district. *Ulmer v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 176.

VII. OBSERVANCE OF RULES OF COURT (p. 98)

The court may refuse to strike portions of a bill of exceptions although they were not prepared and submitted as required by the rules of court. *Czizek v. Western Union Tel. Co.*, (C. C. A. 9th Cir. 1921) 272 Fed. 223.

The common-law bill of exceptions is not the proper way to present the evidence in an equity appeal. The practice is regulated by the equity rules adopted by the Supreme Court. *Struett v. Hill*, (C. C. A. 9th Cir. 1920) 269 Fed. 247.

It is said that rule 75 was adopted with due consideration of the existing practice by which appeals were claimed and permitted, regardless of the expiration of terms, and that the trial court has power to approve and direct the filing of the statement of evidence, although the term has expired when the decree was rendered, and no order

has been entered carrying the subject-matter over until the next term. *Struett v. Hill*, (C. C. A. 9th Cir. 1920) 269 Fed. 247.

Vol. VI, p. 98, sec. 954. [First ed., vol. IV, p. 596.]

VIII. PLEADINGS

1. In General (p. 105)

Supplemental bill.—"Granting or refusing leave to file a supplemental bill is usually in the discretion of the trial court, and not reversible on appeal, except for abuse of discretion." *Rosemary Mfg. Co. v. Halifax Cotton Mills*, (C. C. A. 4th Cir. 1920) 266 Fed. 363.

Vol. VI, p. 111, sec. 955. [First ed., vol. IV, p. 601.]

- I. Survival of action.
- II. Revival of action.

I. SURVIVAL OF ACTION (p. 112)

In general.—As a general rule the death of a party pending a writ of error furnishes no ground for the abatement of a suit. *Roberts v. Criss*, (C. C. A. 2d Cir. 1920) 266 Fed. 296, 11 A. L. R. 698.

II. REVIVAL OF ACTION (p. 113)

Laches of representative.—Under rule 19 of the Circuit Court of Appeals, which provides that whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives of such deceased party may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases, and that, if the representatives of the deceased do not become parties to the action, the other party may suggest the death on the record, and on motion obtain an order that, unless they do become parties to the action within sixty days, the party moving for the order, if plaintiff in error, shall be entitled to open the record and on hearing have the judgment reversed, if it be erroneous, it was held that, where the executrix of the defendant never complied with the privilege accorded to her by the plaintiff in error to become a party within the specified period, or at any time thereafter, she was not and never had been a party to the action, and her counsel was without right to file a brief or be heard on the argument, and she was without right to costs if the court should conclude that there was no reason why the judgment should be reversed. *Roberts v. Criss*, (C. C. A. 2d Cir. 1920) 266 Fed. 296, 11 A. L. R. 698.

Vol. VI, p. 124, sec. 648. [First ed., vol. IV, p. 389.]

- V. Province of court and jury.
- VII. Power to direct verdict.

V. PROVINCE OF COURT AND JURY (p. 127)

In general.—Where in an action on an insurance policy the assessment of damages depends upon the interested testimony of a plaintiff, both as to quantum of goods destroyed and the value of such goods, the credibility of the witnesses, without whose evidence the plaintiff made out no case at all, is eminently for the jury, and the direction of a verdict for the full amount claimed has been held to be error. *Fire Ass'n v. Mechlowitz*, (C. C. A. 2d Cir. 1920) 266 Fed. 322.

VII. POWER TO DIRECT VERDICT (p. 128)

"The rule of directed verdicts is, in the courts of the United States, usually put as requiring a direction when a verdict, if rendered the other way, would necessarily be set aside." *Fire Ass'n v. Mechlowitz*, (C. C. A. 2d Cir. 1920) 266 Fed. 322.

Where both parties move for a directed verdict, whatever controverted issues of fact are revealed by the record are for the purposes of the appellate court conclusively determined in favor of the party whose motion was granted. *Tanner v. Ballard, etc., Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 671.

Vol. VI, p. 130, sec. 649. [First ed., vol. IV, p. 393.]

In general.—A plaintiff in error cannot challenge the sufficiency of these special findings to meet the requirements of this section, where without these findings there would be no question presented that the court would have authority to review. *Mayes v. Jones*, (C. C. A. 6th Cir. 1921) 270 Fed. 121.

Findings of fact.—While a finding of fact is elaborate in detail, and each paragraph thereof might have been separately numbered as a separate finding, yet, where the failure to do this cannot possibly prejudice the rights of the defendant in error, it is of no importance, especially where it also further appears that each and all of these facts so found by the court to be established by the testimony are essential to a full and complete understanding of the issues joined by the pleading in the case, and particularly the conduct and management of the business to which these issues relate. *Mayes v. Jones*, (C. C. A. 6th Cir. 1921) 270 Fed. 121.

Where a jury trial has been waived and issues of law and fact submitted to the court it is a matter entirely for the discretion of the court whether to make special findings of fact. *U. S. v. One Diamond Necklace*, (C. C. A. 2d Cir. 1920) 267 Fed. 696.

Vol. VI, p. 130, sec. 1. [First ed., vol. IV, p. 557.]

Conclusiveness of findings.—To the same effect as the first paragraph of the original annotation, see *The Lake Monroe*, (C. C. A. 1st Cir. 1921) 271 Fed. 474; *The Perseus*, (C. C. A. 6th Cir. 1921) 272 Fed. 633.

Where an issue of fact was presented by oral testimony of men whose mien and bear-

ing justly had weight with the judge who saw them, the appellate court will not disturb the resultant findings. *Donovan v. New York Trap Rock Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 308.

Costs as subject of review.—While mere questions of costs are not appealable, a claim for wharfage by a navigation company inserted by the marshal in his bill of costs, is in no sense costs but an unadjudicated claim against the proceeds of the ship, and an order refusing its payment out of a fund in the registry is appealable. *The St. Paul*, (C. C. A. 2d Cir. 1921) 271 Fed. 265.

Vol. VI, p. 139, sec. 17. [First ed., 1916 Supp., p. 279.]

Review of action as to restraining order.—Although a restraining order was improperly granted and lacked compliance with some of the provisions of this section, yet the court will not examine into the question where criticism has become moot, such order having been superseded by a preliminary injunction and that in turn by a permanent injunction, and no injury appears to have been done by the restraining order. *King v. Weiss, etc., Mfg. Co.*, (C. C. A. 6th Cir. 1920) 266 Fed. 257.

Vol. VI, p. 140, sec. 19. [First ed., 1916 Supp., p. 279.]

Terms of order.—An injunction against strikers which enjoins not only threats and intimidation against the workmen but also "all unlawful interference" with them is not advisable, since it leaves the door open for controversy both as to what is interference and what is unlawful. It is said that doubtless words of general import must sometimes be used so as to give an order its due breadth, but that in most cases more distinctive words than these can be selected and the defendants thereby be more accurately informed as to what is forbidden. *King v. Weiss, etc., Mfg. Co.*, (C. C. A. 6th Cir. 1920) 266 Fed. 257. See also *Davis v. Henry*, (C. C. A. 6th Cir. 1920) 266 Fed. 261.

Vol. VI, p. 141, sec. 20. [First ed., 1916 Supp., p. 280.]

Constitutionality.—This section is not unconstitutional as restricting the powers of courts of equity to issue injunctions in labor disputes between employers and employees. *Kinloch Telephone Co. v. Local Union No. 2*, (E. D. Mo. 1920) 265 Fed. 312. The court said:

"Much of the argument presented in favor of the unconstitutionality urged is directed against the lawfulness of a secondary boycott. This point is not involved in the instant case. Judge Manton, then District Judge, and now Judge of the Circuit Court of Appeals for the Second Circuit, held that this act is constitutional. *Duplex Co. v.*

Deering (D. C.) 247 Fed. loc. cit. 196. The Duplex Case went by appeal to the Circuit Court of Appeals, and was there affirmed. *Duplex Co. v. Deering*, 252 Fed. 722, 164 C. C. A. 562. While no reference is made in the carrying opinion (there was a dissenting opinion by Judge Rogers) to the question of the unconstitutionality of the act, I take it that, if the point was urged, it was deemed of no sufficient moment to render necessary a discussion of it. Since the rule is that the statute attacked as unconstitutional must be held valid till all reasonable inferences of its goodness are resolved against it (*State v. Baskowitz*, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477; *State v. Thompson*, 144 Mo. 314, 46 S. W. 191), I feel constrained to follow the Duplex Case, *supra*, till some court superior to this shall rule the matter.

"Counsel for plaintiffs, to sustain their right to injunctive relief herein, rely largely upon the case of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461. While the *Hitchman* Case was not decided until three years after the Clayton Act took effect, it was, however, begun seven years before the passage of that act. If the provisions of the Clayton Act passed under judgment in the *Hitchman* Case, then plaintiffs have, upon the facts proven, clearly shown themselves entitled to the injunction for which they pray. But I cannot bring myself to conclude that the Supreme Court of the United States held the Clayton Act in judgment when it ruled the *Hitchman* Case. Judge Trieber seemingly held to the view that the *Hitchman* Case did not consider the Clayton Act. *Kroger Grocery Co. v. Retail Clerks*, *supra*. In his view I am constrained to acquiesce.

"Many cases are urged upon my attention, which hold substantially to the view, so forcefully expressed in *Atchison v. Gee*, (D. C.) 139 Fed. 582, that there can be no such thing as peaceful picketing, any more than there can be 'chaste vulgarity, or peaceful mobbing, or lawful lynching'; but of all such cases it is only necessary to say that none of them held in judgment the provisions of the Clayton Act. See 24 Cyc. 838; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783; *Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248.

"Being constrained to follow the fairly plain provisions of the Clayton Act, I am of opinion that this case is ruled by it, and, however strongly I may heretofore have entertained the view that, when there is committed an irreparable injury to property and when similar injury is clearly threatened and no adequate remedy at law exists, equity may grant relief by injunction, even as against employees, I am yet bound by this statute, which I deem it my plain duty to follow, even to the exclusion of these views."

Scope of section.—This section applies only to disputes between employers and employees

and consequently does not prohibit the courts at the instance of a shipper from granting an injunction against labor unions or their members restraining them from interfering with interstate shipments through refusal to handle a shipment because brought to a dock by employees of a transfer company which employs both union and nonunion men. *Buyer v. Guillian*, (C. C. A. 2d Cir. 1921) 271 Fed. 65.

"Property right."—The right of a person to continue his business is a "property right" within the meaning of this section. *King v. Weiss, etc., Mfg. Co.*, (C. C. A. 6th Cir. 1920) 266 Fed. 257. The court said:

"We understand defendants' counsel also to take the position that, since section 20 of the Clayton Act prohibits an injunction, excepting in case of injury to property or property rights, the issue of the injunction was in conflict with this act, because the right of the plaintiff to continue its business, free from unlawful obstruction, was neither 'property' nor a 'property right.' There is no sufficient basis for this contention. The Clayton Act did not undertake to make new definitions of 'property' and 'property right.' It used these terms in their then accepted and well-understood definitions. It was dealing with the fact that between the recognized property right of the employer to conduct his business and the other recognized right of the employees to strike, more or less conflict would arise; and it was prescribing the kind and degree of injury to this employer's right which should be deemed rightly appurtenant to the employees conflicting right, and which should therefore not be deemed unlawful. No court has held, since the passage of the Clayton Act, so far as we find, that it was intended to forbid an injunction in aid of an employer's right to keep his business running, in any case where the injury to that right, which the defendants were inflicting, is beyond the limits which the act purports to authorize. That the right to prosecute a lawful business without unlawful obstruction is either property or a property right has always been recognized, and is at the foundation of equity jurisdiction in this entire class of cases."

"It is settled that the right of an employer to keep his business running is a property right under section 20 of the Clayton Act, notwithstanding the existence of a strike." *Quinlivan v. Dail-Overland Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 56.

No adequate remedy at law.—Under this section employees may lawfully strike in violation of a contract with their employer, and may not be enjoined even though the strike results in irreparable injury to the employer without an adequate remedy at law for the redress of such injury. *Kinloch Telephone Co. v. Local Union No. 2*, (E. D. Mo. 1920) 265 Fed. 312.

Rights of striking employees.—In *Kinloch Telephone Co. v. Local Union No. 2*, (E. D. Mo. 1920) 265 Fed. 312, the court,

in commenting upon the rights of striking employees under this section, said:

"Looking at this law even casually, it seems plain that any employee, by virtue of the provisions which I have quoted, may singly (that is, by himself or herself) or in concert with others (that is, by virtue of prearranged agreement) terminate any relation of employment. Any relation of employment would seem to connote and include any contract of employment; that is, an employment at will, or an employment for a definite contractual term, whether such term has or has not expired by lapse of time.

"Said act further provides that any person or persons, acting alone or together, may by peaceful means advise or persuade others—that is, any employee—to terminate such employment. In order to advise and persuade employees to terminate their employment, and in order to communicate or obtain, or for the purpose of communicating information, or obtaining information as to the existing situation, any person or persons may go to or attend any place to which he or she might have gone, if no labor dispute existed: Provided, he or she go in the same way in which he or she would have gone if no such dispute existed. And all such persons may, of course, peacefully assemble, pending such dispute, in the same manner in which any other citizens might assemble if no such dispute existed. Other provisions of this act are, I think, either so plain and clear as to call for neither interpretation nor exposition, or the same are not now involved in this case.

"These provisions, of course, do not confer any right to assemble about or to picket the shop or place of business of any former employer under such circumstances or in such numbers as to menace peace or produce intimidation by reason of the very fact of numbers. Neither does it permit any striker, or any person acting in concert with any striker, to use physical force or intimidation of any sort, or abuse, or duress, or any threat of physical force, either to the employer, or to the employees who are working, or to persons who are seeking employment of the employer, or to persons who have business, or who desire to transact business, with the employer. So much, I think, is clear from the provisions of the act itself, because, plainly the test therein of what may be done is what any ordinary citizen would have been permitted to do if no labor dispute existed. *Stephens v. Telephone Co.* (D. C.) 240 Fed. 759; *Duplex Co. v. Deering* (D. C.) 247 Fed. 192.

"'Peacefully,' as used in this act, means peacefully in the strict sense of that word; for it will be noted that the words 'peacefully' and 'lawfully' run as red threads through the very warp and woof of this act. Surely no persons can be said to act peacefully, when they crowd the streets, sidewalks,

or alleys near to or adjacent to the shop or place of business under their displeasure and, though silent, threaten and intimidate by numbers. Neither can a person be within the peace or the protection of this statute when he or she, singly or with others, in furtherance of a strike, uses threats, abuse, profane or obscene language, physical force, or other intimidation to any employer, or to his agents, servants, or employees, present or potential, or to the customers, or agents and employees of customers, present or potential."

What constitutes lawful and peaceful actions by strikers.—Regarding the test as to what constitutes lawful and peaceful acts by striking employees, the court in *Langerberg Hat Co. v. United Cloth Hat, etc., Makers*, (E. D. Mo. 1920) 266 Fed. 127, said:

"Lately, this court, in the case of *Kinloch Telephone Co. et al. v. Local Union No. 2 of International Brotherhood of Electrical Workers*, 265 Fed. 312, took occasion to discuss some of the things which cannot lawfully be done by striking employees as well as many of the things which those employees may lawfully do. In that case I took occasion to lay down a test of what is lawful and what is peaceful, by stating that to my mind the plain and simple language of the Clayton Act (38 Stat. 730) itself discloses what is lawful and what is peaceful; conversely, 'he who runs may read' what is unlawful and what is unpeaceful.

"The test which I stated in that case, and which I now repeat (and that test is almost in the language of the Clayton Act itself) could be put in the form of a question: Would any ordinary citizen be permitted to do the acts complained of in this case, if no strike, or labor dispute, existed? If he could do those things, absent a strike, then, of course, he could do them, present a strike; in other words, if any ordinary citizen, when no strike exists, can do a given act against the rights, person, peace, or property of another, and not commit thereby a breach of the peace, or an act of lawlessness, then the striking employee can do the same act when there is a strike existing.

"Injunction, when brought by an employer against an employee reaches only such acts as fall without the pale of the test which I have stated above. In the face of so simple a rule, it is almost incomprehensible why men and women, possessing the capacity to reason from cause to effect, can so blind themselves with their own self-interests as to contend, in case of a strike, for the alleged right to outrageously violate the peace, person, property, and rights of others with whom their interests may for the time clash."

Legalizing secondary boycott.—Injunctive relief to a manufacturer against concerted action which members of labor organizations, standing in no employment relation with it, past, present, or prospective, have

taken in aid of a strike in its factory in order to compel such manufacturer to unionize its factory, establish the closed shop, the eight-hour day, and the union scale of wages, by interfering with and restraining its interstate trade through coercive pressure upon actual or prospective customers, with the intent and result of causing them to withdraw patronage from such manufacturer for fear of loss or damage to themselves should they deal with it, may not be denied on the theory that such relief was forbidden, or that such action—the so-called secondary boycott—was legalized by the provisions of sec. 6 of this act (see Vol. 9, p. 737) that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of labor organizations, or to forbid their members from lawfully carrying out their legitimate objects, and of this section of that act, restricting the granting of injunctions in cases “between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment,” and providing that none of the acts specified therein shall be considered or held to be violations of any law of the United States. *Duplex Printing Press Co. v. Deering*, (1921) 254 U. S. 443, 41 S. Ct. 172, 85 U. S. (L. ed.) —, *reversing* (C. C. A. 2d Cir. 1918) 252 Fed. 722, 164 C. C. A. 562) wherein it was further held that: The exceptional immunity from the operation of the Federal Anti-trust Laws, granted by the Clayton Act in cases “between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment,” must be confined to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment—past, present, or prospective. Moreover it was held that to instigate a sympathetic strike in aid of a secondary boycott cannot be deemed “peaceful and lawful” persuasion, within the meaning of the Clayton Act. The court said:

“The principal reliance is upon § 20. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases, with respect to (a) the terms and conditions of the relief and the practice to be pursued, and (b) the character of acts that are to be exempted from the restraint; and in the concluding words it declares (c) that none of the acts specified shall be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is

to be a ‘case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment.’

“The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that ‘no such restraining order or injunction’ shall prohibit certain conduct specified,—manifestly still referring to a ‘case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or conditions of employment,’ as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, ‘nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States,’ are to be read in the light of the context, and mean only that those acts are not to be so held, when committed by parties concerned in ‘a dispute concerning terms or conditions of employment.’ If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the Anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

“The majority of the circuit court of appeals appear to have entertained the view that the words ‘employers and employees,’ as used in § 20, should be treated as referring to ‘the business class or clan to which the parties litigant respectively belong;’ and that, as there had been a dispute at complainant’s factory in Michigan concerning the conditions of employment there,—a dispute created, it is said, if it did not exist before, by the act of the Machinists’ Union in calling a strike at the factory,—§ 20 operated to permit members of the Machinists’ Union elsewhere,—some 60,000 in number,—although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own, and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant’s factory, and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce,—and this where there was no dispute between such employers

and their employees respecting terms or conditions of employment.

"We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the Anti-trust Laws,—a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words."

Vol. VI, p. 142, sec. 22. [First ed., 1916 Supp., p. 280.]

No indictment or information is essential under this section to the legal trial of one accused of contempt of court. *Jennings v. U. S.* (C. C. A. 8th Cir. 1920) 264 Fed. 399.

Vol. VI, p. 145, sec. 2. [First ed., 1916 Supp., p. 136.]

A decision of the Supreme Court of Porto Rico on a question of procedure which is one of purely local law should not be reversed except on a clear showing of error. *Garcia v. Hernandez*, (C. C. A. 1st Cir. 1920) 270 Fed. 455.

Findings of fact in an action at law tried without a jury cannot be reviewed by a Circuit Court of Appeals in the exercise of its jurisdiction, under this section, to review judgments and decrees of the Porto Rico courts. *Ana Maria Sugar Co. v. Quinones*, (1920) 254 U. S. 245, 41 S. Ct. 110, 65 U. S. (L. ed.) — (affirming (C. C. A. 1st Cir. 1918) 251 Fed. 499, 163 C. C. A. 493) wherein the court said:

"Under § 35 of the Act of April 12, 1900, chap. 191, 31 Stat. at L. 77, 85, 7 Fed. Stat. Anno. 2d ed. pp. 1259, 1275, the power to review final judgments and decrees of the supreme court of Porto Rico, then exercised exclusively by this court, was limited to matters of law. *Garzot v. Rios de Rubio*,

209 U. S. 283, 52 L. ed. 794, 28 Sup. Ct. Rep. 548; *Gonzales v. Buist*, 224 U. S. 126, 56 L. ed. 693, 32 Sup. Ct. Rep. 463; *Rosaly v. Graham y Frazer*, 227 U. S. 584, 57 L. ed. 655, 33 Sup. Ct. Rep. 333; *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 57 L. ed. 1427, 33 Sup. Ct. Rep. 1033; *Porto Rico v. Emmanuel*, 235 U. S. 251, 59 L. ed. 215, 35 Sup. Ct. Rep. 33. When that act was superseded by § 244 of the Judicial Code, writs of error and appeals from the insular supreme court became subject to the same regulations which governed appeals from the district courts of the United States. Thereby this court acquired power to review questions of fact in cases coming to it on appeal in equity or admiralty (*Elzaburu v. Chaves*, 239 U. S. 283, 285, 60 L. ed. 290, 36 Sup. Ct. Rep. 47); but in actions at law which are reviewable on writ of error, there was no right in this court to review the facts, although the case was tried without a jury (*Behn v. Campbell*, 205 U. S. 403, 407, 51 L. ed. 857, 858, 27 Sup. Ct. Rep. 502). The jurisdiction to review judgments and decrees of the Porto Rico courts conferred upon the circuit court of appeals by Act of January 28, 1915, chap. 22, 38 Stat. at L. 803, is subject to the same limitation. The cause of action here sued on is, in its nature, a legal one. The review should therefore have been prosecuted by writ of error instead of by appeal, although the case was tried without a jury. *Oklahoma City v. McMaster*, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324. By reason of § 4 of the Act of September 6, 1916, chap. 448, 39 Stat. at L. 727, Fed. Stat. Anno. Supp. 1918, p. 421, this failure to adopt the proper appellate proceeding is no longer fatal. But the provision does not abolish the distinction between writs of error and appeals. It merely provides that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review. *Gauzon v. Compania General de Tabacos*, 245 U. S. 86, 62 L. ed. 165, 38 Sup. Ct. Rep. 46."

Questions for review — Measure of damages.—Rulings of the supreme court of Porto Rico on the measure of damages, which were not assigned as errors in the Circuit Court of Appeals, and were not considered by it, cannot be insisted upon in the federal Supreme Court as grounds for reversal. *Ana Maria Sugar Co. v. Quinones*, (1920) 254 U. S. 245, 41 S. Ct. 110, 65 U. S. (L. ed.) —, affirming (C. C. A. 1st Cir. 1918) 251 Fed. 499, 163 C. C. A. 493.

Vol. VI, p. 161, sec. 11. [First ed., vol. IV, p. 428.]

I. Necessity of compliance with statute.

1. In general.

II. When time begins to run.

III. Computation of time.

I. NECESSITY OF COMPLIANCE WITH STATUTE

1. *In General* (p. 161)

The proviso in this section applies solely to cases for which at the time of the passage of the act a lesser period than six months for writs of error and appeals existed. *Maple v. Union Pac. R. Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 89.

II. WHEN TIME BEGINS TO RUN (p. 162)

Where a judgment was entered on June 3, 1919, it was held that the period of six months expired with December 3, 1919, and that the subsequent signing on January 22, 1920, on the order book of the court, of the record of the proceedings of June 3, 1919, upon the special reasons stated therefor, in no way changed the rights of either of the parties. *Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co.*, (W. D. Ky. 1920) 267 Fed. 934.

Filing assignment of errors.—In *Benjamin v. Buell*, (C. C. A. 7th Cir. 1920) 268 Fed. 792, the appeal was prayed and allowed and bond filed within due time, but assignment of errors was not filed for more than six months after entry of decree, and appellee moved to dismiss the appeal on the ground that under rule 11 of the court the filing of the assignment of errors was jurisdictional, and unless filed within the statutory six months there was properly no appeal. The court said: "We think the rule itself negatives such conclusion, in that it provides that under certain circumstances the court may notice errors not assigned at all, and hence in its discretion may consider an appeal even without assignment of errors, thus clearly indicating that the provisions of the rule respecting assignment of errors are not jurisdictional. In *Hultberg v. Anderson*, 203 Fed. 853, 122 C. C. A. 171, this court held that, notwithstanding the rule requiring assignment of errors to be first filed, prior filing was not jurisdictional, and failing to so file did not vitiate an appeal otherwise properly taken. The motion to dismiss the appeal is denied."

III. COMPUTATION OF TIME (p. 163)

The court on appeal in computing the time is bound by the recitals in the record as to the time when the judgment was entered. *Texas Co. v. American Trade Developing Co.*, (C. C. A. 5th Cir. 1921) 272 Fed. 670.

This section is not modified by section 6 of the Act of September 6, 1916 (1918 Supp. p. 422). *Maple v. Union Pac. R. Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 89.

Vol. VI, p. 163, sec. 997. [First ed., vol. IV, p. 605.]

II. Allowance of writ of error.

IX. Records.

XI. Filing of assignment of errors.

II. ALLOWANCE OF WRIT OF ERROR (p. 165)

In general.—Ordinarily a writ of error is likely to be granted as of course, thereby leaving the question of its jurisdiction to be

determined by the appellate tribunal, but when the question is raised before the district judge it is necessary for that judge to determine the right to the writ. *Ellicott Mach. Corp. v. Vogt Bros. Mfg. Co.*, (W. D. Ky. 1920) 267 Fed. 934.

IX. RECORDS (p. 166)

Essential parts of record.—A motion for a new trial, being addressed to the discretion of the trial court, is not properly a part of the record for review under this section. *Ford Motor Co. v. Hotel Woodward Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 625.

XI. FILING OF ASSIGNMENT OF ERRORS (p. 167)

Criminal cases.—While it is the general rule that where there are no objections or exceptions to the evidence the judgment cannot be reviewed, yet there is a firmly established exception that in criminal cases, where the life or liberty of the citizen is at stake, the courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request, or assignment of error. *McNutt v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 670.

Opinion of court as basis of assignment of error.—The opinion of the court below cannot form the basis of an assignment of error and assignment of error based on such opinion presents nothing for review, as the opinion may be wrong and still the judgment be right. *Stoffregen v. Moore*, (C. C. A. 8th Cir. 1921) 271 Fed. 680.

Incorporation in record by bill of exceptions.—The rule that errors in rulings of law occurring in the course of the trial cannot be considered on writ of error unless incorporated into the record by bill of exceptions has no application when the errors assigned are wholly those alleged to have been committed by an intermediate appellate court, even though such court has, like the supreme court of Port Rico, power to review the evidence, to make new findings of fact thereon, and to enter such judgment as to it may seem proper. *Ana Maria Sugar Co. v. Quinones*, (1920) 254 U. S. 245, 41 S. Ct. 110, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 1st Cir. 1918) 251 Fed. 499, 163 C. C. A. 493.

Vol. VI, p. 180, sec. 1. [First ed., 1912 Supp., p. 255.]

Applicable to federal appeals only.—This and the following section have no application to appeals in state courts. *Chance v. Hawkins*, (Minn. 1921) 182 N. W. 911.

Vol. VI, p. 187, sec. 1000. [First ed., vol. IV, p. 612.]

X. Damages and costs.

XI. Judgment.

X. DAMAGES AND COSTS (p. 191)

Costs.—To the same effect as the original annotation, see *Oehring v. Fox Typewriter Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 682, 12 A. L. R. 718.

XI. JUDGMENT (p. 192)

District courts have power to render summary judgments on supersedeas bonds, statutory in form, given under this section and rule 13 of the Circuit Court of Appeals. *Medusa Concrete Waterproofing Co. v. McCormick Waterproofing Portland Cement Co.*, (C. C. A. 7th Cir. 1920) 266 Fed. 981.

Vol. VI, p. 192, sec. 1001. [First ed., vol. IV, p. 615.]

Application.—While the section is collocated with others relating to appeals, its terms are broad enough to cover any process in law issuing from a district court. *U. S. v. Kinney*, (E. D. Pa. 1920) 264 Fed. 542.

United States interpleading on rule under state statute.—Where the United States filed a claim with the marshal for goods levied on, and the court on application of the marshal made absolute a rule for an interpleader under the Pennsylvania statute requiring a bond, it was held that the state act must be complied with. The court said:

"In section 1001, as applied to the present case, it is distinctly confined to the narrow sense of process in law issuing from a court by the United States, and therefore does not include all proceedings to which the United States is a party.

"Statutory interpleader proceedings in Pennsylvania are intended for the protection of the sheriff where he has made a levy upon goods and chattels as the property of the defendant in the execution and a third party claims property in the goods and chattels seized and taken in execution. If the court makes the rule absolute, the claimant, it is required, shall give bond that he shall maintain his title, in order to have the goods and chattels delivered to him.

"If 'process' is taken in a sufficiently broad sense to include the order making the rule absolute in the present case, it is still not process issuing from the court 'by the United States,' but process issuing from the court by the marshal. The issue may be framed and the interpleader proceedings may be prosecuted by the United States without the giving of the bond. The act is in the alternative. While under its provisions the sheriff, upon the claimant entering bond, is required to deliver the goods and chattels to him, yet if the claimant fails to give bond, but files his statement of title within the time specified in the act, the court may direct a sale of the goods and chattels, and the proceeds may be paid into court to await the determination of the issue. The money in court is substituted for the goods and chattels. If a bond is given, it is as security 'to answer in damages' if the claimant

shall not maintain its title. If section 1001, therefore, applied to any process in a proceeding to which the United States is a party, the United States would not be required to give bond in the present case because it is an undertaking to answer in damages or costs. As section 1001, however, taking 'process' in its broadest sense, applies only to process issued from the court by the United States, the present proceeding is held not to be within its terms, and the plaintiff's motion for an order on the marshal directing the sale of the goods and chattels levied upon will be granted in accordance with the provisions of the Pennsylvania Interpleader Act." *U. S. v. Kinney*, (E. D. Pa. 1920) 264 Fed. 542.

Vol. VI, p. 205, sec. 700. [First ed., vol. IV, p. 450.]**II. Waiving a jury.**

2. Waiver without written stipulation.

IV. Findings and review.

1. In general.

2. General findings.

3. General and special findings.

a. In general.

b. Effect.

V. Special findings and agreed statements of facts.

4. What constitutes.

6. Effect.

7. Questions reviewable.

VI. Rulings and exceptions.

1. Necessity.

4. Bill of exceptions.

II. WAIVING A JURY**2. Waiver Without Written Stipulation (p. 208)**

Where there is no written stipulation waiving a jury trial, the appellate court has no jurisdiction to review any question on a writ of error, except those which arise on the process, pleadings, or judgment. *St. Louis, Southwestern R. Co. v. Road Imp. Dist. No. 2*, (C. C. A. 8th Cir. 1920) 265 Fed. 524.

IV. FINDINGS AND REVIEW**1. In General (p. 211)**

The findings and judgment of the trial court, to which no objection or exception was taken, being to the effect that the defendant company was not engaged in interstate commerce, and therefore not subject to the provisions of the Federal Hours of Service Act, are conclusive on writ of error. *U. S. v. Columbia, etc., R. Co.*, (C. C. A. 9th Cir. 1921) 274 Fed. 625.

The action of the parties in praying the court for binding instructions in their favor respectively on a matter involving a fact is equivalent to a joint request for a finding of fact by the court, and when the court, acting upon such request, directs the jury to find for one of the parties, both are con-

cluded on its finding. *Richman v. Mulcahy*, (C. C. A. 3d Cir. 1921) 269 Fed. 786.

The court's findings upon questions of fact, a jury having been waived, are not subject to revision by a reviewing court, if there was any evidence upon which such findings could be made. *Mayes v. Jones*, (C. C. A. 8th Cir. 1921) 270 Fed. 121; *Kissel Motor Car Co. v. Walker*, (C. C. A. 5th Cir. 1921) 270 Fed. 492.

Where a case is tried with a jury waived the findings of fact by the court have the force and effect of a jury's verdict, and if based on any supporting evidence are conclusive on the court reviewing by writ of error. *Litchfield First Nat. Bank v. Pipe, etc., Supply Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 105.

Where there was no request by a party, before the court below rendered its judgment, to find facts in his favor, or to declare the law in his favor, and hence no ruling by the court, there is nothing for review by the appellate court, and the judgment of the court below will be affirmed. *McClay v. Fleming*, (C. C. A. 8th Cir. 1921) 271 Fed. 472.

Findings by referee.—The findings of fact by a referee are binding on appeal, the court being concerned only as to whether the conclusions of law are supported by such findings. *Aronstam v. All-Russian Cent. Union, etc.*, (C. C. A. 2d Cir. 1920) 270 Fed. 460.

The District and Supreme Courts of Porto Rico, being familiar with the local law, their findings on the testimony and involving mixed law and fact, should not be disturbed by the Circuit Court of Appeals unless plainly wrong. *Fordham v. Marrero*, (C. C. A. 1st Cir. 1921) 273 Fed. 61.

2. General Findings (p. 212)

A general finding cannot be reviewed on a writ of error in the absence of exception to a ruling made in the progress of the trial. *Gulf, etc., R. Co. v. Clement Grain Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 535.

In the absence of special findings of fact by the court below, its general finding has, under U. S. Rev. Stat. § 649 [6 Fed. Stat. Ann. (2d ed.) 130], the effect of a verdict of a jury, and is conclusive upon all matters of fact, and there being no exceptions to rulings of law in the progress of the trial, the review in the Federal Supreme Court is, under this section, limited to the question of the sufficiency of the complaint. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (1921) 256 U. S. —, 41 S. Ct. 524, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1920) 261 Fed. 741.

Where the master and trial court agree on the findings of fact, they are conclusive on the appellate court, where there is any substantial evidence to support them. *Midland Bridge Co. v. Houston, etc., R. Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 931.

The rule is said to be elementary that the findings of the master, confirmed by the

court, are entitled to great weight, and will be followed, if there has been no serious mistake made in the consideration of the evidence, or in the application of the law to the facts found. *Meyer v. Ritter*, (C. C. A. 8th Cir. 1920) 268 Fed. 937.

The findings of fact by a chancellor are highly persuasive to the reviewing court, and will not be disturbed except for manifest error. *Manning v. American Security, etc., Co.*, (App. Cas. D. C. 1921) 269 Fed. 710.

A finding as to salvage will not be disturbed on appeal where there is sufficient evidence to warrant such finding. *The Ferm*, (C. C. A. 5th Cir. 1920) 268 Fed. 518.

3. General and Special Findings

a. In General (p. 214)

Refusal to make special findings.—On the trial of an action at law without a jury, it is not error for the court to refuse to make special findings. *U. S. v. Columbia, etc., R. Co.*, (C. C. A. 9th Cir. 1921) 274 Fed. 625.

b. Effect (p. 215)

To the same effect as the first paragraph of the original annotation, see *Walsh Constr. Co. v. Cleveland*, (N. D. Ohio 1920) 271 Fed. 701.

To the same effect as the second paragraph of original annotation, see *Huhn v. Strong-Scott Mfg. Co.*, (C. C. A. 8th Cir. 1920) 265 Fed. 638; *American Trading Co. v. Steele*, (C. C. A. 9th Cir. 1921) 274 Fed. 774.

V. SPECIAL FINDINGS AND AGREED STATEMENTS OF FACTS

4. What Constitutes (p. 217)

The facts found by the Interstate Commerce Commission in a reparation proceeding were not so adopted by the district court in a suit upon the reparation order as to become special findings of fact by the court, which may be reviewed by the federal Supreme Court without exception taken, merely because the court found that the report and order of the commission constituted prima facie evidence of the facts therein stated, and entered judgment in favor of plaintiff for the amount of the order, with interest and attorneys' fees. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.* (1921) 256 U. S. —, 41 S. Ct. 524, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1920) 261 Fed. 741.

6. Effect (p. 219)

Special findings if they are sustained by any substantial evidence are conclusive on the circuit court of appeals. *U. S. v. Pennsylvania, etc., Dock Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 839.

7. Questions Reviewable (p. 219)

To the same effect as the first paragraph of the original annotation, see *Stoffregen v. Moore*, (C. C. A. 8th Cir. 1921) 271 Fed. 680.

The Circuit Court of Appeals cannot consider "additional facts not found by the court" but must confine its consideration of the case solely to the special findings of fact made by the trial court. *U. S. v. Pennsylvania, etc., Dock Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 839.

VI. RULINGS AND EXCEPTIONS

1. Necessity (p. 221)

To the same effect as the first paragraph of the original annotation, see *Stoffregen v. Moore*, (C. C. A. 8th Cir. 1921) 271 Fed. 680; *Liberty Oil Co. v. Condon Nat. Bank*, (C. C. A. 8th Cir. 1921) 271 Fed. 928; *Northrup Nat. Bank v. Title Guaranty, etc., Co.*, (C. C. A. 8th Cir. 1921) 271 Fed. 952.

Where after a full hearing and submission of the issues of fact and law the court has filed its findings of fact and conclusion that judgment must be entered for defendant it is too late for the first time to take exceptions to the rulings of the court on the issues tried, where no requests for findings or for modifications of findings were made by the plaintiff until subsequent to the close of the trial. Such subsequent requests and rulings thereon are, like motions for new trials after verdicts and the rulings thereon, discretionary with the trial court, and are not subject to review in the federal appellate courts. *U. S. v. Atchison, etc., R. Co.*, (C. C. A. 8th Cir. 1921) 270 Fed. 1.

4. Bill of Exceptions (p. 223)

The opinion of the court cannot take the place of a bill of exceptions. *Texas Ranger Producing, etc., Co. v. Robinson*, (C. C. A. 5th Cir. 1921) 272 Fed. 453.

Vol. VI, p. 224, sec. 701. [First ed., vol. IV, p. 458.]

Modifying judgment.—The Circuit Court of Appeals has the power to increase or diminish a salvage award made by the lower court. *The High Cliff*, (C. C. A. 2d Cir. 1921) 271 Fed. 202.

Vol. VI, p. 230, sec. 1011. [First ed., vol. IV, p. 624.]

I. Matters reviewable generally.
V. Questions of fact and evidence.

I. MATTERS REVIEWABLE GENERALLY (p. 230)

Under the provisions of this section the Circuit Court of Appeals has no authority to disturb the finding of the jury on a question of fact, if there is any evidence to sustain the verdict. *Tate v. Baugh*, (C. C. A. 6th Cir. 1920) 264 Fed. 892.

Where a jury trial was waived and special findings of fact were made in favor of the defendants, and where at the close of the

testimony plaintiff in error made no request for a finding in its favor on the issues, and made no motion or request presenting to the trial court the question of law whether there was substantial evidence to sustain findings for the defendant, the sufficiency of the evidence to support the findings is not open to review in the Court of Appeals. *Pabst Brewing Co. v. E. Clemens Horst Co.*, (C. C. A. 9th Cir. 1920) 264 Fed. 909.

The Circuit Court of Appeals in cases involving life or liberty will not permit an error in procedure, even though it be substantial, to result in manifest injustice, with consequent loss of liberty or of life. *Holland v. U. S.*, (C. C. A. 8th Cir. 1920) 268 Fed. 244.

V. QUESTIONS OF FACT AND EVIDENCE

In general.—To the same effect as the original annotation, see *American Film Co. v. Moye*, (C. C. A. 9th Cir. 1920) 267 Fed. 419; *Howard v. U. S.*, (C. C. A. 6th Cir. 1921) 271 Fed. 301.

The findings made by the jury when they have some evidence to support them are controlling on appeal. *Champion Spark Plug Co. v. Automobile Sundries Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 74.

If the verdict is sustained by any substantial evidence, it is conclusive upon the Circuit Court of Appeals, regardless of the claim of the plaintiff in error that upon all the evidence the verdict should have been one of acquittal upon this count. *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

The verdict of a jury when based on sufficient evidence cannot be disturbed on appeal because the evidence was contradictory. *Glynn v. May*, (C. C. A. 7th Cir. 1921) 271 Fed. 464.

Where each of the parties moves that the court direct a verdict, a judgment based thereon will not be disturbed, if there be evidence to support it. A conflict in evidence becomes immaterial. *Lockhart v. Tri-State Loan, etc., Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 523.

Weight of evidence.—To the same effect as the original annotation, see *Ramsey v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 825; *Railroads v. Reynolds*, (C. C. A. 6th Cir. 1920) 268 Fed. 948; *Di Preta v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 73; *R. E. Hamilton, etc., Co. v. Moss-Jellico Coal Co.*, (C. C. A. 6th Cir. 1921) 271 Fed. 237; *Degnan v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 291; *Loblowski v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 294; *Columbia Aid Assoc. v. Sprague*, (App. Cas. D. C. 1921) 271 Fed. 381.

The Circuit Court of Appeals has no authority under this section to pass on the weight of the evidence. If there is any substantial evidence to support the verdict of the jury the judgment of the trial court

must be affirmed. *Davidson v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 285.

An assignment of error on the ground of the insufficiency of the evidence will not be further considered where the record is barren of any demurrer to the evidence or of any request for a directed verdict and from a careful consideration of the evidence it is clear that no injustice in the result was reached. *Holland v. U. S.*, (C. C. A. 8th Cir. 1920) 268 Fed. 244.

Where a defendant in a criminal case did not preserve his right to secure a review in the Circuit Court of Appeals of the question of the sufficiency of the evidence to support the verdict, that court will not exercise its discretion to reverse a judgment or grant a new trial where the evidence tends to corroborate admissions made by him and the court is convinced that no grave error was committed or that his punishment would be gross injustice. *Sturtz v. U. S.*, (C. C. A. 8th Cir. 1920) 268 Fed. 350.

Questions as to verdict being excessive.—To the same effect as the original annotation, see *American Film Co. v. Moyer*, (C. C. A. 9th Cir. 1920) 267 Fed. 419.

Where there was no error in the admission of testimony or in the charge of the court on the subject of damages the amount awarded is not reviewable. *Ford Motor Co. v. Hotel Woodward Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 625.

Findings of fact by the trial court are not reviewable. *Stoffregen v. Moore*, (C. C. A. 8th Cir. 1921) 271 Fed. 680.

The general finding of the court below on the facts, a trial by jury being waived, is binding on appeal. *U. S. v. One Diamond Necklace*, (C. C. A. 2d Cir. 1920) 267 Fed. 696.

"It is the settled law of the federal courts that, where a chancellor has made his findings of fact and decree on conflicting evidence, they will be treated as presumptively correct by an appellate court, and will not be disturbed, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence." *Porto Rico Min. Co. v. Conklin*, (C. C. A. 8th Cir. 1921) 271 Fed. 570.

Findings of fact by a master, approved by the trial court, are well nigh controlling on appeal, if there is any substantial evidence to support them. *Stockley v. U. S.*, (C. C. A. 5th Cir. 1921) 271 Fed. 632.

Special findings.—The making of special findings of facts in an action at law tried by the court on a waiver of a jury is discretionary with the trial court, and its action in making such findings, in refusing to make requested findings, or in refusing to amend findings made, is not subject to exception, or to a subsequent review in a federal appellate court. *U. S. v. Atchison*, etc., *R. Co.*, (C. C. A. 8th Cir. 1921) 270 Fed. 1.

Vol. VI, p. 234, sec. 10. [First ed., vol. IV, p. 428.]

I. DISPOSITION OF CASE ON APPEAL OR WRIT OF ERROR (p. 235)

Remand of admiralty case.—An appeal in an admiralty case being a new trial, the court will not send the case back in order that evidence may be given. *The St. Johns N. F.*, (C. C. A. 2d Cir. 1921) 272 Fed. 673.

Remand with directions.—The court may remand a case with direction as to a reduction of the amount of the judgment. *Walker v. Gulf, etc., R. Co.*, (C. C. A. 5th Cir. 1921) 269 Fed. 885.

Where a petition for rehearing and for modification of the judgment of the court has been filed by the appellee, and it appears therefrom that the appellee does not desire to present additional testimony, nor does it wish a new trial, but is willing to stand on the record as made, and that it prefers, instead of a ruling granting a new trial, a decision reversing the judgment of the lower court and directing that court to enter judgment for the appellants, in order that it may carry the case to the Supreme Court of the United States without further delay, it has been held that the petition should be granted. *National League, etc., v. Federal Baseball Club*, (App. Cas. D. C. 1921) 269 Fed. 681.

Mandate to add interest.—In case of a mandate to the district court directing it to modify its decree by the addition of interest to the amount recovered, it has been held that interest is to be added to the date of the original decree and not to the date of the mandate. *American Surety Co. v. Riner*, (C. C. A. 8th Cir. 1920) 269 Fed. 137.

Authority of District Court to allow amendment curing defect pointed out by appellate court.—A decision of a circuit court of appeals holding the bill insufficient, and for that reason alone reversing the decree below, by which such bill was held good on demurrer, and remanding the cause, is not final, but leaves the district court free, in its discretion, to allow an amendment to the bill, curing the defect. *Wells v. Taylor*, (1920) 254 U. S. 175, 41 S. Ct. 93, 65 U. S. (L. ed.) —, reversing (C. C. A. 5th Cir. 1918) 249 Fed. 109, 161 C. C. A. 161.

1918 Supp., p. 411, sec. 2

II. Writ of error.

III. Certiorari.

II. WRIT OF ERROR (p. 412)

Validity of municipal ordinance.—Writ of error, not certiorari, is the proper method of reviewing in the federal Supreme Court the judgment of the highest court of a state in a suit in which the defeated party below drew in question the validity of a municipal ordinance and the statute sanctioning it, as construed and applied, upon the ground of their alleged repugnance to a federal statute,

and the state court sustained their validity notwithstanding such contention. *Merchants' Nat. Bank v. Richmond*, (1921) 256 U. S. —, 41 S. Ct. 619, 65 U. S. (L. ed.) —.

III. CERTIORARI (p. 413)

Review of judgment granting writ of prohibition.—Certiorari, not writ of error, is the only mode of reviewing in the Supreme Court the judgment of a state court granting a writ of prohibition over the objection that such prohibition would take property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution. *Bullock v. Florida*, (1921) 254 U. S. 513, 41 S. Ct. 193, 65 U. S. (L. ed.) —, *affirming* on other grounds (1919) 74 Fla. 321, 82 So. 866, 8 A. L. R. 232.

1918 Supp., p. 414, sec. 2.

Since this amendment has been declared unconstitutional a longshoreman has no right to compensation under a state act. *Lawson v. New York, etc., Steamship Co.*, (1921) 148 La. 290, 86 So. 815.

1918 Supp., p. 421, sec. 4.

Distinction between writs of error and appeals as still existing.—The distinction between writs of error and appeals, so far as the scope of review in either proceeding is concerned, was not abolished by the provision of this section that the reviewing court shall not dismiss a writ of error because an appeal should have been taken, nor dismiss an appeal because a writ of error should have been sued out, but shall disregard such mistakes and take the action appropriate if the proper appellate procedure had been followed. This section merely provides that the party seeking review shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review. *Ana Maria Sugar Co. v. Quinones*, (1920) 254 U. S. 245, 41 S. Ct. 110, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 1st Cir. 1918) 251 Fed. 499, 163 C. C. A. 493.

Review of contempt proceeding.—Where, in a contempt proceeding against a company for having violated an injunction prohibiting it from manufacturing and selling certain infringing machines, the criminal aspect of the judgment of the lower court is reversed, the remainder of the judgment may be reviewed on a writ of error, in view of the provisions of this section. *Wilson v. Union Tool Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 669. The court said: "Upon an appeal from an interlocutory decree, holding that Wilson patent No. 827,595, for an underreamer, was valid as to certain claims, and was infringed as to claims 9 and 19, and awarding an accounting, this court affirmed the decree of the District Court. A full history of the case is given in *Union Tool Co. v. Wilson*, 249 Fed. 736, 161 C. C. A. 646. Thereafter, in contempt proceedings instituted in the District Court, the Union Tool

Company was held to have violated the injunction issued in *Union Tool Company v. Wilson*, supra, by having manufactured, offered for sale, and sold two types of underreamers, neither of which was substantially or even colorably different from the respective devices described in the injunctive order of the court, the manufacture, sale, and use of which underreamers were inhibited, and that the Tool Company, since the issuance and service of the injunction, had offered for sale and sold extra, spare, and repair parts and elements for and to be used with its device, sold prior to the issuance and service of the injunction. The court, however, purged the corporation of contempt in the matter of sales of repair parts, but made the order without prejudice to the right of Wilson to renew his application. The company was fined \$5,000, out of which sum, when paid, the clerk of the court was authorized to pay over to the complainant (Wilson) \$2,500 as a reasonable portion of the expenses incurred by the complainant in the contempt proceeding, and the court ordered that if, upon execution, the fine was not paid, the president of the Tool Company, Double, should stand committed to jail and be confined until the fine was paid. Writ and cross-writ of error were sued out, and upon the writ brought by the Union Tool Company and Double, to review the judgment of conviction, this court reversed the clearly punitive portion of the decree of the District Court, but affirmed that portion which imposed a fine and directed that the fine imposed should be paid to the complainant to cover his costs. *Union Tool Co. et al. v. United States et al.*, 262 Fed. 431, — C. C. A. —. By the cross-writ now before us we are to review that portion of the judgment of the District Court wherein the Tool Company was purged of contempt. The Tool Company, however, first questions our jurisdiction, and contends that appeal, not writ of error, is the proper remedy. Inasmuch as the contempt proceeding had two aspects, criminal and civil, the criminal dominated, and in seeking review the Tool Company properly sued out writ of error. *Matter of Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072. But as both the punitive and remedial phases were before the District Court, and both were considered, both may be reviewed upon writ of error. *Proudfit L. L. Co. v. Kalamazoo L. L. Co.*, 230 Fed. 120, 144 C. C. A. 418; *Krepplik v. Couch Patents Co.*, 190 Fed. 565, 111 C. C. A. 381. It would be strange if, merely because there was a reversal of the criminal aspect of the judgment, the party in whose favor the remedial order was affirmed should now be denied relief, and thus be obliged to proceed anew by another procedure. Such a ruling would be out of accord with section 4 of the act to amend the Judicial Code, approved September 6, 1916 (39 Stat. 726), which provides that—'No court having power to review a judgment or decree rendered or passed by an

other shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed." We therefore deny the motion to dismiss."

1918 Supp., p. 422, sec. 6.

This section in terms applies to the Supreme Court only. *Maple v. Union Pac. R. Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 89.

This section does not modify the provisions of section 11 of the Act of March 3, 1891 (6 Fed. Stat. Ann. p. 161). *Maple v. Union Pac. R. Co.*, (C. C. A. 8th Cir. 1920) 264 Fed. 89.

1919 Supp., p. 231. [*New trials, etc.*]

Construction.—It is said of Jud. Code, sec. 269, as amended: "It means that a judgment should not be reversed for any reason that does not affect the substantial rights of the parties, even though there be a technical ground for doing so. No warrant is afforded by it for holding that a party who assigns one reason in the court below for his objection to an instruction may urge an entirely different one in this court and have it considered." *Standard Oil Co. v. Allen*, (App. Cas. D. C. 1920) 267 Fed. 645.

Effect of amendment.—"The amendment relates only to the hearing and determination of a case which is pending in a court. It has no reference to the preliminary steps by which a case is brought into an appellate court, nor does it affect the question of the jurisdiction of a court, or enlarge the power of an appellate court to entertain appeals or writs of error. It does not make appealable a judgment which, before the enactment of the amendment, was not appealable. It deals only with the examination of a record which is lawfully before a court." *Rumsey v. New York L. Ins. Co.*, (C. C. A. 9th Cir. 1920) 267 Fed. 554.

This amendment has not in criminal cases extended the power in an appellate court beyond that which it formerly asserted and exercised. *Katz v. U. S.*, (C. C. A. 1st Cir. 1921) 273 Fed. 157.

Necessity of exceptions.—In *Rosen v. U. S.*, (C. C. A. 2d Cir. 1920) 271 Fed. 651, it was said: "We shall go into this case more fully than the record required, and in doing so we wish it understood that this case is not to be regarded as a precedent binding this court to examine into assignments of errors where no exceptions have been reserved. In a proper case we may consider errors not excepted to and which are not assigned for error. But we do not understand that Congress in passing the act of February 26, 1919 (40 U. S. St. at L. pt. 1,

c. 48, p. 1181), intended that cases could be reviewed in the appellate courts without regard to the taking of exceptions and the usual assignments of error. Whatever that act may mean, it certainly was not intended, among other things, to relieve counsel from the necessity of calling the attention of a trial judge to his mistake at the time an erroneous instruction or ruling is given in order that he may correct it then and there and avoid the necessity of setting a verdict aside and securing a new trial if a conviction improperly follows."

A written stipulation or agreed statement of facts as to what occurred at a trial cannot be substituted for a bill of exceptions, though it consists of a transcript of the reporter's notes made during the trial. The "record" which this section contemplates is that which is legally the record and it is in only such a record that the court is required to disregard technical errors. *Rosen v. U. S.*, (C. C. A. 2d Cir. 1920) 271 Fed. 651.

Nonprejudicial errors.—The practice prevailing in the courts of the United States forbids the reversal of a judgment in a criminal case for errors which do not prejudice. *Dierkes v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 75.

Technical errors not affecting the substantial rights of the parties are not grounds for new trial under this section as amended by L. 1919, ch. 48. *Twenty-One Mining Co. v. Original Sixteen-to-One Mine*, (C. C. A. 9th Cir. 1920) 265 Fed. 469.

Admission of evidence.—A nonprejudicial error in the admission of stenographers' notes is not ground for reversal under this amendment. *Sneerson v. U. S.*, (C. C. A. 4th Cir. 1920) 264 Fed. 268.

Defect in failure of proof as to one of two counts.—Where a defendant was convicted on both counts of an indictment and the judgment imposed could have been inflicted on either, the judgment should not be reversed on account of any defect in or failure of proof as to one of the counts if the other count is good. *Grant v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 443.

Erroneous instruction to jury.—A federal judge did not commit reversible error, in a criminal case in which the undisputed facts, as testified to by both the witnesses for the government and the defendant, show the latter's guilt, in telling the jury in effect to find the defendant guilty, so long as the jury was allowed the technical right to decide against the law and the facts. If the defendant suffered any wrong, it was of such a purely formal character as not to afford, since this act, a basis for reversing the judgment of the lower court. *Horning v. District of Columbia*, (1920) 254 U. S. 135, 41 S. Ct. 53, 65 U. S. (L. ed.) — (affirming) (1919) 48 App. Cas. (D. C.) 380 wherein the court said:

"The question relates to the charge of

the judge. The judge said to the jury that the only question for them to determine was whether they believed the concurrent testimony of the witnesses for the government and the defendant, describing the course of business that we have stated, and as to which there was no dispute. Those facts he correctly instructed them, constituted an engaging in business in the District of Columbia. This was excepted to and the jury retired. The next day they were recalled to court, and were told that there really was no issue of fact for them to decide; that they were not warranted in capriciously saying that the witnesses for the government and the defendant were not telling the truth; that the course of dealing constituted a breach of the law; that it was their duty to accept this exposition of the law; that, in a criminal case, the court could not peremptorily instruct them to find the defendant guilty, but that, if the law permitted, he would. The court added that a failure to bring in a verdict could only arise from a flagrant disregard of the evidence, the law, and their obligation as jurors. On an exception being taken, the judge repeated that he could not tell them in so many words to find the defendant guilty, but that what he said amounted to that; that the facts proved were in accord with the information, and that the court of appeals had said that that showed a violation of law.

"This was not a case of the judge's expressing an opinion upon the evidence, as he would have had a right to do. *Graham v. United States*, 231 U. S. 474, 480, 58 L. ed. 319, 324, 34 Sup. Ct. Rep. 148. The facts were not in dispute, and what he did was to say so, and to lay down the law applicable to them. In such a case obviously the function of the jury, if they do their duty, is little more than formal. The judge cannot direct a verdict, it is true; and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed, the judge may state that fact also; and when there is no dispute, he may say so, although there has been no formal agreement. Perhaps there was a regrettable peremptoriness of tone, but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts, and that is all there was left for them after the defend-

ant and his witnesses took the stand. If the defendant suffered any wrong, it was purely formal, since, as we have said, on the facts admitted, there was no doubt of his guilt."

In *Consolidation Coal Co. v. Peninsular Portland Cement Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 625, an instruction was held to be prejudicial and not within this provision.

Omission in instruction.—Where in an instruction to the jury as to the testimony of any witness whom the jury might believe to have testified falsely, the court omits to give an instruction that the testimony must be willfully and intentionally false, it was held that such omission did not affect the substantial rights of the defendant. *Braden v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 441.

A mistaken reference by indorsement on the indictment to the act which the accused is alleged to have violated has been held, under this section, to be too trivial and unsubstantial to work a reversal of the judgment. *Wagman v. U. S.*, (C. C. A. 6th Cir. 1920) 269 Fed. 568.

Burden to show error.—Under this section the former practice of holding that an error requires the reversal of a judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless is changed, and now the complaining party must show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial. *Rich v. U. S.*, (C. C. A. 8th Cir. 1921) 271 Fed. 566.

Decree of specific performance granted under this section in an action by minority stockholders to recover certain mining property acquired by a director of the company and leased to the company, see *Presidio Min. Co. v. Overton*, (C. C. A. 9th Cir. 1921) 270 Fed. 388.

1920 Supp., p. 132. [*Removal of causes, etc.*]

Service after removal.—Where several defendants have a right to remove a case but only one of them has been brought within the jurisdiction of the state court, he may exercise the right of removal, but if after such removal the other defendants are served they may at their option exercise that right conferred by this section to have the case removed to the state court. *Hunt v. Pearce*, (E. D. Okla. 1921) 271 Fed. 498.

LABOR

Vol. VI, p. 260, sec. 1. [First ed., 1914 Supp., p. 244.]

Employees within act.—The term “employees” within the meaning of this Act includes all persons operating railroad trains at the time the receiver takes charge. *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 731.

Vol. VI, p. 267, sec. 9. [First ed., 1914 Supp., p. 249.]

Constitutionality.—“On its face it merely declares that the court must hear employees on questions affecting terms and conditions of employment, and where the question is of reducing wages must hear in advance, after 30 days’ notice, and provides a mode of service. As a statute of procedure in federal courts it is justified by the constitutional power of Congress to establish inferior courts with the implied power to define their jurisdiction and regulate their exercise of it. It does no more in the matter of wages than direct the court and its receiver not to meddle with the established scale—established with the consent of the carrier—until an orderly hearing after the usual and reasonable time to prepare for it has elapsed.

“But if it be admitted that in practical operation it fixes wages for 20 days, a law so doing in avoidance of strikes, even where a classification is made of the employees, is a valid regulation of commerce.” *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 731, holding that when a wage is compelled to be paid even for twenty days, which is beyond the power of the road to earn, it does not constitute a taking of property without due process of law nor for public purposes without just compensation. The court further said:

“It is not to see how the maintenance for twenty days, and until a hearing, of a wage inaugurated by consent of the carrier, could be a serious taking of property. In the case at bar it appears that three-fourths of the wages paid are not affected by the act and may be freely reduced. The amount of train service could no doubt have been cut down. The trainmen, if presented the option of taking less pay for 20 days or suspending entirely, might have agreed to the temporary reduction. As a last resort the operation of the road might have been stopped for the period, since it could not constitutionally be compelled. It does not sufficiently appear in this case that the application of the statute necessarily would have been confiscatory.”

Employees within Act.—This section is restricted in its application to those actually engaged in train operation and train service. *Birmingham Trust, etc., Co. v. Atlanta, etc.,*

R. Co., (N. D. Ga. 1921) 271 Fed. 731, wherein it was said:

“The common meaning in railroad circles of ‘train operatives’ and ‘train service men’ includes only engineers, firemen, conductors, switchmen, train hands, and porters, and these alone are intended to be covered by this act. They actually and directly operate and serve the trains. Scheduled trains can be run without the assistance of telegraphers, and freight trains may move without station agents and clerks. While all employees of the railroad, whether upon the track, or in the offices or the shops, are necessary to the continued operation of the business, they are not indispensable to an operation for 20 days, and their places are more readily filled and with less peril from inexperience than are those above mentioned as train operatives. These considerations may have guided Congress in drawing the line it did.”

Orders within section.—The first order of a receiver on taking charge of a railroad establishing wages is within the protection of this section. *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 731, wherein it was said:

“It is supposed, as is ordinarily the case, that the receiver will continue the business of the railroad without interruption, and that, tentatively, at least, the employees of the owner will be continued as the receiver’s employees. The contention, therefore, that the order in question, being the first establishment of wages by the receiver, was not within the intent of Congress, cannot be sustained. The aim of Congress, being to avoid the interruption of train service which may result from a decrease in pay without the human satisfaction of a prior hearing on the subject, would be defeated by the construction contended for.”

Reduction by contract.—As the forbidden reduction of wages in this section is one unconsented to, for such only provide strikes, a receiver may, notwithstanding the Act, make willing contracts with the old employees for a less wage, and a fortiori can make such contracts with new employees if the former ones cease from their employment. *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 731.

Right of striking employees.—*To question reduction.*—The fact that employees have gone on a strike rather than accept an order reducing wages does not deprive them of their standing in court for the purpose of attacking the order and recovering wages at the old rate while working under protest of the order. But the right of striking employees to be heard is limited to the question of their right to the old wage while working under protest under the order reducing such wage. They cannot be heard in proceedings

to fix future wages as by striking they forfeited their position as employees. *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 743, wherein it was said:

"The rights of the trainmen, under the Newlands Act may be analogized to those that would exist under a definite contract to serve for the 20 days involved, at the fixed wage. As in the case of a contract, the benefit of the act may be waived by the trainmen. *Ft. Smith Railway Co. v. Mills*, 253 U. S. 206, 40 Sup. Ct. 526, 64 L. ed. 862. The wages here were not payable in advance of service, but were not due until about April 1st. The receiver's announcement was no more than an anticipatory breach of his duty to pay, like an anticipatory breach of a contract to pay, which gave the other party the choice of treating the relation as broken and abandoning it without incurring liability, or of denying the right to terminate it and performing or tendering the service and claiming the pay.

"Both things may not be done. A contract could not be treated as broken and abandoned, and also treated as unbreakable and to be performed. To make a homely illustration, if A. hires B. for 20 days to work for \$5 per day, payable after the work is done, and during the work A. announces he will pay only \$4, B. may decline to work further for him, in view of this announced intention, and may even sue him for damages for the breach of the contract in addition to recovering full wages for the work done. But, if he would have wages for the future time, he must remain at work, unless A. actually prevents him from working, and B. must take the position that A. cannot refuse to pay him the correct wages. In this case, after the receiver announced his wage reduction, the trainmen, with the others, conferred with him and insisted on the sole jurisdiction of the Labor Board, but made no mention of the Newlands Act; and as to the question discussed they were referred by the receiver to the provision in the court's order for a hearing at any time before the court. The men remained at work under protest. This was, as has been ruled, sufficient to reserve all rights, including those under the Newlands Act, and rebutted any inference of consent to the reduction.

"The refusal to work further on March 5th, when summoned by the receiver, no matter what the reason or justification, terminated the employment."

Re-employment of striking workmen.—Where workmen have gone on a strike because of an order improperly announced by the receiver, reducing their wages without a hearing, their re-employment will not be ordered though the strike has been conducted in an orderly manner, the court saying that re-employment must be treated as an administrative detail, to be taken up by the receiver, and that a strike though a lawful and valuable economic weapon, is not a sub-

stitute for orderly procedure in court and cannot be allowed as a legal remedy for legal rights against a receiver. *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 743.

Vol. VI, p. 280, sec. 1. [First ed., 1909 Supp., p. 330.]

Jurisdiction of state court of action by employee.—Congress having taken jurisdiction of Muscle Shoals for the production of nitrate, under the act of June 3, 1916, (9 Fed. St. Ann. (2d ed.) p. 1340, sec. 124) and the employees of nitrate companies there operating having been declared to be within this compensation act, a state court has no jurisdiction of an action by such an employee for personal injuries. *Webb v. J. G. White Engineering Co.*, (1920) 204 Ala. 429, 85 So. 729.

1918 Supp., p. 429, sec. 1.

Remedy as exclusive.—"It is optional with the employee as to whether he will make a claim under the act or not. If he does not, in our opinion he would have a right to maintain the present action and prosecute the same to judgment, as we think that the United States as to this particular case by the Federal Control Act consented to be sued. But if the employee elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect which of the two remedies he desires to pursue, and, having elected to pursue one, he may not pursue the other. The United States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the act is exclusive." *Hines v. Dahn*, (C. C. A. 8th Cir. 1920) 267 Fed. 105.

1918 Supp., p. 435, sec. 27.

Effect of recovery against person other than United States.—"Whether the employee assigns his cause of action against a person other than the United States to the United States, and the same is prosecuted by said commission, or whether the employee prosecutes the cause of action himself, the employee gains nothing, but the whole recovery after deduction of the expense of litigation either goes into the compensation fund out of which employees are paid, or is retained by the employee and the amount thereof is credited to the United States on future payments. So that in any event the employee realizes nothing from the liability of a person other than the United States. In this very case the plaintiff would receive nothing, if he should collect his judgment other than his compensation under the Compensation Act." *Hines v. Dahn*, (C. C. A. 8th Cir. 1920) 267 Fed. 105.

LABOR DEPARTMENT

Vol. VI, p. 287, sec. 3. [First ed., 1914 Supp., p. 242.]

The administration of the immigration laws has been intrusted by Congress to the Department of Labor—not to the Depart-

ment of Justice. The latter department has no more legal right or power to deal with the exclusion or the expulsion of aliens than has the Department of the Interior. *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

LIMITATION OF VESSEL OWNERS' LIABILITY

Vol. VI, p. 334, sec. 4282. [First ed., vol. IV, p. 838.]

Application.—This section has no application to claims for deaths, personal injuries, or the destruction of passenger's baggage. *The Virginia*, (D. C. Md. 1920) 264 Fed. 986.

Director General of Railroads was held to be a charterer of vessels taken over as part of railroad property in *The Virginia*, (D. C. Md. 1920) 264 Fed. 986.

Vol. VI, p. 336, sec. 4283. [First ed., vol. IV, p. 839.]

III. Construction.

IV. Scope of statute.

3. Owners affected.
4. Vessels included.
5. Losses covered.

V. Privy or knowledge of owner.

1. In general.
3. Competency of master and crew.
4. Unseaworthiness of vessel.

VIII. Procedure.

11. Payment into court.

III. CONSTRUCTION (p. 338)

In general.—This act should be liberally construed in favor of shipowners, so as to encourage shipbuilding, and the employment of ships in commerce. *People's Nav. Co. v. Toxey*, (C. C. A. 4th Cir. 1920) 269 Fed. 793.

Relation to R. S. sec. 4493.—In *The Virginia*, (D. C. Md. 1920) 264 Fed. 986, it is said that this section is in no way a restriction on R. S. sec. 4493 (9 Fed. St. Ann. (2d ed.) p. 468).

IV. SCOPE OF STATUTE

3. Owners Affected (p. 338)

Director General of Railroads was held to be a charterer of vessels taken over as part of railroad property in *The Virginia*, (D. C. Md. 1920) 264 Fed. 986.

4. Vessels Included (p. 339)

In general.—A derrick boat in service as an instrumentality of interstate commerce

has been held to come within the operation of the statute. *Patton Tully Transp. Co. v. Turner*, (C. C. A. 6th Cir. 1920) 269 Fed. 334. The court said: "Section 4283 reaches 'any vessel.' It was the theory of the act that always when a vessel was on a voyage between ports, and commonly until its return to the home port, the owner would have scant opportunity for personal control, and therefore ought to be relieved from the full effect of the respondeat superior rule. This theory applied with lessened force to ordinary vessels upon inland lakes and rivers, and with little, if any, force to the class of quasi vessels which often remain in or about one harbor and have no propelling power—barges, lighters, etc. Accordingly, section 7 of the original act of 1851 (R. S. § 4289) provided that the act should not apply 'to the owners of any canal boat, barge or lighter, or to any vessel of any description whatever used in river navigation.' In 1886, either because the original theory of the act had not justified section 7 or from a change in the theory, this section was amended so as to direct that the liability limiting provisions 'shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges and lighters.' U. S. C. S. § 8027. This last-quoted language is therefore controlling upon the present question. In a certain broad sense, all these floating structures, including even floating dry docks, are vessels; but it is accurate enough to say that they constitute a general class, which may be called quasi vessels, and which is divided into subclasses by more specific nomenclature. Under the general and familiar rule of construction, 'expressio unius,' etc., specific classes, not enumerated, would be excluded; for example, a dredge or pump boat is not a canal boat, and not within the ordinary definitions of a barge or lighter, and we have not seen decisions that undertake to classify such a boat under this section of the statute.

"This derrick boat was not a canal boat, nor, in the ordinary sense, a barge. It did at least closely approximate a lighter. A lighter often has lifting means for elevating

cargo, though it commonly transfers cargo from the shore to itself, and then from itself to the ship, instead of directly from the shore to the ship, as here. There is not much inherent distinction, nor apparent reason for excluding this from the statute and including ordinary lighters. Both are directly essential to the transportation of freight by water, while the connection therewith of (e. g.) a dredge, is more indirect and remote.

"Upon the whole, we conclude that the lack of jurisdiction to proceed under this statute as to this derrick boat is not so clear that we ought, practically on our own motion to decline to proceed."

5. Losses Covered (p. 344)

Cases of personal injury and death.—In *Flynn v. Christenson*, (C. C. A. 9th Cir. 1921) 273 Fed. 385, it was held that the court committed no error in holding the respondent's liability for the death of a stevedore to be limited to their respective interests in the vessel.

Cargo claims.—This section has no application to cargo claims. *The Virginia*, (D. C. Md. 1920) 264 Fed. 986.

V. PRIVILEY OR KNOWLEDGE OF OWNER

1. In General (p. 344)

Mere negligence.—To same effect as first paragraph of original annotation, see *The Virginia*, (D. C. Md. 1920) 264 Fed. 986; *Patton-Tully Transp. Co. v. Turner*, (C. C. A. 6th Cir. 1920) 269 Fed. 334.

3. Competency of Master and Crew (p. 346)

Negligence of crew.—The right of a libellant to have limitation of liability decreed under this act should be recognized where the evidence shows a full complement or crew of competent officers, as well as the seaworthiness of the boat, and also shows statutory clearances and the fact that all statutory requirements as to a full crew had been complied with, and that all requisite life-saving appliances were on board. And the mere fact that the crew were guilty of negligence will not preclude the granting of a limitation of liability, such negligence not necessarily establishing privy or knowledge. *In re St. Louis, etc., River Packet Co.*, (E. D. Mo. 1920) 266 Fed. 919.

4. Unseaworthiness of Vessel (p. 347)

Defective boiler.—Where a boiler was in all respects in good condition with a fusible plug in position and a supply of fusible plugs on board to be used in case of necessity when the boat left her home port and there was nothing to show that any appliance was not in good condition after the last visit of inspection by the manager of the owner a few weeks before the explosion, it was held that there was no knowledge or privy on the part of the owners which

would operate as a denial of the right to limit liability. *Patton-Tully Transp. Co. v. Turner*, (C. C. A. 6th Cir. 1920) 269 Fed. 334.

VIII. PROCEDURE

11. Payment into Court (p. 357)

Assignment of insurance money as condition precedent to limitation.—A libellant is not obliged to turn over insurance money collected on the boat as a condition precedent to a decree for limitation of liability. *In re St. Louis, etc., River Packet Co.*, (E. D. Mo. 1920) 266 Fed. 919.

Vol. VI, p. 371, sec. 1. [First ed., vol. IV, p. 854.]

Liability of vessel—Negligence in stowage.—The fact that bills of lading contain the exception, "Leakage of contents at owner's risk," does not absolve the carrier from liability arising from negligence, or want of the exercise of due diligence, in properly stowing cargo. *The Korea Maru*, (C. C. A. 9th Cir. 1921) 274 Fed. 509.

Limitation as to baggage—In general.—Where by the tariff of a steamship company duly filed with the Interstate Commerce Commission its liability in case of checked baggage is limited to a specified sum such limitation of liability is binding and must be enforced. *The Virginia*, (D. C. Md. 1920) 266 Fed. 437.

Applicability.—A limitation of liability as to checked baggage has no application to hand baggage not checked or to clothing or other articles worn on the passenger's person. And no recovery can be had for articles lost and claimed as personal effects where they are not included within the necessary baggage and effects which a traveller may be expected to carry with him. *The Virginia*, (D. C. Md. 1920) 266 Fed. 437.

Limitation of value of package.—A provision in a bill of lading limiting the liability of a vessel in case of loss to a fixed amount per package unless a higher value be declared by the shipper and extra freight paid thereon, is valid and binding and takes precedence over other provisions for ascertaining damages to goods in case of loss. *Stevens v. Cunard Steamship Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 306.

Loss not within limitation.—The act was referred to without a definite holding in respect thereto in *Sunny Point Packing Co. v. Alaska Steamship Co.*, (Wash. 1921) 196 Pac. 642, wherein the court stated the facts as to a shortage in delivery and its conclusion as follows: "The voyage, as the captain's log shows, was somewhat tempestuous. Salmon cases of another shipment, loaded in that part of the vessel in which these cases were loaded, went overboard. No check of the number of cases unloaded was kept as the cases were taken from the vessel. The loss was ascertained by the count after they

had been piled upon the dock. While the checker testifies that he kept track of the longshoremen who were performing the work, and was careful to see that none of the cases were misplaced or intermixed with other piles of salmon cases on the dock, it seems to us that the chance of error was here much greater than was the chance of error at the place of shipment. A loss caused by either of the reasons suggested will not excuse a failure to deliver on the part of the carrier. A carrier was at common law an insurer, save as against the act of God or of the public enemy. While by the Harter Act its liability has been somewhat more limited, still nothing is here shown to bring the carrier within the excepted causes."

Burden of proof.—An exception in bills of lading "leakage of contents at owner's risk," casts upon the libelants the burden of establishing negligence or want of diligence in stowage which conduces, as the proximate cause, to the injury complained of. *The Korea Maru*, (C. C. A. 9th Cir. 1921) 274 Fed. 509.

Vol. VI, p. 377, sec. 3. [First ed.,
vol. IV, p. 857.]

- I. In general.
- II. Properly manned and equipped.
- III. Due diligence.
- IV. Seaworthy vessel.
- V. Navigation or management of ship.
- VI. Burden of proof.

I. IN GENERAL (p. 378)

Prior to the passage of this Act vessel owners would have been answerable for a loss caused by the negligence of the master or crew. *The Mary F. Barrett*, (E. D. Pa. 1921) 270 Fed. 618.

Owner's liability.—There is no right to limit liability unless the vessel was seaworthy and reasonable care was exercised by the owner to see that she was properly manned, equipped and supplied. *The Bessie J.*, (D. C. Mass. 1920) 208 Fed. 66.

General average.—"The doctrine of general average is the equitable one that the loss caused by a sacrifice made for the common benefit of all should be borne ratably by all. It has no application, however, when the necessity for the sacrifice was caused by the negligence of the master or crew." *The Mary F. Barrett*, (E. D. Pa. 1921) 270 Fed. 618, wherein the court further said: "The right to invoke the law of general average is a defense pro tanto if there is a stipulation in the charter party to this effect, but in the absence of such a contract there is no such right if the loss was due to the negligence of master or crew."

II. PROPERLY MANNED AND EQUIPPED
(p. 382)

Duty to provide competent crew.—In the case of a tug contracting to tow vessels the

rule has been applied that it is the duty of the owners of the tug not only to provide a seaworthy vessel, but also to provide the vessel with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended voyage. *Myloie v. British Columbia Mills Tug, etc., Co.*, (C. C. A. 9th Cir. 1920) 268 Fed. 449.

Barge captain absent from boat at night.—A petition for limitation of liability has been denied where during the absence at night of the barge captain a vessel sank at a pier and it appeared that the petitioner's fleet manager knew or should have known that, notwithstanding instructions to the contrary, its barge captains not being followed up were likely to leave their vessels at night. *The Bessie J.*, (D. C. Mass. 1920) 268 Fed. 66.

III. DUE DILIGENCE (p. 383)

Negligent navigation.—Holding a towing tug liable for damages resulting from sunken wrecks, the existence of which was known or should have been known to the master of the tug, the court, in *McWilliams v. Director Gen. of Railroads*, (C. C. A. 2d Cir. 1921) 271 Fed. 931, said: "It is elementary that in every contract of towage it is impliedly agreed that the tug will use proper skill and diligence, and that she will not unnecessarily by negligence or mismanagement imperil her tow. The highest degree of skill is not required, for she is not a common carrier; neither is she an insurer. She is merely a bailee for hire. As such she is simply bound to exercise reasonable skill, care, and diligence. *Eastern Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477; *The John G. Stevens*, 170 U. S. 113, 126, 18 Sup. Ct. 544, 42 L. Ed. 969. From what has been said we must be understood as meaning that the degree of skill, care, and diligence for which the tug is liable is dependent upon the peculiar circumstances of each particular case and of the special hazards of the waters traversed. *Societe des Voilers Francais v. Oregon R., etc., Co.*, (D. C.) 178 Fed. 324.

"The master of the tug is bound to know the channel and its usual currents, and dangers which are known generally to men experienced in its navigation. *The Inca*, (D. C.) 130 Fed. 36, aff'd 148 Fed. 363, 78 C. C. A. 273. And he must exercise that degree of care, caution, and maritime skill which prudent navigators usually employ in similar services. In all such cases the burden rests upon the libellant to prove affirmatively that the tug is in fault."

Leakage.—Where the leakage resulted from the structural defects, which manifested themselves under ordinary conditions of severe weather, it cannot be held that the damage caused thereby was due to perils of the sea, within the exemptions of this section, unless due care to render the vessel

seaworthy be shown. *The Lake Allen*, (E. D. N. Y. 1921) 274 Fed. 873.

Failure to close stop cock.—The failure to close a stop cock in a pipe, which cock was essential to the seaworthiness of a vessel when loaded to a certain depth was a failure to use due diligence to make the vessel seaworthy within the meaning of this act, and the fact that coal was taken in after leaving port increased the draft so as to bring the opening in the pipe under the water was immaterial. *The Viking*, (C. C. A. 6th Cir. 1921) 271 Fed. 801.

IV. SEAWORTHY VESSEL (p. 384)

Obligation of owners as to seaworthiness of vessel.—Inherent in the shipping articles was the absolute obligation of the owners and operators to see that the vessel was seaworthy. To be seaworthy the vessel must be tight, staunch, and strong, and so equipped and the cargo so stored as to resist all ordinary action of the sea. But the requirement does not extend to perfect condition of the vessel or the most improved appliances. *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15.

The duty to use reasonable care in keeping the ship and her appliances in safe condition is a continuing duty resting upon the owners during the voyage. This is nondelegable, and for injuries resulting from its breach, the owners are liable to the seamen, even if there is an entire lack of that privity or knowledge which will deny to the owners the right to limit their liability. *Patton-Tully Transp. Co. v. Turner*, (C. C. A. 6th Cir. 1920) 269 Fed. 334.

The provisions of this section cannot be relied upon to relieve the shipowner from the obligation to furnish a seaworthy vessel, or to escape from responsibility for failure to do so; and especially is this true when the unseaworthiness existed at the time the charter party was entered into. Nor can the owner escape liability by the exercise merely of due diligence to perform his obligations in this respect. His duty is to furnish a seaworthy vessel, and by frequent examinations and thorough inspection to see that it was so maintained, having due regard to the service to be performed. *The Pehr Ugland*, (E. D. Va. 1921) 271 Fed. 340.

Implied warranty of seaworthiness.—In the absence of an express warranty of seaworthiness in a contract for the shipment of a cargo, the law will imply a warranty that the ship is seaworthy and fitted for the service in hand, and for the faithful performance of which it contracts and accepts compensation. *The Pehr Ugland*, (E. D. Va. 1921) 271 Fed. 340.

Presumption as to seaworthiness.—The presumption is in favor of seaworthiness, since the owners and officers ordinarily would not venture the risk of property or life in an unseaworthy ship, and from their superior ability and skill their judgment is entitled

to much greater weight than that of the crew. *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15.

Liability where vessel is chartered.—“The general rule is that the owner of a vessel is bound to the charterer to see that she is seaworthy and suitable for the service in which she is employed. But the rule does not apply when the charterer undertakes by contract, either express or implied, to inspect the vessel and ascertain for himself her seaworthiness and fitness.” *Portsmouth Fisheries Co. v. John L. Roper Lumber Co.*, (C. C. A. 4th Cir. 1920) 269 Fed. 586.

Where in the case of a buyer the damage done to the cargo greatly exceeded the value of the craft, it was held that the charterer was not entitled to limit his liability where the barge was unseaworthy for the work it undertook to do and the charterer had signed bills of lading himself and was the individual who actually inspected it before it sailed. *The Nettie Moore*, (D. C. Md. 1921) 270 Fed. 1005.

Official test.—The fact that a ship has passed official and other inspections is not conclusive of the fact of seaworthiness. *The Viking*, (C. C. A. 6th Cir. 1921) 271 Fed. 801.

Mere failure of machinery or failure to provide the best machinery does not prove unseaworthiness nor even negligence. *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15, holding that unseaworthiness was not established by the fact that the engine had to be repaired and that the ship lost three propeller blades.

Defective boilers.—As to the existence of defective boilers as rendering a vessel unseaworthy it has been said: “Proceeding to this question of fact, whether the master used reasonable care in maintaining the boat's appliances in seaworthy condition, we conclude that he did not. It is strenuously urged that the fusible plug did not pertain to the seaworthiness of the boat, that the water gauges and try cocks were all the appliances necessary to complete safety, and that the fusible plug was only the means of avoiding the fireman's possible negligence in using the devices which of themselves answered every requirement of safety on the theory that the operator would do his duty. We cannot accept this view as controlling. It appears that such plugs were in very common use; that they were required by the federal regulations (although this particular kind of boat was not within the regulations); and one of the witnesses for the boat gave the expert opinion that they were essential to safety. However, the case does not rest on this alone. The injector was in bad order, and was likely to fail to operate unless assisted, and the boiler was leaking. These conditions had continued for some time, and they must have been known to the master. In light of their existence, the office of the fusible plug as a safety device

was emphasized. We think that to substitute a permanent for a fusible plug in a boiler, where it was abnormally difficult to maintain the proper water level, was a failure to exercise reasonable care to keep the boat in seaworthy condition, and that, therefore, the owners and the boat were liable for the explosion to which this combination of leaky boiler, defective injector, and nonfusible plug contributed." *Patton-Tully Transp. Co. v. Turner*, (C. C. A. 6th Cir. 1920) 269 Fed. 334.

Improper dunnage.—In *The Tabor*, (E. D. N. Y. 1921) 274 Fed. 880, damage to sugar was held to be caused by the poor character of the dunnage and the libellant was held entitled to a decree.

Negligence of crew as aggravating unseaworthy condition.—If the unseaworthiness was a contributing cause of the injury, without which it probably would not have happened, it makes no difference in the owner's liability that the negligence of these of the crew developed this unseaworthiness into action, and made it destructive when it would otherwise have been harmless. *Patton-Tully Transp. Co. v. Turner*, (C. C. A. 6th Cir. 1920) 269 Fed. 334.

V. NAVIGATION OR MANAGEMENT OF SHIP (p. 389)

Abandonment of vessel as error in navigation.—Where a vessel is abandoned when not past saving this constitutes an error in the navigation and management of the

vessel for which the owners are not liable under this section if they have exercised due diligence to make her seaworthy. *The Thessaloniki*, (C. C. A. 2d Cir. 1920) 267 Fed. 67.

VI. BURDEN OF PROOF (p. 391)

Competency of officers and crew.—Where a vessel which was stranded, through negligence in the engine room, sets up this act it is necessary in order that she may have its protection to affirmatively show that her owner exercised due diligence to make her seaworthy and that proper care had been given to the selection of her engine room force. *The Fort Morgan*, (D. C. Md. 1921) 274 Fed. 734.

Unseaworthiness as contributing cause.—The burden of proof that the accident would have happened regardless of the unseaworthiness alleged is on the owner, and there is no presumption in his favor that that which was necessary to be done to make the vessel seaworthy, was done. *The Viking*, (C. C. A. 6th Cir. 1921) 271 Fed. 801.

Vol. VI, p. 392, sec. 4. [First ed., vol. IV, p. 863.]

Nature and effect of bill of lading.—A bill of lading is both a receipt and a contract, and if the owner's master signs the bill, he has receipted and contracted for his own principals. *The Esrom*, (C. C. A. 2d Cir. 1921) 272 Fed. 266.

MINERAL LANDS, MINES AND MINING

Vol. VI, p. 509, sec. 2319. [First ed., vol. V, p. 4.]

Effect of prior location.—Lands on which there are valid and subsisting locations are not open to exploration and purchase. *Lehman v. Sutter*, (Mont. 1921) 198 Pac. 1100.

Vol. VI, p. 523, sec. 2322. [First ed., vol. V, p. 13.]

- II. Possessory rights.
- III. Extralateral rights.

II. POSSESSORY RIGHTS (p. 524)

Exclusiveness of right.—"Section 2322, Rev. St. U. S., guarantees the exclusive right of possession to the prior locator, and thus excludes the idea that any one else may enter thereon for any purpose during the life of a prior location. . . . The law on this subject is well stated in volume 18 R. C. L. at page 1136, as follows:

"A valid location of a mining claim, so long as it is in full force and effect, operates as a bar to a second location of the premises

so claimed. Hence it is a general rule that an attempted location of a mining claim based upon a discovery within a then valid and subsisting claim, is absolutely void for the purpose of founding an adverse claim, and does not attach upon the subsequent failure of the first locator to do the required annual assessment work; and a location of a mining claim at a time when a senior locator is not in default under state or federal laws is subordinate to a relocation by a stranger made after the rights of the first locator lapsed because of such default." *Lehman v. Sutter*, (Mont. 1921) 198 Pac. 1100.

III. EXTRALATERAL RIGHTS (p. 527)

Extent of right—Scope of mining operations.—Where a vein extending over a side line varies in width and is undulating and waving, the company mining it may extend its shaft in the footwall and immediately under the vein and may make excavations in the country rock for stations, ore pockets and chutes connecting with its shaft. This is especially true where it appears from the evidence that the country rock encountered

in such excavations is entirely barren and worthless. *Twenty-One Min. Co. v. Original Sixteen to One Mine*, (C. C. A. 9th Cir. 1920) 265 Fed. 547.

Course of vein—Side and end lines.—If a lode mining location lies across instead of along the strike of a vein, the side lines become the end lines for the purpose of defining the right of the owner, under this section, to follow a vein apexing within the surface boundaries on its dip downward outside the vertical side lines of such claim. *Silver King Coalition Mines Co. v. Conkling Min. Co.*, (1921) 256 U. S. 18, 41 S. Ct. 426, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1916) 230 Fed. 553, 144 C. C. A. 607.

Side lines and end lines do not depend on the mere act of the locator; those lines which are crosswise of the general course of the vein are the end lines, although the locator may have termed them side lines. *Northport Smelting, etc., Co. v. Lone Pine-Surprise Consol. Mines Co.*, (E. D. Wash. 1920) 271 Fed. 105.

Lode bisected by lines of adjoining claims.—Where a lode or vein is bisected by the lines of two adjoining claims it belongs to the one having priority. *Star Min. Co. v. Federal Min., etc., Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 881.

Vol. VI, p. 533, sec. 2324. [First ed., vol. V, p. 19.]

V. Annual assessment work.

2. Work, labor and improvements.

3. Forfeiture of claim.

IX. Relocation of claims.

V. ANNUAL ASSESSMENT WORK

2. *Work, Labor and Improvements* (p. 544)

Erection of stamp mill as assessment work.—Expenditures made for work performed, labor done, and repairs made upon a stamp mill do not tend to develop the mineral claim, or facilitate the extraction of ore therefrom, and consequently do not constitute any part of the sum required to be expended for annual assessment or improvement work under this section. *Golden Giant Min. Co. v. Hill*, (N. M. 1921) 198 Pac. 276.

3. *Forfeiture of Claim* (p. 548)

Estoppel to claim forfeiture.—Where one enters into possession of a mineral claim under a contract with a locator, by which the person entering undertakes to do the required assessment work, or do other work which would have been sufficient to constitute assessment work, he will not be heard to assert the forfeiture of the claim for non-performance of the assessment work, where such nonperformance was the result of his own default, nor will he be permitted to take advantage, at any time, of the information obtained by him on account of such rela-

tion. *Golden Giant Min. Co. v. Hill*, (N. M. 1921) 198 Pac. 276.

Necessity of relocation.—The failure to do the annual assessment work upon a mining claim does not of itself forfeit the claim, a relocation by a third party being essential to work a forfeiture of the original locator's rights. *Golden Giant Min. Co. v. Hill*, (N. M. 1921) 198 Pac. 276.

IX. RELOCATION OF CLAIMS (p. 552)

Right to relocate.—The locator or claimant may, at any time, relocate his own claim for any purpose except to avoid the doing of annual labor thereon required by this section. *Lehman v. Sutter*, (Mont. 1921) 198 Pac. 1100.

Effect on right of cotenant.—That some of the locators relocate their claim does not operate as an abandonment by those who do not, and as to the latter the claim remains valid and subsisting, forbidding the location of another claim. *Lehman v. Sutter*, (Mont. 1921) 198 Pac. 1100.

Patent as relating to date of relocation.—Where a mining claim is located and several years later relocated by the same parties and a patent issued therefor, the patent relates back only to the date of its relocation. *Star Min. Co. v. Federal Min., etc., Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 881.

Vol. VI, p. 573, sec. 2327. [First ed., vol. X, p. 235.]

Monuments prevail over courses and distances.—A patent for a lode mining claim which, after reciting the deposit in the General Land Office of field and plat notes of a survey of such claim, which is designated by the Surveyor General as lot No. 689, describes its boundaries as platted as beginning at corner No. 1, a pine post, running thence by a described course 600 feet to corner No. 2, a pine post, thence by a described course 1,500 feet to corner No. 3 thence by a described course 600 feet to corner No. 4, and thence by a described course 1,500 feet to the place of beginning, and which, in granting "said mining premises hereinbefore described," assumes such premises to be the lot designated as lot No. 689, does not represent an adjudication by the Land Department that the claim is 1,500 feet long and 600 feet wide, without regard to the location of the posts and corners 3 and 4, which the field notes showed to exist, but which the patent does not mention, and evidence is admissible to show that there were monuments at corners 3 and 4, and, if established, the monuments as fixed control the courses and distances of the patent, and exclude from the grant land outside the monuments, though comprehended by the courses and distances. *Silver King Coalition Mines Co. v. Conkling Min. Co.*, (1921) 255 U. S. 151, 41 S. Ct. 310, 65 U. S. (L. ed.)

—, *reversing* (C. C. A. 8th Cir. 1916) 230 Fed. 553, 144 C. C. A. 607.

Vol. VI, p. 575, sec. 2329. [First ed., vol. V, p. 42.]

Priority between placer and timber patents.—In *Adams v. C. A. Smith Timber Co.*, (C. C. A. 9th Cir. 1921) 273 Fed. 652, it was held under the facts of the case that a conflict between a placer and a timber patent must be resolved by requiring the patent for the placer to yield to the timber patent theretofore issued to the predecessors of the appellee.

Vol. VI, p. 580, sec. 2332. [First ed., vol. V, p. 44.]

Scope of section.—This statute "is a part of the statutory chapters on mineral and mining resources, having to do with the evidence which will be regarded as sufficient to establish the right of one in possession and who has worked a mining claim to obtain a patent. The statute is based upon the premise that the lands had been open to entry and could be patented under the mining laws of the United States. It was not enacted as a statute of limitation, and has no application in the case of a trespasser on land, title to which cannot be acquired under the laws of the United States." *Chanslor-Canfield Midway Oil Co. v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 145.

Adverse possession.—Where plaintiffs allege possession of a placer claim, it is the rule that one claiming by adverse possession must establish that the property is held and used as a mining ground. Appropriate use must be shown. *Adams v. C. A. Smith Timber Co.*, (C. C. A. 9th Cir. 1921) 273 Fed. 652.

Vol. VI, p. 587, sec. 2336. [First ed., vol. V, p. 50.]

Pleading in suit to determine adverse claims.—"The amended complaint is not a model pleading. It would have been entirely sufficient if plaintiff had confined himself to appropriate allegations showing his right to the ground covered by his locations, and left it to the defendants to disclose the nature of their claim. It was not necessary for him to go further, and show that defendants' adverse claim is without foundation. *Woody v. Hinds*, 30 Mont. 189, 76 Pac. 1. Since, however, he has assumed to do this, and the demurrer admits the truth of his allegations in this behalf, the question submitted for decision is whether, assuming the plaintiff's allegations to be true, they so far impeach the validity of the Sutter locations, or any of them, as to put the defendants upon the defensive." *Lehman v. Sutter*, (Mont. 1921) 198 Pac. 1100.

Vol. VI, p. 593, sec. 2347. [First ed., vol. V, p. 55.]

Price.—A price in excess of \$20 an acre may be exacted by the Secretary of the Interior for coal lands within 15 miles of a railroad, entered under this section. *Friedman v. U. S.*, 255 U. S. 468, 41 S. Ct. 380, 65 U. S. (L. ed.) —, *affirming* (1919) 54 Ct. Cl. 225.

Conclusiveness of decision as to whether land is vacant.—A decision that land is not vacant is one entirely within the discretion of the Secretary of the Interior and not subject to control by the courts. *Payne v. U. S.*, (App. Cas. D. C. 1920) 269 Fed. 198.

Vol. VI, p. 602. [*Entry of petroleum, etc.*] [First ed., vol. V, p. 47.]

Federal jurisdiction—Equitable relief.—Where there is a serious controversy as to the title and the party in possession is holding adversely, plaintiff's remedy is at law and not in equity. But where the title and right to possession is clear, and the defendant is wrongfully in possession, extracting mineral from the land, and thus is practically consuming the substance of the estate, jurisdiction is in a court of equity to stop such waste, and, after having interfered to stop the waste, the court will determine the rights of the parties before it. Remedy at law for possession and to recover damages for the trespass is in plaintiff, but such remedy is not adequate, by no means as practical and as efficient as a remedy in equity. *Chanslor-Canfield Midway Oil Co. v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 145.

Validity of location made in names of third persons.—Where a location was made by a person in the name of his mother-in-law and seven others and the alleged locators did not know of the location at or prior to the time it was made and when subsequently advised thereof declined to assume or pay any part of the expense or to accept or ratify the same but on the suggestion of the one making the location they executed a deed conveying their interests to his mother-in-law who subsequently made an assignment to him, it was held that the location was invalid and that no title passed. *Chanslor-Canfield Midway Oil Co. v. U. S.*, (C. C. A. 9th Cir. 1920) 268 Fed. 145.

Vol. VI, p. 609, sec. 3. First ed., 1912 Supp., p. 318.]

Action of secretary as conclusive.—The action of the Secretary of the Interior in refusing to approve an entry is not subject to review where he has not acted arbitrarily. *Payne v. U. S.*, (App. Cas. D. C. 1920) 269 Fed. 198.

1918 Supp., p. 461. [*Mining claims, etc.*]

Effect of failure to file notice of desire to hold claim.—A failure to file the notice required by the resolution does not forfeit a claim where it was due to a mistake as to county boundaries, a diligent effort in good faith having been made. *Donoghue v. Tonopah Oriental Min. Co.*, (Nev. 1921) 198 Pac. 553. The court said:

"If the proviso is solely for the benefit of the individual claim owner, we are not in accord with an interpretation that nullifies its beneficent purposes. We think that reflection inevitably leads to the conclusion that exceptions, which are present and concurring in this case, arise from a failure to comply literally with the terms of the proviso. First, there is no fraud or deceit; second, no intention, shown by competent, clear, and satisfying proof, to abandon the claims; third, there is good faith, and an open and honest effort to comply; and, fourth, excusable neglect or omission of others to file the notice, not attributable to the claim owner.

"This interpretation is supported, in a measure, by that of the Interior Department in a case arising under the Suspensory Act of 1893 (28 U. S. Stat. 6). The act of 1893, suspending the assessment work for that year, came before the department in *Cain et al. v. Addenda Mining Co.*, 24 Land Dec. 18. The owner was permitted to hold the ground under the resolution, though the company had not filed any declaration of intention whatever. It is true that it was in

a contest which involved fraud of the worst kind, still the ruling indicates that each case arising between claim owners and third parties for failure to comply with the resolution is to be controlled and decided upon its own particular facts and circumstances.

It is true, from the situation developed from the trial of this case, that the representatives of the true owners of the ground in dispute, though acting in good faith, upon their own showing, could have taken the precaution, being in doubt, to file the notice in both Nye and Esmeralda counties; but their omission so to do, under the particular circumstances, should not be visited upon the owners. In arriving at this conclusion, we are mindful that it is not the province of courts to concern themselves with the injustice and inconvenience or hardships of a law where its meaning is plain. Such a matter is addressed to Congress. But where it is clear that a strict and literal interpretation of a public resolution, concerning land in which the government has a proprietary interest, will result in manifest injustice, we may scrutinize it closely to see if it will not admit of some other interpretation. We take it that Congress is presumed to have intended an interpretation which would avoid results of this character. We freely admit that the language of the proviso is susceptible of the interpretation that it is mandatory in terms, but we are of the opinion that its resulting effect is doubtful and susceptible of two interpretations, and under the well-settled rule we give it that interpretation which best comports with reason and justice."

NATIONAL BANKS

Vol. VI, p. 654, sec. 5136. [First ed., vol. V, p. 82.]

II. Contracts in general.

V. "Incidental powers as shall be necessary," etc.

4. Indorser, guarantor or surety.

II. CONTRACTS IN GENERAL (p. 656)

Purpose of limitations in section.—The limitations contained in this section were intended to insure the safe management of the affairs of a national bank, so as to protect the owners thereof in the safe conduct of its affairs, and as a guaranty that the management of such bank should at all times be free from speculation, the assumption of undue risks, or the doing of anything else calculated to injure the public by impairing the credit of the bank. It also confers upon the directors "all such incidental powers as shall be necessary to carry on the business of banking." *Parkersburg Second Nat. Bank v. United States Fidelity, etc., Co.*, (C. C. A. 4th Cir. 1920) 266 Fed. 489.

V. INCIDENTAL POWERS AS SHALL BE NECESSARY

4. Indorser, Guarantor or Surety (p. 665)

Indemnity bond.—It has been held that a national bank may in some cases execute an indemnity bond to protect its interest in a bankrupt's estate. Thus, it was so held where it seemed that if contracts of the bankrupt could be completed a large profit could be realized but the surety company which was on the contractor's bond refused to turn the matter over to the trustees unless it was protected by an indemnity bond. *Parkersburg Second Nat. Bank v. United States Fidelity, etc., Co.*, (C. C. A. 4th Cir. 1920) 266 Fed. 489.

Vol. VI, p. 703, sec. 5145. [First ed., vol. V, p. 104.]

Powers of management other than those of directors.—This section provides that the affairs of each national banking association shall be managed by not less than five directors, who shall be elected by the share-

holders. This rule, however, is not without many exceptions. For instance, the vice-president, cashier or other officer of the bank may act without the scope of his authority, and in a matter to which he is not authorized, and yet the bank may subsequently act in such a manner with reference to the particular transaction or subject-matter as to amount to a ratification of the unauthorized action of such officer, or it may take such affirmative action in accepting the benefits and fruits of the transaction as to preclude it from thereafter questioning or denying the authority of the officer to act for it. It may also remain silent and inactive at a time when good faith would have impelled it to have spoken up and disclaimed the unauthorized act of its officer. In these and many other instances that might be mentioned, the unauthorized action of such officer of the bank may become, in presumption and contemplation of law, the act of the bank itself. *Smith v. First Nat. Bank*, (Okla. 1921) 198 Pac. 103.

Vol. VI, p. 722, sec. 23. [First ed., 1914 Supp., p. 282.]

IV. ENFORCEMENT OF LIABILITY (p. 725)

Costs.—The costs in an action under this section against several defendants may be apportioned among them. In reaching this conclusion the court said:

"The act of 1876 permits a joinder of all shareholders of a national bank to enforce each shareholder's individual liability. That liability is restricted by the statute which creates it; shareholders being individually responsible, equally and ratably, and not one for another, for debts of the bank, to the extent of the amount of their stock therein. R. S. § 5151. The dominant idea is the limitation of the liability of the shareholder to the amount of his stock. It would seem that the spirit of this restrictive liability would be violated by awarding judgment for costs in *solido*. Suppose there should be only five stockholders in a bank, holding, respectively, the following number of shares: One, 5, 10, 50, and 250, of the par value of \$100, and the costs should aggregate \$1,000. Would it be equitable and right to make the holder of one share pay the same as the holder of 250 shares? If such be the case, the shareholder with one share would pay in costs double the par value of his stock, and the holder of 250 shares would pay less than \$1 per share on his holding. Moreover, the holder of the 250 shares might be insolvent, and his burden would be cast on the minority stockholders, multiplying the liability of the holder of the single share of stock almost to the extent of oppression. Such a result would be repugnant to the spirit of the statute, that the extent of the stockholders'

liability was gauged by the amount of their stock, ratably, and not as surety for one another.

"If all the defendants were solvent, of course, the plaintiff could have no reasonable objection to an apportionment of the costs. But it is argued that, where some of the defendants may prove insolvent, the plaintiff, though recovering judgment against such insolvent defendants, would have to pay the costs assessed against them. This argument is urged against the contention that apportionment of costs would be equitable. The circumstance that the plaintiff will lose some of his costs is no more a hazard of litigation than that he will lose his judgment on account of the defendant's insolvency.

"There is another consideration. Suppose, when the decree adjudicating the several shareholders' liability is entered, some shareholders desire to pay, and others wish to prosecute an appeal. If the costs have been apportioned, then a defendant could settle the judgment against him, and leave his more litigious codefendants to prosecute appeal proceedings.

"So that on the whole I think that it is within the power of the court, and that it is neither inequitable nor unjust to the plaintiff, that the costs be apportioned among the defendants, the basis to be as follows: All the costs at the time the case was at issue to be apportioned between all defendants at the ratio of their several holdings of stock. Costs subsequently accruing, brought about by reason of litigation on issues made by pleas, to be apportioned among litigating defendants at the ratio of their respective holdings of stock.

"A judgment on the motion to apportion costs may be taken in accordance with the views herein expressed." *American Nat. Bank v. Commercial Nat. Bank*, (S. D. Ga. 1920) 268 Fed. 688.

Vol. VI, p. 761, sec. 5200. [First ed., 1909 Supp., p. 353.]

Nature of loan.—Where a violation of this section is charged by a loan in excess of the statutory ten per cent, it seems that it should appear from the complaint whether or not the defendants are charged with such violation by reason of the indorsement or discount of commercial or business paper, or by reason of direct borrowing. *Curtis v. Metcalf*, (D. C. R. I. 1918) 265 Fed. 293.

Vol. VI, p. 762, sec. 5201. [First ed., vol. V, p. 140.]

Who may assail purchase.—A purchase of its own shares by a national bank in failing circumstances can be questioned only by the United States and not by private persons. *Iowa State, etc., Bank v. City Nat. Bank*,

(Neb. 1921) 183 N. W. 982, following Thompson v. St. Nichols Nat. Bank, 146 U. S. 240, 13 S. Ct. 66, 36 U. S. (L. ed.) 936.

Vol. VI, p. 766, sec. 5204. [First ed., vol. V, p. 142.]

Necessity of description of bad loans.—In an action by a receiver of a national bank against its directors to recover damages for payments of dividends in violation of this section, it is not necessary "that the plaintiff in his bill should set forth what loans depleted the capital, though it may become necessary for him to charge this before the master. Neither is it necessary to show that the depletion was caused by debts due on which interest was past due and unpaid for a period of six months; the same not being well secured. It does not follow, because section 5204 makes these bad debts, that it makes all other debts good, or that debts which are otherwise bad are not to be deducted to determine the unimpaired capital and surplus." *Curtis v. Metcalf*, (D. C. R. I. 1918) 265 Fed. 293.

Vol. VI, p. 767, sec. 5205. [First ed., vol. V, p. 143.]

The estate of a shareholder when holding the shares is responsible though insolvency occur and the assessment on the shares be made after his death. *Miller v. Hamner*, (C. C. A. 3d Cir. 1920) 269 Fed. 891, *reversing* (D. C. Del. 1920) 263 Fed. 956.

Liability of executor.—An executor who settles an estate without making provision for or disposing of a liability imposed by statute may, in a proper action seasonably brought, be held personally liable for devastavit. *Miller v. Hamner*, (C. C. A. 3d Cir. 1920) 269 Fed. 891, *reversing* (D. C. Del. 1920) 263 Fed. 956.

Decision of comptroller conclusive.—The action of the comptroller in ordering an assessment on the shares of an insolvent national bank is conclusive on the shareholders. *Miller v. Hamner*, (C. C. A. 3d Cir. 1920) 269 Fed. 891, *reversing* (D. C. Del. 1920) 263 Fed. 956.

Nature of action.—When a fractional part of a shareholder's liability to assessment is sought the action, though on the statute, is in equity. *Miller v. Hamner*, (C. C. A. 3d Cir. 1920) 269 Fed. 891, *reversing* (D. C. Del. 1920) 263 Fed. 956.

State statutes of limitations apply to suits brought to enforce the payment of an assessment, in the absence of federal provisions. *Miller v. Hamner*, (C. C. A. 3d Cir. 1920) 269 Fed. 891, *reversing* (D. C. Del. 1920) 263 Fed. 956.

Vol. VI, p. 770, sec. 5209. [First ed., vol. V, p. 145.]

II. EMBEZZLEMENT

1. Definition and Scope (p. 774)

"Embezzlement was a crime known to the common law, and was classed as a felony of the same grade as larceny. 4 Bl. Comm. 231; *United States v. Cadwallader*, (D. C.) 59 Fed. 677. The word 'embezzle' is constantly used in the Criminal Code of the United States. It has a technical significance, and conveys the idea of wrongful appropriation of the property of another by one intrusted with it, or who has possession of it under some trust duty or office. 3 Words and Phrases, p. 2354. The word 'embezzle' of itself implies a fraudulent and unlawful intention on the part of the person charged. No one can 'lawfully' or 'honestly' embezzle money or other property, and hence the use of the word 'embezzle' in an indictment against an employee of the Post Office Department, charging him with embezzling and secreting valuable letters, is sufficient to charge the offense; it is not necessary to allege that the same was done with fraudulent intent. *United States v. Atkinson*, (D. C.) 34 Fed. 316. A fraudulent intent may be presumed from the criminal act done. 1 Bishop's Criminal Procedure, §§ 278-290. The word 'embezzle,' as used in section 5209, Rev. St., or the words 'steal, take, and carry away,' as used in the common law, have a technical meaning. They do not, therefore, of themselves fully set forth every element of the offense charged. *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520." U. S. v. Davenport, (W. D. Tex. 1920) 266 Fed. 425.

Vol. VI, p. 796, sec. 5219. [First ed., vol. V, p. 517.]

I. Power of state to tax.

1. Rule stated.

2. Federal decisions as controlling.

II. Property taxable.

1. Stock and real property.

V. Discrimination.

2. "Moneyed capital."

3. Different system or method of taxation.

8. Shares taxed to owners.

VI. Exemptions and deductions.

3. Municipal, state, and federal bonds.

4. Real estate.

I. POWER OF STATE TO TAX

1. Rule Stated (p. 797)

National banks are governmental agencies of the United States and are not subject to taxation by the states on their general property. *Hannan v. Council Bluffs First Nat. Bank*, (C. C. A. 8th Cir. 1920) 269 Fed. 527.

2. *Federal Decisions as Controlling* (p. 797)

A decision of the Circuit Court of Appeals as to the power of a state to tax a national bank is controlling in a state court. *Des Moines Nat. Bank v. Fairweather*, (Ia. 1921) 181 N. W. 459.

II. PROPERTY TAXABLE

1. *Stock and Real Property* (p. 797)

Taxation of shares.—Where a statute purports to tax the shares of national banks "it cannot be assumed unless the language used plainly requires it, that the Legislature intended to tax the property generally of national banks, which it could not do, and not to tax the shares of national banks, which was the only thing it could tax, apart from the real estate of the banks. It must be assumed that the Legislature was familiar with the United States statutes creating national banks and granting and limiting the power of the state in taxing them. It is the more to be assumed because the Legislature of the state has constantly recognized this limitation of the taxing power over national banks, and its statutes have directed the taxing of national bank shares and not the taxing the general property of such banks." *Hannan v. Council Bluffs First Nat. Bank*, (C. C. A. 8th Cir. 1920) 269 Fed. 527, wherein it was said: "It is undoubtedly true that, in practical effect, a taxation of shares of stock results in much the same financial loss to the individual owners as if the corporation had been taxed on its property, but in legal contemplation the shares and the corporate capital are separate things."

An assessment against a bank, rather than against its shareholders, of taxes on its stock, is void. *Allen v. Bilyeu*, (Ore. 1921) 198 Pac. 208, holding that where a tax so levied had been paid and a part of it refunded for an insufficient reason, the county could not recover the amount so refunded though the bank had by laches lost the right to complain of the assessment of the tax against it.

V. DISCRIMINATION

2. "*Moneyed Capital*" (p. 801)

A state tax upon bank stock, state and national, at a higher rate than is imposed upon intangible personal property in general, including bonds, notes, and other evidences of indebtedness, violates the provisions of this section that state taxation of shares in national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," where moneyed capital in the hands of individuals, invested in bonds, notes, and other evidences of indebtedness, comes into competition, relatively material in amount, in the loan market, with the moneyed capital of national banks. Mer-

chants' Nat. Bank v. Richmond, (1921) 256 U. S. —, 41 S. Ct. 619, 65 U. S. (L. ed.) —(reversing (1919) 124 Va. 522, 98 S. E. 643), wherein the court said: "By repeated decisions of this court, dealing with the restriction here imposed, it has become established that while the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking."

A systematic and intentional omission to tax a material portion of other moneyed capital of the kind designated in this section, may be a violation of that section equally with a similar omission to tax by legislative enactment. *Hannan v. Council Bluffs First Nat. Bank*, (C. C. A. 8th Cir. 1920) 269 Fed. 527.

3. *Different System or Method of Taxation* (p. 802)

A state statute taxing shareholders of national banks on their shares should in order to be valid impose a like tax on state bank shares, representing similar moneyed capital. *Hannan v. Council Bluffs First Nat. Bank*, (C. C. A. 8th Cir. 1920) 269 Fed. 527. The court said: "The fact that individuals, such as private bankers, may deduct from the amount of their assessable property the amount of United States securities held by them, is not a discrimination forbidden by section 5219, as against the owners of national bank shares, assessed at their full value, because section 5219, in requiring other moneyed capital to be assessed at an equal rate, only refers to such moneyed capital as the state has the power to tax, and not to that property which the national power has exempted from taxation."

8. *Shares Taxed to Owners* (p. 804)

Effect of exemption of bank property.—A state statute assessing against the owners of shares of stock in a national bank the value thereof, regardless of the tax-exempt character of the assets of the bank, is valid. *Des Moines Nat. Bank v. Fairweather*, (Ia. 1921) 181 N. W. 459, following *Hannan v. Council Bluffs First Nat. Bank*, (C. C. A. 8th Cir. 1920) 269 Fed. 527.

VI. EXEMPTIONS AND DEDUCTIONS

3. *Municipal, State, and Federal Bonds* (p. 806)

Investment of bank capital in exempt securities.—Shares in a national bank are

subject to taxation by the states, in accordance with the grant of power conferred by this section, and the fact that a part or all of the capital of the national bank is invested in United States bonds or securities, which are exempt from taxation, does not entitle the shareholder to any deduction from an assessment upon the full value of his shares. *Hannan v. Council Bluffs First Nat. Bank*, (C. C. A. 8th Cir. 1920) 269 Fed. 527.

4. *Real Estate* (p. 807)

Deduction of actual value.—Where a statute provides that in assessing the value of the stock of private unincorporated banks the actual value of its real estate must be deducted, a general statute relating to corporate taxation and providing for the deduction of the assessed valuation of real estate will be construed as not being applicable to national banks, since a different construction would invalidate the tax statute as being in violation of the federal act because of the resultant discrimination. *Security Sav. Bank v. Board of Review*, (1a. 1920) 178 N. W. 562.

Vol. VI, p. 817, sec. 1. [First ed., 1914 Supp., p. 260.]

Purpose of act.—“The broad purpose of the Federal Reserve Act was to incorporate under federal control, as members of federal reserve banks, all national banks, as well as banks other than national banks. By force of the law all national banks, though still national banks, are members of federal reserve banks. National banks cannot exist and continue to operate alone as such within one year after the passage of the Federal Reserve Act of December, 1913, because of the mandate of the statutes.” *U. S. v. Davenport*, (W. D. Tex. 1920) 266 Fed. 425.

Vol. VI, p. 831, sec. 13. [First ed., 1914 Supp., p. 273.]

Accumulating checks in state country banks as ultra vires transaction.—Federal reserve banks exceed their powers by accumulating checks on state country banks, not members of the federal reserve system, until they reach a large amount, and then causing them to be presented for payment over the counter, or, by other devices, requiring payment in cash, so as to compel such banks to maintain so much cash in their vaults as to drive them out of business, or force them, if able, to submit to the scheme to compel them to become members of the federal reserve system, or at least to open a nonmember clearing account, which necessitates the maintenance of a larger reserve, and hence diminishes the lending power of such banks, so that, with the loss of the profit caused by the clearing of bank checks and drafts at par, some of such banks will be driven out of business, and the income

of all will be diminished. *American Bank, etc., Co. v. Federal Reserve Bank*, (1921) 256 U. S. —, 41 S. Ct. 499, 85 U. S. (L. ed.) —, reversing (C. C. A. 5th Cir. 1920) 269 Fed. 4.

Vol. VI, p. 850, sec. 5234. [First ed., vol. V, p. 170.]

V. ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS

1. *Determination and Assessment by Comptroller* (p. 859)

Judgment of court as taking place of assessment.—The judgment of a court of competent jurisdiction against a national bank takes the place of an assessment against it by the comptroller of the currency where it has gone into voluntary liquidation because of insolvency, and a cause of action accrues against the shareholders as of the date of the return of an execution unsatisfied. *Warner v. Citizens' Nat. Bank*, (C. C. A. 8th Cir. 1920) 267 Fed. 661.

Vol. VI, p. 873, sec. 5239. [First ed., vol. V, p. 180.]

III. Statutory liability of directors and enforcement thereof.

3. “Knowingly violate or knowingly permit,” etc.
7. Excessive loans.

III. STATUTORY LIABILITY OF DIRECTORS AND ENFORCEMENT THEREOF.

3. “Knowingly Violate or Knowingly Permit,” etc. (p. 880)

To same effect as original annotation, see *Curtis v. Metcalf*, (D. C. R. I. 1918) 265 Fed. 293.

7. *Excessive Loans* (p. 881)

Necessity of description of specific transactions.—In an action by a receiver against directors of a national bank to recover damages for loans made by them in excess of the ten per cent limitation, each defendant is entitled to be informed as to the extent of the charge of liability and which specific transactions are charged against them. *Curtis v. Metcalf*, (D. C. R. I. 1918) 265 Fed. 293, wherein the court said:

“I am of the opinion that each defendant is entitled to be informed as to the extent of the charge of liability under the statute for loans in excess of 10 per cent., so that it will appear whether he is charged for the entire amount of the loans to a particular borrower, or only for the amount by which said loans exceeded the statutory limit, and so that he may raise an issue as to his liability under the statute distinct from the issue as to his liability upon grounds other than those fixed by statute. Though section 5239 furnishes the exclusive rule applicable

to a loss resulting solely from a violation of the Banking Act, it does not follow that a defendant may not be liable on common law principles for the entire amount of the aggregate loans to a borrower, including the excess over the statutory limit. *Allen v. Luke* (C. C.) 163 Fed. 1018, 1020; *McCormick v. King*, 241 Fed. 737, 743 et seq., 154 C. C. A. 439; *Williams v. Brady* (D. C.) 232 Fed. 740. But the two grounds of liability are distinct and raise distinct issues of fact and law.

"It seems to have been held that the liability under section 5239 is applicable only to the amount of damages resulting from the excess of a borrower's obligations over the statutory limit, and is inapplicable to that portion of the gross indebtedness which did not exceed the specific limit. *Witters v. Sowles* (C. C.) 43 Fed. 405; *Rankin v. Cooper* (C. C.) 149 Fed. 1010, 1017; *Stephens v. Overstolz* (C. C.) 43 Fed. 771, 775. The bill should show clearly whether the defendant is charged with the whole loan or only with the excess.

"As was said in *Allen v. Luke* (C. C.) 141 Fed. 694, 696, the defendants 'are entitled to know the kind of alleged negligence upon which the complainant will rely.' * * * The complainant must specify the action or inaction relied on.' So, also, the defendants are entitled to know, respectively, which specific transactions are charged against them as violations of the statute involving liability under section 5239.

"As a basis of the charges of statutory liability it will be necessary for the plaintiff to show the amount of the bank's unimpaired capital stock and unimpaired surplus fund from time to time, in order to determine if the total liabilities of any borrower exceed one-tenth part thereof. R. S. § 5200, as amended June 22, 1906. This is unnecessary to establish the charges of negligence and of liability upon common-law grounds."

Vol. VI, p. 915, sec. 2. [First ed., vol. V, p. 106.]

Limitations of action under state statute.—In view of the requirements of the federal statute that an action to enforce the liability of shareholders shall be commenced in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established, the commencement of such an action in a state court does not give them the benefit of a state act providing that "if any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survives, his representatives, may commence a new action

within one year after the reversal or failure." *Warner v. Citizens' Nat. Bank*, (C. C. A. 8th Cir. 1920) 267 Fed. 661.

1919 Supp., p. 257, sec. 2.

Power to act as trustee and use name.—The name of a national bank must be approved by the Comptroller of the Currency. It can be changed, or, its use interfered with, by no other authority. In the case of a national bank, empowered by the laws of the United States to act in a fiduciary capacity, and bearing a name confirmed by national authority, clearly, any act on the part of the state which impairs, hampers, embarrasses, restricts, or in effect, wholly prevents, the discharge of its functions as a national banking institution with the incidental powers enumerated, must be void, because in express conflict with the paramount laws of the United States. *Fidelity Nat. Bank, etc., Co. v. Enright*, (W. D. Mo. 1920) 264 Fed. 236.

A state statute providing that only corporations organized under a certain state law shall be appointed as trustee, etc., must yield to this amendment. *Matter of Stanchfield*, (1920) 178 Wis. 553, 178 N. W. 310.

1919 Supp., p. 261, sec. 7.

Liberty bonds as "funds."—Liberty bonds delivered by the Treasury Department to a federal reserve bank to be held by it for exchange for other bonds, are a part of the funds of the bank as between the bank and its employees, so as to justify an indictment under this section for a conspiracy to embezzle the bank funds. *U. S. v. Jenks*, (E. D. Pa. 1920) 264 Fed. 697. The court said:

"It is contended that a verdict should have been directed for the defendants, upon the ground that the bonds alleged to have been embezzled did not constitute part of the funds and credits of the federal reserve bank. The arrangement under which the bonds were deposited in the bank constituted a bailment, under which the bank was to render the service to the United States of delivering the 4½'s in exchange for the 4's, and it was accountable to the Treasury Department for carrying out its part of the transaction.

"The evidence showed Patton's employment was such that the bonds came into his possession, and in taking them out he committed a breach of the confidence or trust reposed in him by reason of his employment. It is not material that the bonds belonged to the United States, or that the bank was responsible to it for the bonds, for between the defendants and the bank the bonds belonged to the bank, and a wrongful appropriation of the bonds was an appropriation of funds of the bank, and the defendants cannot be heard to say in their defense that the bonds which their principal authorized

them to deliver to holders of the 4's for the purpose of conversion belonged to any one but the principal."

Defenses.—On the trial of an indictment for conspiracy by employees to embezzle bank funds in the form of Liberty bonds deposited with the bank by the Treasury Department for exchange for other bonds, where the evidence showed that the bonds were secretly taken away and sold and the proceeds converted to defendants' own use, it is no defense that the defendants intended to purchase other bonds of an equivalent amount and replace them in the bank. The natural and probable consequences of the act caused a presumption of intent to injure and de-

fraud. *U. S. v. Jenks*, (E. D. Pa. 1920) 264 Fed. 697.

Evidence.—On the trial of an indictment for conspiracy by employees to embezzle bond funds in the form of Liberty bonds, in order to prove the division of the alleged proceeds among the conspirators evidence is admissible of the checks given by the brokerage company which conducted the transaction to one of the defendants, the deposit of such checks in the bank by the drawee, the giving of checks by the latter to the other defendant for one-half the amount thus received, and the deposit in the bank of such checks by the other defendant. *U. S. v. Jenks*, (E. D. Pa. 1920) 264 Fed. 697.

NATURALIZATION

Vol. VI, p. 944, sec. 2169. [First ed., vol. V, p. 207.]

Repeal of section.—This section was not repealed by implication by the act of June 29, 1906 [6 Fed. Stat. Ann. (2d ed.) p. 952 et seq.]. *Petition of Easurk Emsen Charr*, (W. D. Mo. 1921) 273 Fed. 207.

This section in so far as it embraces the words "white persons" was not repealed by the Act of Feb. 5, 1917, ch. 29. [1918 Supp. Fed. Stat. Ann. 212 et seq.] *In re Bhagat Singh Thind*, (D. C. Ore. 1920) 268 Fed. 683, wherein the court said:

"Repeals by implication are not favored, and, unless there is manifest repugnancy between the later and the former act, the former must remain operative. The argument is that, as Congress eliminated the words 'white persons' from the Immigration Act, the act in question, it must be inferred that it intended to eliminate these words also from section 2169, and thus to amend that section accordingly. This does not necessarily follow. Congress was dealing with the subject of immigration, and not of naturalization, and it may well be that Congress designed thenceforth to exclude Hindus from entry into the United States, and still permit such as were domiciled here the privilege of being naturalized. In this light, I see no repugnancy between the act and section 2169 and other naturalization regulations."

"Free white persons"—*In general.*—In accordance with numerous holdings the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally speaking, 'free white persons' includes members of the

white or Caucasian race as distinct from the black, red, yellow, and brown races.

"Whether or not historically the term 'Caucasian' is accurate as a designation of the white race, it is a term which appeals to common understanding and to that of the lawmakers with practical definiteness, and the term 'white person' may now be said to have a well understood meaning." *Petition of Easurk Emsen Charr*, (W. D. Mo. 1921) 273 Fed. 207.

Hindu.—Section 3 of the Act of Feb. 5, 1917, (1918 Supp. Fed. Stat. Ann. 214) which excludes Hindus from admission into this country by territorial delimitations, does not deprive a high class Hindu of his right to be admitted to citizenship where it appears that he was a resident in this country prior to the time when such act was passed. *In re Bhagat Singh Thind*, (D. C. Ore. 1920) 268 Fed. 683.

Korean.—Koreans are admittedly members of the Mongol race. "Whatever their precise shade of color may be defined to be, they are confessedly not white persons, either in fact or in accordance with common understanding, and they are about as far removed from Europe and the Mediterranean Sea as could well be imagined." *Petition of Easurk Emsen Charr*, (W. D. Mo. 1921) 273 Fed. 207.

Vol. VI, p. 947, sec. 2170. [First ed., vol. V, p. 208.]

Purpose of section.—"While Congress, in dealing with the naturalization problem, recognized it to be impolitic to perpetuate the character of alien longer than was absolutely necessary, the law-making body still recognized that a reasonable probationary term should be prescribed to enable candidates to get rid of foreign and to acquire American attachments, to learn the principles and imbibe the spirit of our government, and to admit of a probability, at

least, of their feeling a real interest in our affairs. A residence of not less than five years was, therefore, required of an alien before he might petition for citizenship, this to conciliate the feelings of the candidate to the manners, laws, and government of this country." *In re Vasicek*, (E. D. Mo. 1921) 271 Fed. 326.

Vol. VI, p. 952, sec. 3. [First ed., 1909 Supp., p. 365.]

I. INTRODUCTORY (p. 953)

Historical as to origin and growth of naturalization laws, see *In re Goldberg*, (E. D. Mo. 1920) 269 Fed. 392.

Naturalization as a matter of right.—"Aliens have no right, inherent or statutory, to be admitted to membership in the body politic of the United States of America. Naturalization, then, being solely and entirely a political privilege extended by sovereign grace to aliens resident within the United States, Congress has undoubted authority under the Constitution to prescribe the terms and conditions upon which such privilege shall be granted." *Ex p. Eberhardt*, (E. D. Mo. 1921) 270 Fed. 334; *In re Tomarchio*, (E. D. Mo. 1920) 269 Fed. 400; *In re Sigelman*, (E. D. Mo. 1920) 268 Fed. 217.

Necessity of strict compliance with law.—"The provisions of the Naturalization Law must be strictly complied with in order to confer jurisdiction." *Petition of Briesse*, (E. D. N. Y. 1920) 267 Fed. 600.

Balancing benefit to country with obligations assumed.—"Since the status of citizenship involves reciprocal obligations as between state and citizen, it ought in fairness and in compensation for such obligations to be beneficial as well to the state as to the person who by naturalization seeks citizenship. To this end, the proofs exacted from the applicant, and the status and condition of the applicant, which these proofs disclose, ought to be considered in the light of what such status and conditions promise to the government for the future, and with only negligible regard for the past. *Luria v. United States*, 231 U. S. 23, 34 Sup. Ct. 10, 58 L. ed. 101. While the antecedent character of the applicant and his reputation and acts in the past are persuasive, as aiding the assumption of continuance upon a good course, yet the government is entitled, before it receives him, and before it assumes the obligation to protect him as a citizen, to consider whether the burdens entailed will not be so far greater than the benefits accruing to it as to make the naturalization of the applicant a bad or dangerous bargain, and a bargain utterly unfair to its other millions of citizens." Thus, where an applicant had left his wife and children in Russia in 1913 and had not been able to communi-

cate with them for a period of seven years, his petition was denied where it appeared that he sought citizenship mainly for the purpose of returning to Russia under the protection of the American flag in order to get his family and bring them to this country, and it further appeared that he secured deferred classification in the draft for army service on his representation that his wife and children were "mainly dependent on his labor for support." The court, however, said it did not particularly stress the latter point, and it principally emphasized the fact that the benefits which the country would receive were entirely incommensurate with the obligations it would incur by reason of possible foreign complications. *In re Sigelman*, (E. D. Mo. 1920) 268 Fed. 217.

Vol. VI, p. 956, sec. 4. [First ed., 1909 Supp., p. 366.]

A privilege not a right.—To the same effect as original annotation, see *In re Roeper*, (D. C. Del. 1921) 274 Fed. 490.

Terms and conditions to be strictly enforced.—"The terms and conditions specified and prescribed by Congress respecting the grant to aliens of the favor or privilege of naturalization as citizens of the United States of America must be strictly construed and enforced, and aliens are bound to strictly meet and conform to these terms and conditions upon which alone the right they seek can be conferred." *Ex p. Eberhardt*, (E. D. Mo. 1921) 270 Fed. 334.

Vol. VI, p. 958, sec. 4, par. first. [First ed., 1909 Supp., p. 366.]

"District in which such alien resides."—In New York it is held that the jurisdiction of the Supreme Court is limited to the county in which the alien resides and makes his application. *Petition of Briesse*, (E. D. N. Y. 1920) 267 Fed. 600, wherein it was held that a declaration of intention was ineffectual where it incorrectly stated that the applicant was a resident of the county in which he filed his declaration.

Effect of subsequent acts on declaration.—It is said that there is not any statutory provision or controlling decision, or decision by any appellate court, which would warrant a holding to the effect that a declaration of intention, properly made, is "violated" or becomes "void" by reason of subsequent acts or conduct on the part of the alien in question, in the absence of a formal declaration withdrawing such intention to become a citizen, and in the absence of an express statutory provision to that effect. *In re Miegel*, (E. D. Mich. 1921) 272 Fed. 688. In this connection the court further said:

"By making his declaration of intention, petitioner took the first step toward citizen-

ship. There were, to be sure, several other steps to be taken before the coveted goal of citizenship could be reached, and it might be that he could not, because of failure or inability to take such other steps, attain such goal. That, however, is a wholly different consideration and one which cannot change or effect the fact that the first step had actually been taken. The statute having prescribed the requisites of this first step, and the latter having been taken in strict conformity to such statute, this court cannot hold, and thereby in effect declare, that what has, in fact and according to the undisputed public record, been done by petitioner has not been done."

Vol. VI, p. 959, sec. 4, par. second.
[First ed., 1909 Supp., p. 366.]

II. Signature and verification.

2. Verification.

III. Filing petition.

1. Time of filing.

V. Certificate.

II. SIGNATURE AND VERIFICATION

2. Verification (p. 961)

The words "duly verified" as used in this section "mean a verification before the clerk of the court or his duly authorized deputy, and not before a notary public or other officer." *In re Guary*, (S. D. N. Y. 1921) 271 Fed. 968.

Substitution of witnesses.—A competent witness to a naturalization application cannot be substituted for an incompetent one. *In re Kornstein*, (E. D. Mo. 1920) 268 Fed. 172.

Effect of insufficient verification.—A witness who testifies to the good character of a candidate, in a case where such candidate is not in truth and in fact a man of good character, is not a credible witness, such as the law calls for and a petition verified by such an incredible witness will be denied. *In re Kornstein*, (E. D. Mo. 1920) 268 Fed. 172, holding also that the verification of a naturalization application by an incompetent witness renders it void.

III. FILING PETITION

1. Time of Filing (p. 962)

"Nor more than seven years."—As to the limitation of seven years on the life of a declaration of intention it is said: "Existing law places a limitation of seven years upon the life of a declaration of intention. The law excludes parts of days. A declaration is therefore valid, so far as its age is concerned, for the purpose of petitioning for naturalization, on its seventh anniversary. *In re Babjak* (D. C.) 211 Fed. 551. But there is no expedient that may be resorted to whereby the life of a given declaration of intention may be extended beyond said

seventh anniversary." *Ex p. Eberhardt*, (E. D. Mo. 1921) 270 Fed. 334.

V. CERTIFICATE (p. 964)

Necessity of filing.—As to the necessity of filing the certificate of arrival the court, in *Ex p. Eberhardt*, (E. D. Mo. 1921) 270 Fed. 334, said:

"It is particularly to be noted that 'at the time of filing his petition there shall be filed with the clerk of the court,' by the petitioner, the certificate of arrival called for by the statute. The same provision of law requires the candidate to make a part of his application, in the same manner, his declaration of intention. Where a valid declaration of intention is not attached to such a petition at the time of its filing, that fact renders the application void. *United States v. Morena*, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. ed. 359. And the same rule prevails, as we have seen in the *Ness Case*, supra, where at the time of the execution of the petition, the same was not supported by a valid certificate of arrival. The fact that such a certificate was in existence, on the date petition was executed, and that the same was being mailed to St. Louis from Washington, does not in any manner alter the situation. The statute is specific in its requirement that at the time of the execution of the petition the certificate of arrival needed must be in the hands of the clerk of the court, who is required to make the same an integral part thereof. A later attaching of such a certificate of arrival to a given petition does not meet the requirements of the law. Such petition is a nullity. It is not voidable, but is void. . . .

"It is worthy of notice, also, that the administrative officer concerned with naturalization matters, to wit, the Secretary of Labor, has in naturalization regulations promulgated September 24, 1920, rule 5, declared that when a clerk of court executes a petition for an alien who arrived after June 29, 1906, and fails to attach thereto his certificate of arrival, then no valid petition is docketed. While the construction of a statute is a judicial function, the ultimate exercise of which must lodge in the courts, yet 'the construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government.'"

Vol. VI, p. 967, sec. 4, par. third.
[First ed., 1909 Supp., p. 368.]

Reservations in taking oath.—Where it is manifest that the petitioner cannot, without reservations, mental or otherwise, take the oath of allegiance, such oath should not be administered or accepted. *In re Roeper*, (D. C. Del. 1921) 274 Fed. 490, so declaring

in denying the petition of one who at the final hearing in open court testified, in substance, that he has conscientious scruples against the shedding of human blood, even in warfare, and that, if admitted to citizenship, he would not be willing to serve in the field in the military forces of the United States, if called upon to do so.

Vol. VI, p. 967, sec. 4, par. fourth.
[First ed., 1909 Supp., p. 368.]

- I. "Satisfaction of court."
 III. "Good moral character."

I. SATISFACTION OF COURT (p. 967)

Acquaintance with American institutions essential.—As to qualification in this respect it has been said:

"While a candidate for naturalization is to be commended for having acquired material wealth, and for having lived a blameless life, during his period of residence here, nevertheless such a state of affairs does not relieve him in any way of the necessity of possessing a working knowledge of the form and general structure of our government, and of the responsibilities and duties, as well as the privileges of a citizen thereof. Lacking such qualifications, it is impossible for him to swear, either intelligently or conscientiously, that, as required by law, he is 'attached to the principles of the Constitution of the United States,' or that he is 'well disposed to the good order and happiness of the same.' Under our form of government, the people, theoretically, at least, make, interpret, and execute the laws. Accordingly, their reasonable intelligence and education are indispensable prerequisites to the preservation and transmission of civil liberty and republican institutions.

"The requirements of law cannot be held to have been met on a mere showing of the candidate that he is peaceable, industrious, of good character, and law-abiding. By reference to decisions of the courts announced prior to the Naturalization Act of 1906 (34 Stat. pt. 1, p. 596), and during the period the government did not, as now, exercise supervision of the naturalization of aliens, we find declared in *In re Naturalization*, 5 Pa. Dist. R. 597, that no person will be naturalized who has not a general familiarity with the federal Constitution and with our method of government, state and national. The act of Congress requires each applicant to take an oath that he is attached to the principles of the Constitution. No applicant will be permitted to so swear unless he knows what these principles are. No person should be naturalized who has not some general comprehension of what the Constitution of the United States is and of the principles which it affirms. *In re Bodek* (C. C.) 63 Fed. 813.

Also see *Rushworth v. Judges*, 58 N. J. Law, 97, 32 Atl. 743, 30 L. R. A. 761; *In re Conway*, 9 Misc. Rep. 652, 30 N. Y. Supp. 835; *In re Lab's Petition*, 3 Pa. Dist. R. 728, 5 Pa. Dist. R. 597; *In re Kanaka Nian*, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726. The applicant's oath to support the Constitution of the United States will not be accepted, if, upon examination, it appears that he does not understand its significance, or is without such knowledge of the Constitution as is essential to the rational assumption of an understanding to support it . . . even a casual consideration of such a case must, however, convince any thoughtful person that as an indispensable prerequisite to naturalization the candidate must possess an acquaintance with, and working knowledge of, the principles of the Declaration of Independence and Constitution of the United States. An intelligent sympathy with, and understanding of the purposes of these great charters of human liberty must be shown by the candidate, and he must have a comprehension of the obligations and responsibilities of citizenship arising from his taking the oath of allegiance forming a part of his naturalization proceeding." *In re Goldberg*, (E. D. Mo. 1920) 269 Fed. 392.

Understanding of terms "anarchy" and "polygamy."—A petitioner for naturalization who admits that he does not know the meaning of the words "anarchy" and "polygamy" as used in his petition must be held to have failed to meet the requirements prescribed in naturalization cases, as it cannot be said in such a case that the candidate is in truth and in fact "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same." *In re Vasicek*, (E. D. Mo. 1921) 271 Fed. 326.

III. "GOOD MORAL CHARACTER" (p. 971)

The test in any given naturalization case is whether the candidate is in law and in fact actually entitled to citizenship. *In re Kornstein*, (E. D. Mo. 1920) 268 Fed. 172.

Nature of testimony as to moral character.—As to the nature of the testimony required of witnesses in respect to moral character it is said:

"The spirit of the law requires that upon the hearing they shall, in person, in open court, positively support their preliminary affidavits to the effect that, in their opinion, the petitioner is in every way qualified to be admitted as a citizen. The requirement is not that they shall testify that he is qualified in every way considered necessary in the opinion of the court, but qualified in every way in their, the witnesses' opinion. The government wants no citizen whom his own selected friends cannot whole-heartedly recommend. Witnesses may feel that they

know the petitioner sufficiently well to say of their own personal knowledge that he is a man of good moral character, but, in the very nature of things, in the vast majority of cases, the court must depend upon good reputation of the petitioner as vouched for by these witnesses, as the best evidence of good character, and, if the two witnesses of the petitioner, chosen by himself, plainly show themselves unwilling to positively and unequivocally state that the petitioner has a good reputation in the community where he lives, and that they themselves believe him to be a man of good moral character in all respects, and that his neighbors think well of him, and that he is in every way qualified in their opinion to be admitted, they have disqualified themselves as witnesses in his behalf, at least unless it develops that their reason for not so doing is entirely groundless or whimsical." *U. S. v. Olsen*, (W. D. Wash. 1921) 272 Fed. 706.

Maintaining place of bad repute.—One who has conducted a disorderly hotel for years cannot be considered a man of good moral character for naturalization purposes. Such an offense is one against morals which will permanently disbar him from citizenship and his application will be denied with prejudice to his right to renew it. *In re Kornstein*, (E. D. Mo. 1920) 268 Fed. 172.

Member of I. W. W. organization.—In *U. S. v. Olsen*, (W. D. Wash. 1921) 272 Fed. 706, a certificate of naturalization, issued to a member of the I. W. W. organization, was cancelled.

Claiming exemption from military duty under a plea of alienage is a bar to citizenship under section 2 of the Selective Service Act as amended by section 4, ch. 12, of Act of July 9, 1918 (1918 Supp. Fed. Stat. Ann. sec. 4, p. 895). *In re Tomarchio*, (E. D. Mo. 1920) 269 Fed. 400. And *In re Miegel*, (E. D. Mich. 1921) 272 Fed. 688, the act of a petitioner in claiming exemption as an alien enemy from military service in the army of the United States during the war, was held to show in itself, that he was not "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," within the meaning of this section, and his petition for citizenship was therefore denied on that ground. This view, however, was held not to be applicable in the case of an alien who claimed an exemption to which he was not entitled. See also as to the second proposition *In re Rubin*, (E. D. Mich. 1921) 272 Fed. 697.

Registration for military service with German consul.—In *In re Cuny*, (S. D. Tex. 1920) 269 Fed. 464, the government objected to the admission of the petitioner to citizenship on the ground that, in the summer of 1914, he, having theretofore filed his declaration of intention to become a citizen of the United States, did register for military service with the German consul at Galveston.

The contention of the government was that this registration invalidated the declaration of intention, and therefore left the petitioner in the case of one without a declaration of intention, wanting in one of the essential formal requisites for admission.

The petitioner replied that, while it was true that he did register, he did so, not for the purpose of aiding Germany, but in order that, after the war should be over, if he should at any time in his future life have an opportunity to go to Germany to visit his mother, he could not be excluded or imprisoned, and sought to emphasize this position by the proof, uncontradicted, that while he was technically a German subject, because born in Alsace, he was born of French parents, educated in France, and always cherished a lively antipathy toward the Germans; that he knew, when he registered, that it would not be possible for him to return to Germany for service, and he registered, not with the intention of serving, but merely to preserve his standing.

The petitioner was of high moral character, and the only objection to his admission is grounded on the point above stated. The court said: "In view, therefore, of the fact that at the time of his registration the United States was not at war with Germany, and that the evidence not only fully acquits petitioner of any disloyalty to the United States, but furnishes a record of loyalty and efficient helpfulness in the war work of this government after the United States became a party to the conflict, it is my opinion that the order in this case should be that the petition of the applicant be dismissed without prejudice, with the right to refile, or, if he is so disposed, to withdraw the declaration as a basis for filing the petition in any other district to which he may remove, with the right to the petitioner to be admitted upon showing that for a period of five years prior to the filing of his new petition he conducted himself in the manner which the statute requires this five years to be arrived at, without taking into consideration any time prior to the registration with the German consul; and it will be so ordered."

Attempt to enlist in British army.—In *In re Watkiss*, (S. D. Tex. 1920) 269 Fed. 466, which was a hearing on the petition for citizenship of John Walford Watkiss, a subject of Great Britain, whose papers were in proper form, and who stood accredited in every respect for the award of citizenship, except for the objection raised by the government, through its examiner, that petitioner did, subsequent to the date of the execution of his declaration of intention, endeavor to enlist in the British armies for service in the World War. The court declared:

"The record containing no proof of a provision for compulsory military service in the British army applicable to petitioner at the time when he undertook to enlist in

it, his act must be held to be that of a volunteer, which neither in fact nor in law was a recognition of the authority of the British government, or an act of allegiance thereto. This being true, I find nothing in the conduct of petitioner which could be said to be contrary to the Constitution of the United States, or other than well disposed to the good order and happiness of the same.

"In the Case of John Peter Cuny, 269 Fed. 464, opinion filed the 3d day of November, 1920, where the applicant registered with the German consul, I have set out the reasons which induced me to hold that that petition should be denied, and to that opinion I refer for the general considerations controlling here. Applying those considerations to this case, I think it clear that this petition should be granted, and the applicant admitted, for, while the distinction at first blush between this and the Cuny Case may appear narrow, it is none the less clear, resting as it does upon the fact that the act of Cuny was a rendering allegiance to a compulsory requirement, and therefore an attorning or act of fealty to the German government, while the acts of Watkiss were merely voluntary acts of a person who felt the call of a righteous cause, and desired to do his part in it, with no attorning to or recognition of the authority of the British government over him.

"It is therefore my judgment, and it will be so ordered, that the petitioner be admitted."

Vol. VI, p. 977, sec. 9. [First ed., 1909 Supp., p. 370.]

- II. Burden of proof.
- IV. Judgment or order.
- 5. *Res judicata*.
- VII. Vacation of proceedings.

II. BURDEN OF PROOF (p. 978)

To same effect as original annotation, see *In re Vasicek*, (E. D. Mo. 1921) 271 Fed. 326.

IV. JUDGMENT OR ORDER

5. *Res Judicata* (p. 979)

A denial of a candidate's petition for naturalization on the ground that he is not a man of good moral character will debar him again seeking citizenship for at least five years. *In re Kornstein*, (E. D. Mo. 1920) 268 Fed. 172.

VII. VACATION OF PROCEEDINGS (p. 980)

Procuring passport as citizen of foreign country.—A petition for naturalization will be denied where it appears that the applicant subsequent to his declaration of intention presented himself before the diplomatic officer of his native land and procured a passport as a subject of that country. *In re Aldani*, (E. D. Mo. 1920) 269 Fed. 193.

The court said: "Some three months after filing the petition for naturalization in question, the candidate, on his own testimony, returned to Italy, the country of his nativity. He was unable to procure a passport from the American authorities. He accordingly presented himself before the diplomatic officer of his native land, stationed here in St. Louis, and procured a passport as an Italian subject. Therein he renewed his oath of allegiance to the monarch governing that country.

"Such action is inconsistent with the avowal contained in the declaration of intention of the candidate. His petition for naturalization will accordingly have to be denied for the reason that the declaration of intention has been nullified. A petition for naturalization not predicated on a valid declaration of intention, is void."

Vol. VI, p. 983, sec. 11. [First ed., 1909 Supp., p. 371.]

Scope of examination.—The government may inquire into the entire life history of a candidate in determining his right to naturalization through the cross examination prescribed by this section. *In re Kornstein*, (E. D. Mo. 1920) 268 Fed. 172.

Vol. VI, p. 987, sec. 15. [First ed., 1909 Supp., p. 373.]

- II. Construction in general.
- III. Grounds for cancellation.
- 2. Fraud.
- 3. Illegal procurement.

II. CONSTRUCTION IN GENERAL (p. 990)

"Illegally."—A narrow meaning will not be attached to the word "illegally" by paraphrasing it with "unlawfully." *U. S. v. Olsen*, (W. D. Wash. 1921) 272 Fed. 706.

Certificates of citizenship affected.—The provisions of this section apply not only to certificates of citizenship issued under the act but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws. *Schurmann v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 917.

III. GROUNDS FOR CANCELLATION

2. *Fraud* (p. 991)

Disloyalty at time of making application.—*In U. S. v. Herberger*, (W. D. Wash. 1921) 272 Fed. 278, the certificate of naturalization issued to the defendant, a person of German birth, was cancelled on the ground of disloyalty existing at the time of making his application. The court said: "Loyalty or allegiance is, necessarily, of slow growth; therefore, somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change

their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may not be fully realized at the time of their naturalization, renders it none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter."

3. *Illegal Procurement* (p. 982)

In general.—Where an alien engaged in an immoral and illegal business procures naturalization he will on proper proceedings be stripped of his citizenship on the ground that he fraudulently and illegally procured the same. *In re Kornstein*, (E. D. Mo. 1920) 268 Fed. 172.

False swearing in renouncing allegiance.—Original fraud in renouncing allegiance to a foreign sovereign may be determined by later conduct of the person. *Schurmann v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 917, so holding in the case of a person of German birth who before and during the war with Germany showed his allegiance to that nation by his remarks and conduct.

Membership in organization to promote anarchy.—In *U. S. v. Olsen*, (W. D. Wash. 1921) 272 Fed. 706, a certificate of naturalization to a member of the I. W. W. organization was cancelled as illegally procured.

Vol. VI, p. 1001, sec. 30. [First ed., 1909 Supp., p. 379.]

Section as repealing R. S. sec. 2169.—The act did not repeal by implication section 2169 of the Revised Statutes (see 6 Fed. Stat. Ann. 2d ed. p. 944). *Petition of Easurk Emsen Charr*, (W. D. Mo. 1921) 273 Fed. 207.

Purpose.—This act was passed in order "to make possible the naturalization of citizens of the Philippine Islands and of Porto Rico, who were theretofore generally excluded because, first, the naturalization laws of the United States applied only to aliens, and, second, they required a renunciation of former allegiance. It was contended that this provision of the act of 1906 removed the inhabitants of those islands from the limitation of section 2169. A native of the Philippine Islands applied for citizenship upon that ground. Ethnologically he was found to be one-fourth white and three-fourths brown or Malay. His application was denied for the reason that he was not a white person, and section 2169 controlled and limited the provisions of the act of 1906 as part of the general naturalization statute of the United States." *Petition of Easurk Emsen Charr*, (W. D. Mo. 1921) 273 Fed. 207.

1918 Supp., p. 488, sec. 1, par. seventh.

Purpose and scope of act.—"The purpose of this act is well understood. It was to reward those aliens who had entered the military or naval service of the United States, as therein described, by admitting them to citizenship without many of the slow processes, formalities, and strictness of proofs which were rigidly provided and enforced under the law affecting naturalization as it existed then, and as it exists now. The amendments made were not to the title as a whole, but primarily to section 4 of the Act of June 29, 1906, 34 Stat. 596. This section deals, not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. This in itself is significant in its bearing upon the specific interpretation we are required to make. * * *

"It should be borne in mind that the policy of our law, from 1802 down to the present time, has had in view the prevention of all aliens, not free white persons, from becoming citizens. The first exception was introduced by the act of July 14, 1870, at which time persons of African nativity and African descent were included, in view, as has been stated, of the peculiar situation of inhabitants in this country of that race. The revisers of the laws of the United States, at the first session of the Forty-Third Congress from 1873 to 1874, inadvertently omitted the words 'free white persons' from section 2169; but this was immediately corrected, upon discovery, by Act of February 18, 1875, entitled 'An act to correct errors and to supply omissions in the Revised Statutes of the United States,' and the language of that section was restored to its present reading. The repealing section of the act of 1906 did not include section 2169, and the present act of 1918 expressly preserves it in force, 'except as specified in the seventh subdivision of this act and under the limitation therein defined.' The history of legislation upon this subject convincingly demonstrates the purpose of Congress to limit applicants for naturalization to free white persons and those of African nativity and descent." *Petition of Easurk Emsen Charr*, (W. D. Mo. 1921) 273 Fed. 207.

"Any alien."—The words "any alien," appearing in the Act of May 9, 1918, are subject to prior judicial interpretation, and embrace only such aliens as could theretofore have been admitted to citizenship, and merely provide more expeditious and favorable terms of admission than before existed. *In re Geronimo Para*, (S. D. N. Y. 1919) 269 Fed. 643.

The privilege granted by this section is limited to those races otherwise eligible to naturalization and has been held not to ex-

tend the privilege to a Korean. Petition of Easurk Emsen Charr, (W. D. Mo. 1921) 273 Fed. 207.

Effect of military service by aliens.—It may be added that the provisions of the draft law clearly did not contemplate the incorporation of those not eligible to citizenship into the land and naval forces of the United States. That such may have been inducted into the service through voluntary enlistment or inadvertence of draft boards cannot affect the purpose of Congress, in regard to naturalization. Petition of Easurk Emsen Charr, (W. D. Mo. 1921) 273 Fed. 207, wherein it was said:

"What are the specifications referred to in the seventh subdivision, and what is the limitation therein defined? As has been said, the only reference to race contained in that section was as to Filipinos and Porto Ricans. For this reason, it may well have been deemed necessary, or at least expedient, to reaffirm the binding force and effect of section 2169. It has already been shown that Filipinos, in certain cases, have been adjudged inadmissible to citizenship because of racial disqualification. Some citizens of Porto Rico may be conceived to present similar disabilities. Congress, in passing this law, must be presumed to have acted with knowledge of all previous legislation and of its interpretation by the courts. The exceptions referred to must have been the races especially mentioned in the seventh subdivision, and the limitation was the military or naval service performed. In other words, under the general law, neither a Filipino nor a Porto Rican could necessarily have been admitted to citizenship. Under this subdivision, he may be, irrespective of race, if he has performed the service specified.

"If, as contended by the petitioner, the exception reserved was intended to mean *any* alien who should perform military service, it is difficult to perceive why the provision as to the continuing force of section 2169 was necessary at all; the limitation of military or naval service being sufficient to preserve that section intact in all its general features. This view is corroborated and emphasized by the fact that, throughout the original title 30, Revised Statutes of 1878, the term 'any alien' is used repeatedly without qualification, the limitation to free white persons and those of African nativity and descent being raised entirely from section 2169; and the same is true of section 2166 and other acts conferring special privileges upon soldiers and sailors. Moreover, as has been previously stated, the Act of May 9, 1918, was chiefly intended to modify section 4 of the Act of 1906 as to procedure merely, shortening the time and smoothing the way to citizenship. Section 2169 has to do only with racial qualification, and out of

abundance of caution it was expressly reaffirmed."

"Merchant vessel" defined.—A merchant vessel is a ship that is engaged in a carrying trade in connection with trade and commerce, and not merely engaged in the transportation of such goods as may be necessary for repairs of cable lines of a privately owned concern, and which goods are not designed for the general trade. *In re Jupp*, (W. D. Wash. 1921) 274 Fed. 494.

1918 Supp., p. 491, sec. 1, par. tenth.

Act available to supply record evidence of naturalization.—In *State v. Superior Ct.*, (1920) 113 Wash. 54, 193 Pac. 226, this act was referred to arguendo in sustaining a state statute prescribing the proof of citizenship to be furnished by a naturalized citizen. Answering an argument that it disfranchised citizens who might be unable to furnish record evidence of their naturalization, the court quoted the act and said:

"It will be noted that this statute provides that any person not an alien enemy, who has resided uninterruptedly in the United States during the 5 years next preceding July 1, 1914, and was on that date otherwise qualified to become a citizen of the United States, and because of misinformation regarding his citizenship status erroneously exercised the rights, and performed the duties of a citizen in good faith, may file a petition for naturalization prescribed by the law, without making the preliminary declaration of intention required of other aliens, and upon satisfactory proof may be admitted as a citizen of the United States. Even if the naturalization papers or a copy thereof cannot be produced, it is no great hardship upon a naturalized citizen, who has previously in good faith exercised the rights and performed the duties of a citizen of the United States, to comply with that act, and thereby be able to furnish the proof required by the registration act of this state."

1919 Supp., p. 274, sec. 1.

Scope of section.—In *Petition of Easurk Emsen Charr*, (D. C. W. D. Mo. 1921) 273 Fed. 207, the court said, regarding this section:

"Because of the importance of the question involved and the earnestness of counsel, the court has made further investigation of the proceedings in Congress attending this legislation, in order, if possible, to ascertain the intent and purpose of that body in view of the claimed ambiguity in the language employed. This enactment appears in the naturalization section of the Sundry Civil Act Public No. 21, 66th Congress. It is not mentioned in the report on the bill, and a search of the Congressional Record discloses

that it was not mentioned in any of the debates either in the House or Senate, and therefore there is nothing in the records of Congress to show the intent of Congress as to this particular section. It is worthy of note in this connection that a bill of similar purport, H. R. 6804, entitled 'A bill to facilitate the naturalization of persons who served in the military or naval forces of the United States since April 6, 1917, who have been, or who may be, honorably discharged therefrom,' introduced June 27, 1919, by Congressman Rogers, and referred to the committee on immigration and naturalization, failed to pass. It would seem, therefore, that this clause of the naturalization section of the Act approved July 19, 1919, was simply attached as a rider to an appropriation bill, and went through without scrutiny or debate by either house. It cannot, therefore, in the absence of language clearly expressing that purpose, be held to relax the provisions of the prior Act of May 9, 1918, which have been duly considered.

"The court has also received a copy of the report of the Senate committee on immigra-

tion upon the Act of May 9, 1918, aforesaid. It contains this significant language:

"It [section 2 of the act] also declares that nothing in the act shall enlarge or repeal in any way section 2169 of the Revised Statutes, except as specified in the seventh subdivision and under the limitation therein defined. This means that Filipinos may be naturalized who are enlisted in the army or navy of the United States and are honorably discharged therefrom."

"This confirms the purpose and intent of Congress as deduced and declared in the foregoing memorandum. The words 'any person of foreign birth' occurring in the Act of July 19, supra, do not enlarge the word 'alien' as contemplated by these acts, in view of their specific reservations. A reason for the later legislation, if one is necessary to be advanced, is found in the further limitation of the application of the provisions of section 7 to a period of one year after all the American troops are returned to the United States, which provision is not found in the earlier act."

NAVY

Vol. VI, p. 1141, sec. 1496. [First ed., vol. V, p. 295.]

Promotion as of what date.—Where an ensign in the Navy entitled to promotion to the grade of junior lieutenant on January 31, 1910, successfully passes his examination as required by this section, but is found temporarily disqualified by the medical board acting under R. S. sec. 1493, and afterwards successfully passes the medical examination, he is entitled to the pay of lieutenant, junior grade, from the date when he was eligible to promotion to that grade. *Wadsworth v. U. S.*, (1920) 55 Ct. Cl. 383.

Vol. VI, p. 1154, sec. 5. [First ed., vol. V, p. 302.]

Effect of authority to sell given by President.—The effect of authority thus given to the Secretary of the Navy to sell a vessel for such price as he shall approve is only to relieve him of the restriction of the act of 1883 that a bid, to be accepted, must be more than the appraised value and to permit him to reject all bids, if they be wholly inadequate. *U. S. v. Levineon*, (C. C. A. 2d Cir. 1920) 267 Fed. 692.

Highest bidder not selected.—Where by mistake the highest bid for a vessel is not known to the Secretary of the Navy owing to its having been placed with bids for another vessel and he executes a bill of sale

to a lower bidder who had apparently made the highest bid, the government is not bound by his act, as he was bound to deliver the bill of sale to the highest bidder. *U. S. v. Levinson*, (C. C. A. 2d Cir. 1920) 267 Fed. 692.

Vol. VI, p. 1168, sec. 9. [First ed., 1909 Supp., p. 395.]

Effect of setting aside sentence.—Where one is dismissed from the United States navy pursuant to a sentence of a summary court-martial with what is known as a bad conduct discharge, his service in the navy is terminated and the fact that the sentence of the court-martial is subsequently set aside and that he reports for duty under protest when directed but does not re-enlist, gives the navy no further control over him. *Ex p. Harrie*, (E. D. N. Y. 1920) 268 Fed. 911.

1918 Supp., p. 541, par. (b).

Power to modify or cancel held not applicable as to subcontracts in West, etc., Co. v. Bethlehem Shipbuilding Corp., (D. C. Mass. 1920) 266 Fed. 557.

1918 Supp., p. 551. [Uniform gratuity for training, etc.]

What constitutes severance of connection with service.—Where an ensign in the Naval

Reserve Force receives an order from the Navy Department stating that he is discharged from the U. S. Naval Reserve Force, and the next day accepts a commission as temporary ensign in the Regular Navy, his connection with the service is not severed within the meaning of this paragraph. *Price v. U. S.*, (1920) 55 Ct. Cl. 499.

1918 Supp., p. 555. [*Clothing gratuity to members, etc.*]

Effect of checking account by Treasury officers.—This paragraph does not prevent a member of the Naval Reserve Force from recovering his uniform gratuity even though his account had already been checked by the accounting officers of the Treasury. *Price v. U. S.*, (1920) 55 Ct. Cl. 499.

OFFICERS OF MERCHANT VESSELS

Vol. VI, p. 1252, sec. 4438. [First ed., vol. V, p. 398.]

Failure to have government license as defense to civil action.—Where a canal company licensed a person to act as pilot of vessels through the Cape Cod canal and he undertook to pilot a boat through a channel which had been dredged in Buzzard's Bay and which formed an approach to the canal, when an accident happened, the canal company cannot set up in defense to an action against it for the pilot's alleged negligence the fact that he has not obtained a govern-

ment license to act as pilot in Buzzard's Bay. *Boston, etc., Canal Co. v. Chadwick*, (C. C. A. 1st Cir. 1920) 266 Fed. 775, wherein it was said:

"The canal company, by granting a license to McBride, held him out as one who had such special knowledge, and if it issued him such a license without his having obtained a government license as a pilot for Buzzard's Bay, it cannot take advantage of its wrong by claiming that it should be relieved from the consequence of his negligence because he did not have a government license."

PATENTS

Vol. VII, p. 11, sec. 4883. [First ed., vol. V, p. 417.]

- I. Nature of patent.
- II. Validity of patent.

I. NATURE OF PATENT (p. 11)

Authority to issue.—The patent laws of the United States are addressed to no one in particular, but dictated by public policy, restrained only by the Constitution, that the patent "secure for limited time to inventors the exclusive right to their discovery." *U. S. v. United Shoe Machinery Co.*, (E. D. Mo. 1920) 264 Fed. 138.

Power of Congress—*Contracts, sales, leases and licenses.*—There is nothing in the laws relating to patents which in any wise affects contracts for license, use, sale, or lease of patented articles. They are subject to the same governmental and legislative control as other contracts. The court said:

"While it is true, as claimed by counsel, that by the Tenth Amendment to the Constitution the police power is reserved to the states, it is now well settled that, as the Constitution vested in Congress the exclusive power to regulate commerce among the states and grant patents, it possesses what is akin to the police power of the states, the

right to regulate acts relating to them, including licenses, sales, contracts, and leases of patented articles, especially when employed in commerce among the states or foreign states."

And later in the same case the court further declared:

"The conclusion reached is that, while Congress cannot deprive a patentee of the exclusive use of the patent, or reduce the time for which it is granted by existing law, without violating the Fifth Amendment, a patentee has no vested right in conditions of contracts for use, license, or lease of his patented invention, which Congress may not prohibit, if in its judgment they are injurious to the public welfare, though he may have possessed that right under the common or municipal law, as theretofore construed by the courts. A patentee may exclude all others from the use of it; he may withhold it entirely from the public, if he so desires; but, when he enters into contracts for the use of it, his contracts are subject to regulation by legislative act, if deemed necessary for the protection of the public, though subject to judicial review. But this review by the courts is limited to only one matter: i. e., is there any reasonably substantial ground for the regulation, or is it arbitrary and without any substantial reason? The

wisdom of the act is beyond the power of the courts to question." *U. S. v. United Shoe Machinery Co.*, (E. D. Mo. 1920) 264 Fed. 138. Hence, articles of commerce, notwithstanding they are covered by valid patents become when manufactured, sold and placed in the ordinary channels of trade, subject to the same limitations and stand on the same footing as ordinary unpatented articles of commerce; and whatever would be an illegal combination in restraint of trade having for its subject-matter unpatented articles will be an illegal combination if the articles are patented. *U. S. v. Schrader*, (N. D. Ohio 1919) 264 Fed. 175, wherein it was held that agreements between a manufacturer and jobbers for the sale to them of the manufacturer's own patented product on condition or with the understanding on their part that they will resell that product only at certain prices fixed or listed by the manufacturer were not per se contracts or combinations or conspiracies in restraint of trade in violation of the provisions of the Sherman Anti-Trust Act.

Nature and privileges of patent right.—A patent is a contract made by acceptance by the government of the proposition made by the inventor in his application. *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424. And is in the nature of property. *U. S. v. United Shoe Machinery Co.*, (E. D. Mo. 1920) 264 Fed. 138.

Purpose and effect of patent right.—It has long been settled that the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using or selling that which he has invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, (1917) 243 U. S. 502, 37 S. Ct. 416, 61 U. S. (L. ed.) 871, Ann. Cas. 1918A 959, L. R. A. 1917E 1187.

Construction.—To the same effect as the original annotation, see *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424; *I. T. S. Rubber Co. v. Essex Rubber Co.*, (D. C. Mass. 1920) 270 Fed. 593.

Patents are to be liberally construed so as to secure to an inventor the real invention which he intends to secure by his patent. *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424.

II. VALIDITY OF PATENT (p. 12)

Presumption.—To same effect as original annotation, see *Window Glass Mach. Co. v. Smethport Window Glass Co.*, (W. D. Pa. 1917) 266 Fed. 85.

The validity of a patent depends on novelty, utility and invention. *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424.

Vol. VII, p. 14, sec. 4884. [First ed., vol. V, p. 419.]

IV. GRANT TO PATENTEE (p. 20)

Expiration of patent — Rights of public.—In *Lenox v. Jones, etc., Corp.*, (D. C. Mass. 1921) 271 Fed. 511, it was said: "That rights of monopoly, under patents based upon machines, instrumentalities, designs, etc., expire at the end of the term expressed in the patent (except, perhaps, as to exact copies, or something in striking similitude, in bad faith), and that things covered by the patent become public property—provided they are reasonably marked, by the name of the manufacturer who adopts them, and are reasonably and properly designated as something made by one, other than the original patentee, or producer, or manufacturer, by giving the true name of the one who makes them, and puts them into the trade, except perhaps in cases in exact like, or perhaps something in very close similitude, of the original in bad faith, to the end that purchasers shall not be deceived into buying a particular thing as an original, when it is not, and thus deceived into buying something they are not getting—seems to have been settled by decisions."

Vol. VII, p. 22, sec. 4885. [First ed., vol. V, p. 420.]

Priority of patents dated on same day.—To same effect as original annotation, see *Hubbell v. General Electric Co.*, (C. C. A. 2d Cir. 1920) 267 Fed. 564.

Vol. VII, p. 23, sec. 4886. [First ed., vol. V, p. 421.]

- I. In general.
- II. Who may obtain patents.
- III. What may be patented.
- IV. Invention.
- V. Utility.
- VI. Novelty and anticipation.
- VII. Prior use or sale.
- VIII. Abandonment.

I. IN GENERAL (p. 23)

The limitation of two years within which claims may be taken from a patent arises from the application of a sound principle of public policy for the prevention of the undue extension of monopoly by procrastination in the assertion of adverse rights against one already in possession. *De Ferranti v. Har-matta*, (App. Cas. D. C. 1921) 273 Fed. 357.

II. WHO MAY OBTAIN PATENTS (p. 23)

Person entitled to patent — Invention at request of another.—Where the agent of a film manufacturing company requests a manufacturer of carbon paper, who is highly skilled in the art, to invent a special kind of such paper which shall have certain prop-

erties, but does not disclose any means of attaining the result, and the latter complies with the request and manufactures paper fulfilling the requirements, he is entitled to a patent as the inventor. *Pembroke v. Sulzer*, (App. Cas. D. C. 1920) 265 Fed. 996.

Employer and employee—Conception of employer carried out by employee.—To the same effect as the first paragraph of the original annotation, see *Laughlin v. Burry*, (App. Cas. D. C. 1921) 270 Fed. 1013.

Effect of suggestions by employees.—"Suggestions as to improvements during experimentation may be made by workmen or associates of the inventor, but do not thereby deprive the inventor of the sole right to claim invention, if they are not of themselves patentable, or if they have to do with mere details in the work which were pointed out to the inventor and accepted and worked out by him, so that his own independent effort is actually responsible for the complete device. It is frequently difficult in a simple structure to determine whether there was participation by other people in what is claimed as invention, or whether the inventor has received ideas from his workmen and associates, under such circumstances that his own mind has been working with these associates, and has arrived at the result without independent invention on their part. Frequently this question must be determined by the acts of the parties. A share of credit for an invention does not mean that there has been joint invention in the legal sense, nor is an inventor to be deprived of his property in the invention because subsequently those who have voluntarily assisted him decide that they should have demanded recognition as coinventors in applying for a patent." *Cline v. Horton*, (E. D. N. Y. 1921) 274 Fed. 728.

Where an employee is the actual inventor the employer is not entitled to any rights in the patent by reason of the relation of employer and employee in the absence of some contract right. *Ingle v. Landis Tool Co.*, (C. C. A. 3d Cir. 1921) 272 Fed. 464.

III. WHAT MAY BE PATENTED (p. 35)

Process.—A process patent is void where it represents only the functions of a machine. *United Shoe Machinery Co. v. L. Q. White Shoe Co.*, (D. C. Mass. 1919) 270 Fed. 650.

Patent for product as barring process patent.—A patent for an article does not bar a patent for the process by which it was produced, where the application for the process patent was a division of, and was co-pending with, the application which resulted in the patent for the article. *In re Zenk*, (App. Cas. D. C. 1920) 267 Fed. 327.

Improved combination.—The fact that there is no exact combination like the one sought to be patented, and that the new combination produces a better result than any prior one, has been held not to be conclusive of patentability. *Rosenwasser v. B.*

E. Mfg. Co., (C. C. A. 2d Cir. 1920) 264 Fed. 114.

Imitation.—Where claims disclose not a mere imitation of an existing patent, but a new construction, whereby an imitation is made, the invention is patentable. *Scott v. Aristo Hosiery Co.*, (S. D. N. Y. 1920) 266 Fed. 382. The court said: "If the dealer deceives by statement, or by some tricky method of sale, then he who is injured may have a cause of action. But where a patentee contributes a new construction, whereby an imitation is made, it cannot be presumed, at the threshold, that the purpose of the imitation is to deceive. Indeed, imitations may prove of great utility. They may serve the public just as acceptably and effectively as the real article at less cost."

A patent on a mere difference of degree in the use of a principle shown in the prior art is invalid. *Minnesota, etc., Co. v. Eibel Process Co.*, (C. C. A. 1st Cir. 1921) 274 Fed. 540.

IV. INVENTION (p. 44)

Determining invention.—Invention is not determined by the extent of the advance in any art which the inventor makes. *Bestwall Mfg. Co. v. U. S. Gypsum Co.*, (C. C. A. 7th Cir. 1921) 270 Fed. 542.

Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and in equity cases, without any averment in the answer touching the subject. *Brown v. Piper*, (1875) 91 U. S. 37, 23 U. S. (L. ed.) 200; *Kauffmann v. Sodemann Heat, etc., Co.*, (E. D. Mo. 1920) 267 Fed. 435.

Invention shown by new combination.—To the same effect as the original annotation, see *St. Louis Electrical Works v. Fore Electrical Mfg. Co.*, (E. D. Mo. 1920) 267 Fed. 440.

Functions of natural substances.—Patentable invention cannot be made to depend upon well-known inherent qualities, attributes, and functions of natural substances, such as wood, iron, or steel. *Luten v. Kansas City Bridge Co.*, (W. D. Mo. 1921) 272 Fed. 533.

"The production of a new result which meets a recognized need and goes immediately into general use is held to disclose invention, though there would be no invention in the adoption of any one of the successive steps by which the result was attained." *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424.

A change of well-known material.—To same effect as original annotation, see *Jennison-Wright Co. v. Hempy*, (C. C. A. 6th Cir. 1920) 266 Fed. 372.

Bringing art to highest degree of perfection.—A device does not lack invention merely because the inventor did not successfully bring his art to the highest degree of perfection, nor because, without changes in or additions thereto, it could not be success-

ful commercially. *Sparks-Withington Co. v. Jay*, (C. C. A. 6th Cir. 1921) 270 Fed. 449.

But an invention which adds nothing to the knowledge of the art, and does not accomplish its purpose practically when applied in industry, or is so negligible in its nature as to be wholly immaterial in results, is necessarily invalid. *Houston v. Brown Mfg. Co.*, (C. C. A. 6th Cir. 1921) 270 Fed. 445.

Product of mechanical skill.—To same effect as first paragraph of original annotation, see *Pfeffer v. Western Doll Mfg. Co.*, (N. D. Ill. 1920) 271 Fed. 124.

What is obvious to a person skilled in the particular line of mechanics is not invention. *Troy Wagon Works Co. v. Ohio Trailer Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 612.

Mechanical improvements as "invention."

—The claim of a patent, for improvements in scaffold supporting means, discloses no invention, where the changes therein made in a device, described in an earlier patent are simply mechanical, easy to discern and as easy to make, incidental entirely to the main idea of the earlier patentee, which was, as declared by him, to provide a scaffold that would "permit of adjustment at any height during the construction of a building or the repairing thereof," one which might "be readily moved from one position to another by the workmen without interfering materially with the work being performed," and one "in which different supports are employed," and "in which the shifting from one set of supports to another set" might "be accomplished without interfering in any degree with the workmen thereon, or their work." *New York Scaffolding Co. v. Liebel-Binney Constr. Co.*, (1920) 254 U. S. 24, 41 S. Ct. 18, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1917) 243 Fed. 577, 156 C. C. A. 275. Followed in *New York Scaffolding Co. v. Chain Belt Co.*, (1920) 254 U. S. 32, 41 S. Ct. 21, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 7th Cir. 1917) 245 Fed. 747, 158 C. C. A. 149.

Where an improvement produces a new and useful result and efficiency where there has been inefficiency there is invention. *In re Coffield*, (App. Cas. D. C. 1921) 270 Fed. 695.

Substitution of material.—To the same effect as the original annotation, see *Westinghouse Electric, etc., Co. v. Fornica Insulating Co.*, (S. D. Ohio 1920) 270 Fed. 632.

The test of equivalency.—To same effect as original annotation, see *Superior Skylight Co. v. Kuhnla*, (E. D. N. Y. 1920) 265 Fed. 282.

The difference between aggregations and combinations is not academic; the comparison frequently affords a valuable test of invention when the subject is cumbrous if not complicated machinery. *Bryant Electric Co. v. Harvey Hubbell Co.*, (C. C. A. 2d Cir. 1920) 267 Fed. 572.

Construction of patent for combination.—A patent for a combination should be more strictly construed than a pioneer patent.

Handel Co. v. Jefferson Glass Co., (N. D. W. Va. 1920) 265 Fed. 286.

Combination of old devices.—Invention may lie in the adaption of old intermittent tools to a continuous machine. *Juengst v. Hill Pub. Co.*, (S. D. N. Y. 1919) 267 Fed. 428.

"A mere aggregation of old and well-known devices may or may not be patentable, depending upon the circumstances of the particular case. If the combination claimed is an obvious one for attaining the advantages proposed, and one which would occur to any mechanic skilled in the art, it would not be patentable; and, if otherwise, it may be." *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424.

A combination of old devices entirely through the intelligence of the user does not constitute a valid combination. *In re Smithey*, (App. Cas. D. C. 1920) 265 Fed. 1014.

New combination of old elements.—To same effect as original annotation, see *Carnes Artificial Limb Co. v. Didworth Arm Co.*, (D. C. Conn. 1921) 273 Fed. 838.

The mere fact that each element of a claim is old and in the same art does not necessarily preclude invention in the combination of these claims. *Sparks-Withington Co. v. Jay*, (C. C. A. 6th Cir. 1921) 270 Fed. 449.

In *Handel Co. v. Jefferson Glass Co.*, (N. D. W. Va. 1920) 265 Fed. 286, the court said that where a patent "is sought for a combination of old elements not only a new and useful result must be attained, but it must be such as 'amounts to discovery or invention'—'not of a trifling character, but a step in advance in the useful arts'—that 'mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought and brings into activity a different faculty. Their domains are distinct.' That 'to be patentable the invention covered must consist of a new and useful means of accomplishing the result, and if the means consist of a mere adaptation, by the application of mechanical skill, of devices previously well known, there can be no valid patent.' That merely making the parts of a machine or device adjustable with respect to each other does not constitute invention, but is within the ordinary ingenuity of a skilled mechanic. *Fraser v. Gates Iron Works*, 85 Fed. 441, 29 C. C. A. 261 (C. C. A. 7th Cir.), *certiorari denied* 171 U. S. 687, 18 Sup. Ct. 942. That 'an improvement consisting in taking a material well known and long used for the purpose, and using it in a method well known and long used, involves merely the skill of the workman, and not the genius of the inventor, and lacks the novelty of a patent.' That 'the substitution of a known equivalent for one of the elements of a former structure is not patentable.' That 'the mere carrying forward or extending the application of a prior device,

with a change only in degree, does not amount to invention."

Patented device as element of combination.

—One who selects and combines elements from the inventions of others into a new structure adapted to accomplish the old results is entitled to a patent only for his own particular form of adaptation. There is room for such an adapter to have only a specific patent for his particular form of adaptation and he is not privileged to exclude others from gleaning in the same general field. *Dalton Adding Mach. Co. v. Rockford Milling Mach. Co.*, (C. C. A. 7th Cir. 1920) 267 Fed. 422.

Combination producing new result.—To same effect as original annotation, see *Ohio Rake Co. v. Buckner, etc.*, *Plow Co.*, (C. C. A. 6th Cir. 1920) 266 Fed. 891.

New and useful result necessary.—To same effect as original annotation, see *Application of Moore*, (App. Cas. D. C. 1920) 265 Fed. 462.

In order to render a combination patentable the elements comprising it must so coact that, as a consequence thereof, a new and useful result, and not a mere aggregation of several results, follows. *Egry Register Co. v. Standard Register Co.*, (C. C. A. 6th Cir. 1920) 267 Fed. 186.

Applying known processes in a different art with a new and different result is invention. *Wenborne-Karpen Dryer Co. v. Rockford Bookcase Co.*, (N. D. Ill. 1921) 269 Fed. 144.

Using repair methods for new construction.

—The use for new construction of a method previously used in repair jobs, does not constitute invention. *Bellows v. New York Cent. R. Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 532.

Old process applied to new material.

—A patent for a lard-like food product consisting of a vegetable oil partially hydrogenized to a homogeneous whitish, yellowish product, must be deemed void for lack of invention, since it was previously known that a vegetable oil could be changed into a semi-solid homogeneous substance by a process of hydrogenation arrested before completion, and that the product might be edible, and the product of this process was also known and open to public use. *Berlin Mills Co. v. Procter, etc., Co.*, (1920) 254 U. S. 156, 41 S. Ct. 75, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 2d Cir. 1919) 256 Fed. 23, 167 C. C. A. 295.

New use of old device.—The adoption of common expedients in adapting an existing machine to a new use constitutes invention, the thought of the utility and of the result being new. *Cincinnati Milling Mach. Co. v. Oakley Mach. Tool Co.*, (S. D. Ohio 1920) 263 Fed. 257.

Reduction to practice.—*Necessity of practical test.*—It is the actual test that is essential to establish reduction to practice. The patent law recognizes no such thing as reduction to practice *nunc pro tunc*. *Smith*

v. Warnock, (App. Cas. D. C. 1921) 271 Fed. 556.

Lack of diligence.—Where an applicant's early efforts do not amount to reduction to practice, and he does nothing thereafter for almost two years, during which time a competitor enters the field, he must be regarded as lacking in diligence and as not entitled to an award of priority in an interference proceeding. *Du Rell v. Haley*, (App. Cas. D. C. 1920) 267 Fed. 351.

Commercial success.—To same effect as original annotation, see *Tweedie v. Royal Co.*, (E. D. Mo. 1920) 267 Fed. 224.

The fact that a patent was not commercially adopted is not inconsistent with the conclusion that it was completely operative. *Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 386.

In Wire Wheel Corp. v. Silver, (S. D. N. Y. 1919) 266 Fed. 221, *affirmed* (C. C. A. 2d Cir. 1920) 266 Fed. 229, regarding commercial success as evidence of invention, the court said: "As in all successful patents, the patentee, properly enough, relies upon the supposed proof of invention arising from commercial exploitation. It is a most hazardous test. Commercial success, as the courts have repeatedly observed, may arise from many other reasons than a new inventive idea. Without trying to lay down any exhaustive definition of the conditions where it may be helpful, I can very generally say that its main value is in cases where the existing means have for some time been unsatisfactory, and where the new step has at once answered the need and displaced what went before. When to this is added the fact that others have earlier tried to reach the same result, the proof becomes telling, and we hesitate to substitute our own judgment for the objective evidence that the new thing was not so easy to make as it looked."

General and extensive use.—Practical use and extensive growth will outweigh laboratory tests in determining whether an invention is patentable. *Medusa Concrete Waterproofing Co. v. Ceresit Waterproofing Co.*, (N. D. Ill. 1920) 271 Fed. 122, wherein it was said: "Laboratory tests cannot turn the balance in the scale against practical use. The testimony of experts that a device will not work is of no value, if it does work. In the light of the practical use of plaintiff's process, and its increasing growth, I must assume that Newberry discovered 'something worth while.'"

V. UTILITY (p. 79)

Utility as evidence of invention.—The evident utility of a device, its extensive use and the absence of other competing devices strongly attest its patentable merit. *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424.

Commercial utility is available only when

a doubt as to patentability arises and commercial success must be approached with caution when the subject matter is an article of wear. *Bonnie-B. Co. v. Giguet*, (S. D. N. Y. 1919) 269 Fed. 275.

Vogue and general testimony showing a device to be commercially successful has been held sufficient. *Sandusky Foundry, etc., Co. v. DeLavaud*, (C. C. A. 6th Cir. 1921) 274 Fed. 607.

"It is the experience of the courts that some of the most troublesome cases in which to determine whether invention resides in the patent are those which involve the simplest expedients. The reason is that the more easily a patent is understood the more difficult it is to relate the mind back to the state of the art as it existed at the time of invention. Thus it happens that invention is often found by the aid of commercial utility in resolving the doubt as to patentability, or by the fact, *inter alia*, that an article of manufacture long known is so rearranged as to be adapted to an entirely new use, which no one disclosed up to the time in question." *Bonnie-B. Co. v. Giguet*, (S. D. N. Y. 1919) 269 Fed. 272.

Infringement as evidence of utility.—Utility of an invention is established by the fact that defendants have persisted in infringing it. *Morgan Constr. Co. v. Donner Steel Co.*, (W. D. N. Y. 1920) 269 Fed. 389.

Better than other inventions.—To same effect as original annotation, see *Tompkins-Hawley-Fuller Co. v. Holden*, (C. C. A. 2d Cir. 1921) 273 Fed. 424.

VI. NOVELTY AND ANTICIPATION (p. 83)

Test of novelty.—If there is any doubt as to patentable novelty this doubt may well be resolved in favor of the patent by its commercial utility. *Eibel Process Co. v. Minnesota, etc., Paper Co.*, (D. C. Me. 1920) 267 Fed. 847.

Accidental production.—Accidental and unappreciated results and functions in prior uses are not anticipation. *Minnesota, etc., Paper Co. v. Eibel Process Co.*, (C. C. A. 1st Cir. 1921) 274 Fed. 540.

Unintended feature.—The principle that patentees may obtain advantages in patents which they did not discover applies to prior art uses. *Minnesota, etc., Paper Co. v. Eibel Process Co.*, (C. C. A. 1st Cir. 1921) 274 Fed. 540.

Reduction to practice—*In general.*—The person to first conceive an invention, though the last to reduce it to practice, is entitled to priority where he has used diligence. *Smith v. Warnock*, (App. Cas. D. C. 1921) 271 Fed. 556. But where he is lacking in diligence he will be denied priority. *Smith v. Warnock*, (App. Cas. D. C. 1921) 271 Fed. 559.

Application as reduction to practice.—An application for a patent is a constructive reduction to practice. *Republic Iron, etc.,*

Co. v. Youngstown Sheet, etc., Co., (C. C. A. 6th Cir. 1921) 272 Fed. 386.

Unsuccessful device.—It cannot be said that a patent for a device, which fails to accomplish the desired end, is an anticipation of one which successfully accomplishes it." *Carnes Artificial Limb Co. v. Dilworth Arm Co.*, (D. C. Conn. 1921) 273 Fed. 838.

"The law is that prior invention or discoveries, relied on to anticipate or limit the claim of a later invention, must disclose a method capable of producing the result designed to be obtained." *One-Piece Bifocal Lens Co. v. Stead*, (W. D. N. Y. 1921) 274 Fed. 667.

Imperfect device.—If the mechanism made under a prior art patent is capable of producing the same results, is designed, adapted or used to produce the same results or perform the same function, it may be successfully set up as an anticipation although there are imperfections in it. *Barber v. Otis Motor Sales Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 171.

Novelty of proportions in the case of metals in the sense of the patent law involves something more than figuring out proportions differing from any that were known before. It involves new results from new proportions, developing a new metal, or, it may be, an old metal with new characteristics of structure or performance, embracing entirely new, or at least substantially enhanced, qualities of utility. *Bethlehem Steel Co. v. Churchward International Steel Co.*, (C. C. A. 3d Cir. 1920) 268 Fed. 361.

Elements of new combination found in older patents.—To same effect as original annotation, see *Carnes Artificial Limb Co. v. Dilworth Arm Co.*, (D. C. Conn. 1921) 273 Fed. 838.

Reference to prior application.—A prior application although not allowed until after another's application was filed, may be considered in determining the question raised by the answer, whether the patentee was the first inventor. *Westinghouse Electric, etc., Co. v. Formica Insulating Co.*, (S. D. Ohio 1920) 270 Fed. 632.

Prior foreign patent.—A prior patent in order to be anticipatory "must be so clear and definite as to enable any mechanic skilled in the art to reach the patented invention certainly, directly, and without the necessity of any experiment, and this rule is enforced with peculiar strictness when the alleged disclosure is found in a foreign patent or publication." *Selectasine Patents Co. v. Prest-O-Graph Co.*, (D. C. Ore. 1920) 267 Fed. 840.

Foreign publications.—Foreign publications, to constitute them anticipations of a later invention, must disclose a complete and operative structure, and, indeed, the description given must be sufficiently clear and definite and understandable to enable persons skilled in the art or science to which the invention or device belongs to practice and construct it. Drawings or exhibits, if any,

shown in connection with prior publications, must be considered with the published description of the device, which the law requires must be in "full, clear, and exact terms," so that those desiring to manufacture the article or reduce it to practice may do so without either independent experiments or the exercise by them of the inventive faculty. If the prior description and drawings relied on do not conform to that rule, a subsequently issued patent in this country for the same invention is not defeated. *Permutit Co. v. Harvey Laundry Co.*, (W. D. N. Y. 1921) 274 Fed. 937.

Date of invention.—"An invention does not date from the conception in the mind of the inventor nor from unsuccessful experiments abandoned by the inventor. He must represent it in some physical form or impart his conception to another." *Yates v. Smith*, (D. C. N. J. 1920) 271 Fed. 27.

Date of issuance of patent as controlling.—"For the purpose of anticipation, a patent speaks, not from the date of the application, but from the date of its issuance." *Perfection Disappearing Bed Co. v. Murphy Wall Bed. Co.*, (C. C. A. 9th Cir. 1920) 266 Fed. 698.

Date of foreign anticipating patent.—In order to constitute anticipation by a foreign patent, the date of such patent must be previous to the date of the invention of the domestic patent or more than two years prior to the application for the domestic patent. *Barber v. Otis Motor Sales Co.*, (N. D. N. Y. 1920) 265 Fed. 675, holding that the foreign patents did not become patents more than two years prior to the date of the application for the domestic patent.

Process—Anticipation.—A process patent can only be anticipated by a similar process. *Window Glass Mach. Co. v. Smethport Window Glass Co.*, (W. D. Pa. 1917) 266 Fed. 85.

Successful adoption and use.—In the case of a lighting fixture the presence of novelty was held to be met by evidence that the design, viewed as a whole, was new; that it produced a pleasing sensation on the aesthetic sense; that it imparted a sense of uniqueness and character; that it created an enlarged demand for the goods, and that it attained great popularity. *Bayley v. Krich*, (D. C. N. J. 1920) 264 Fed. 978.

Patent as evidence of novelty.—The granting of a patent raises a strong presumption of novelty and in case of a doubt it will be resolved in favor of the patent. This rule is said to be especially applicable where the commercial utility of the apparatus is beyond dispute. *Permutit Co. v. Harvey Laundry Co.*, (W. D. N. Y. 1921) 274 Fed. 937.

Burden of proving priority.—To the same effect as second paragraph of original annotation, see *Barber v. Otis Motor Sales Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 171.

Disproof of asserted anticipation.—"As against the statutory defense of anticipation, the patentee may show, if he can, the fact

of his prior invention by drawings, sketches, models, or by any other competent proofs." *Barber v. Otis Motor Sales Co.*, (N. D. N. Y. 1920) 265 Fed. 675.

VII. PRIOR USE OR SALE (p. 117)

For patents held void because of anticipation and prior use, see *E. H. Mumford Co. v. Mumford Molding Mach. Co.*, (C. C. A. 3d Cir. 1920) 266 Fed. 80.

VIII. ABANDONMENT (p. 127)

Discontinuance of experiments.—Abandonment after making experiments which did not amount to a reduction to practice operates to deprive a person, who was inadvertently granted a patent while another's application was pending, of priority in interference proceedings. *Jay v. Coulombe*, (App. Cas. D. C. 1921) 270 Fed. 703.

In *Halbleib v. Bendix*, (App. Cas. D. C. 1921) 270 Fed. 683, the facts were held to show an abandoned experiment, there never having been an attempt to resurrect or commercialize his device after it was tested until after another person's device was tested.

Delay in filing application.—The failure of an inventor to file his application for a patent until ten months after reducing it to practice, will not be regarded as an abandonment where it appears that such delay was due to financial embarrassment. *Hoenig v. Parker*, (App. Cas. D. C. 1920) 267 Fed. 323.

Burden of proof.—To same effect as original annotation, see *Hoenig v. Parker*, (App. Cas. D. C. 1920) 267 Fed. 323. See also *Hoenig v. Kendig*, (App. Cas. D. C. 1920) 267 Fed. 326.

Vol. VII, p. 138, sec. 4887. [First ed., vol. X, p. 250.]

Date of foreign patent.—British and French patents do not become "patents" nor "printed publications" within the meaning of the patent statutes of this country, until the enrollment or sealing of the complete specifications. *Barber v. Otis Motor Sales Co.*, (N. D. N. Y. 1920) 265 Fed. 675.

Presumption of validity from issuance of foreign patents.—The presumption of validity arising from the granting of foreign patents is strengthened by decisions of foreign courts upholding such patents. Such a presumption, however, is at best rebuttable and is overcome by a decision of a domestic court holding the patent invalid. *Wire Wheel Corp. v. Madison Motor Car Co.*, (W. D. Wis. 1920) 267 Fed. 220.

Effect of filing within time limitation.—Where the application for a United States patent was filed within the limitations provided in this section this gives the United States application the same force and effect as it would have if it had been filed on the date the foreign application was filed. *Kisovitz v. Rosenberg*, (App. Cas. D. C. 1921) 269 Fed. 866.

Reduction to practice.—The date of filing a British application has been held a constructive reduction to possession where the same disclosure appears in each application and each contains a claim broad enough to include the issue. *Kisovitz v. Rosenberg*, (App. Cas. D. C. 1921) 269 Fed. 866.

Vol. VII, p. 145, sec. 4888. [First ed., 1916 Supp., p. 185.]

II. Specifications and description.

1. In general.
2. Construction.
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III. Claims.

1. Object.
2. Construction.
3. Essentials and scope.
5. Effect of claim.
6. Amendment of claim.
8. Rejection of claim.

II. SPECIFICATIONS AND DESCRIPTION

1. In General (p. 146)

Necessity of disclosure.—"Even a pioneer patent must be accompanied with a disclosure, which will show the art how the idea stated in the claim may be realized in an operable structure. It is, of course, not enough merely to conceive abstractly of a combination of elements which will together do something new. Invention requires the added elements of showing how the idea may be actually incorporated, and without such a disclosure as would enable a skilled artisan to embody the idea it remains sterile, and makes no advance in the art, from which the man conceiving the idea should be entitled to a monopoly." *Manhattan Book Casing Mach. Co. v. E. C. Fuller Co.*, (S. D. N. Y. 1912) 274 Fed. 964.

2. Construction (p. 147)

Patent not limited by specifications.—A claim as granted is not limited by a representation in the drawing; nor can it be enlarged by such reference. *Hubbell v. General Electric Co.*, (C. C. A. 2d Cir. 1920) 267 Fed. 564.

3. Sufficiency (p. 148)

In general.—"If the faults were merely in the diagrammatic representations, that would not be a defense, for diagrams or descriptions are not meant for working drawings. *Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 845, 48 C. C. A. 72. But such drawings must at least show enough for the ordinary skilled mechanic to build the machine, correcting the discrepancies and the difficulties appearing in the drawings, by means of that store of expert information which such men will bring to the task in a bona fide effort to make the machine work." *Manhattan Book Casing Mach. Co. v. E. C. Fuller Co.*, (S. D. N. Y. 1912) 274 Fed. 964;

Sandusky Foundry, etc., Co. v. De Lavaud, (C. C. A. 6th Cir. 1921) 274 Fed. 607.

Substantial description is an elastic term, and it may be restricted by prior act or by a limitation arising in the patent office. *Hubbell v. General Electric Co.*, (C. C. A. 2d Cir. 1920) 267 Fed. 564.

III. CLAIMS

1. Object (p. 158)

To the same effect as first paragraph of original annotation, see *I. T. S. Rubber Co. v. Essex Rubber Co.*, (D. C. Mass. 1920) 270 Fed. 593.

2. Construction (p. 158)

The necessity for construction of a claim does not arise until uncertainty is encountered. *Blaine v. White* (App. Cas. D. C. 1920) 267 Fed. 340.

Limiting claim.—The scope of the claims allowed must be limited to the prior art, the specifications and drawings and the record made in the patent office in securing their allowance. *Mechanical Constr. Co. v. Locomotive Stoker Co.*, (W. D. Pa. 1921) 274 Fed. 411. And an applicant for a patent is bound by the voluntary limitation of his claim, and the fact that such limitation was unnecessary is of no importance, if it was intentional. *Schulz v. Jackson Cushion Spring Co.*, (C. C. A. 6th Cir. 1921) 271 Fed. 665. Thus, in *I. T. S. Rubber Co. v. Essex Rubber Co.*, (D. C. Mass. 1920) 270 Fed. 595, the court said: "When we consider that a patent is nothing but a contract between the nation and the patentee, in the main couched in the patentee's own language, granting the inventor a monopoly, it is utterly inadmissible to extend this monopoly beyond the limits fairly defined by the inventor himself. What an inventor does not plainly claim he cannot have—unless we are to make patent construction a trap—a fraud upon the general public."

But limitations not expressed and not intended cannot be read into an unambiguous claim in order to save it. *Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 386.

Limiting claims as abandonment.—Where broad and general claims are limited so as to cover the claimed invention more particularly, this does not constitute an abandonment and prevent a suit for infringement. *General Electric Co. v. Nitro Tungsten Lamp Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 994.

Construed with specifications and description.—A claim is to be construed in the light of the specifications. *W. Bickford Co. v. Merrill*, (C. C. A. 1st Cir. 1920) 268 Fed. 540. And while it is presumed that broader claims were intended to and do cover equivalent forms of construction described in other and narrower claims yet these claims must be read in connection with the description of the invention filed with the application for the patent, in order to determine the scope

and effect that should be given to them. *Troy Wagon Works Co. v. Ohio Trailer Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 850.

Construction of claims for improvements.—To same effect as second paragraph of original annotation, see *Marconi Wireless Tel. Co. v. Kilbourne & Clark Mfg. Co.*, (C. C. A. 9th Cir. 1920) 265 Fed. 644.

Enlargement of claims by specification or description.—To the same effect as second paragraph of original annotation, see *Yates v. Smith*, (D. C. N. J. 1920) 271 Fed. 27.

Claims substituted for cancelled claims.—Where certain claims as originally filed were cancelled the construction of the claims substituted therefor cannot be as broad as the claims cancelled. *Mechanical Constr. Co. v. Locomotive Stoker Co.*, (W. D. Pa. 1921) 274 Fed. 411.

Where a claim is made for a "continuous strip" of metal, the word "continuous" may be taken in a mechanical sense, "and two pieces of metal contiguously placed and soldered together may be considered as a continuous piece when together they function like one piece." *Whitlock Coil Pipe Co. v. Mayo Radiator Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 215.

3. *Essentials and Scope* (p. 161)

Indefinite claims.—Claims which are indefinite and do not point out the invention, should be rejected. *In re Duncan*, (App. Cas. D. C. 1920) 265 Fed. 1012.

Claim includes mechanical equivalents.—"Within the rule of equivalents, the thing thought to be the equivalent must be shown to perform the same function and to do it in substantially the same manner as the thing of which it is alleged to be the equivalent." *Superior Skylight Co. v. Kuhnla*, (C. C. A. 2d Cir. 1921) 273 Fed. 482.

5. *Effect of Claim* (p. 170)

Invention limited by claims.—An intentional limitation of a claim is binding on a patentee although entirely voluntary. *McCallum v. Pittsburgh, etc., Coal Co.*, (C. C. A. 6th Cir. 1920) 268 Fed. 331.

Failure to claim.—"When an applicant for a patent to cover a new combination is compelled by rejection or submission to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping the element which he was compelled to include in order to secure his patent." *Superior Skylight Co. v. Kuhnla*, (C. C. A. 2d Cir. 1921) 273 Fed. 482.

Estoppel by language of claim.—Where an applicant put into his claim, whether originally or by amendment, language which distinguished it from that of another and without which he would not have received his patent he will be held to the language employed. *Tee Pee Rubber Co. v. T. S. Rubber Co.*, (C. C. A. 6th Cir. 1920) 268 Fed. 250.

6. *Amendment of Claim* (p. 173)

Amendments to meet objections of patent office.—Where a patent is not obtained until after numerous objections and amendments of claims on reference to prior patents, the law is well settled that the patentee is limited to the precise form and language of the claims allowed. *W. F. Schultheiss Co. v. Phillips*, (C. C. A. 9th Cir. 1920) 264 Fed. 971. And an applicant who has yielded to an objection of the patent office and modified his claim by adding a limitation suggested is bound thereby. *Nisbet v. Perkins Tonneau Wind Shield Co.*, (S. D. N. Y. 1920) 261 Fed. 633.

8. *Rejection of Claim* (p. 175)

Estoppel by acquiescence in rejection.—An applicant who has acquiesced in the rejection of some of his claims is bound thereby and is estopped to assert a different or a broader construction. *Elliott Mach. Co. v. P. B. Appeldoorn's Sons Co.*, (C. C. A. 6th Cir. 1920) 267 Fed. 983; *Hubbell Inc. v. General Electric Co.*, (C. C. A. 2d Cir. 1920) 267 Fed. 564.

But the fact that a patentee acquiesces in the rejection of certain claims as originally presented, does not estop him from subsequently relying upon such claims when they are used as a part of a combination. *Egry Register Co. v. Standard Register Co.*, (C. C. A. 6th Cir. 1920) 267 Fed. 186. And "under all usual conditions, acquiescence in the rejection of a claim is of no importance, unless the court is called upon to determine whether the claim, as issued, has a scope sufficiently broad to include defendants' somewhat variant device." *Jennison-Wright Co. v. Hempy*, (C. C. A. 6th Cir. 1920) 266 Fed. 372.

Vol. VII, p. 179, sec. 4893. [First ed., vol. V, p. 488.]

Doubt as to patentability.—To same effect as original annotation, see *In re Coffield*. (App. Cas. D. C. 1921) 270 Fed. 695; *In re Zenk*, (App. Cas. D. C. 1920) 267 Fed. 327; *In re Sorum*, (App. Cas. D. C. 1920) 265 Fed. 1000.

Constructive notice by issuance.—A person who files an application for a patent has constructive notice of the issuance of a patent more than two years prior thereto, and is estopped to make claims against the prior patentee. *De Ferranti v. Harmatta*, (App. Cas. D. C. 1921) 273 Fed. 357.

Effect of granting patent.—The grant of the patent by the Patent Office makes out a prima facie case for the successful applicant, and one who attacks it has the burden of showing that the Patent Office reached a wrong conclusion concerning it. *Knapp v. Will, etc., Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 380.

As between two patents the one for which the earlier application was made has priority

nothing to the contrary being indicated, although the patent was issued on the later application prior to that on the earlier one. *Excelsior Steel Furnace Co. v. Williamson Heater Co.*, (C. C. A. 6th Cir. 1921) 260 Fed. 614.

The senior applicant derives no benefit in an interference proceeding from the granting of the patent where, when it was granted, the other party's application was pending. *Ransdell v. Jahns*, (App. Cas. D. C. 1921) 273 Fed. 365.

Vol. VII, p. 181, sec. 4894. [First ed., vol. V, p. 488.]

Delay of attorney.—A delay of less than three months by attorneys in preparing an application after the case is turned over to them, is not of itself evidence of lack of diligence on the part of the client which will defeat priority. *Olson v. Pospeshil*, (App. Cas. D. C. 1921) 269 Fed. 698.

Vol. VII, p. 184, sec. 4895. [First ed., vol. V, p. 492.]

Historical.—"The subject-matter of section 4895 was first dealt with by Congress in section 6 of the Act of March 3, 1837 (5 Stat. at Large, 193). It then read:

"Sec. 6. *And be it further enacted, that any patent hereafter to be issued, may be made and issued to the assignee or assignees of the inventor or discoverer, the assignment thereof being first entered of record, and the application therefor being duly made, and the specification duly sworn to by the inventor.* * * *

"In section 33 of the Act of July 8, 1870 (16 Stat. at Large, 202), section 6 of the Act of 1837 was amended to read as follows:

"Sec. 33. *And be it further enacted, that patents may be granted and issued or re-issued to the assignee of the inventor or discoverer, the assignment thereof being first entered of record in the Patent Office; but in such case the application for the patent shall be made and the specification sworn to by the inventor or discoverer; and also if he be living, in case of an application for reissue.*' Under either section 6 or section 33 an inventor could assign his right to obtain a patent, prior to filing an application and specification verified by his oath. Section 33 was amended in the Revised Statutes of 1878, and as now found in section 4895 authorizes an assignee to make application for the issue of a patent, and provides how he shall do it." *Becker v. General Chain Co.*, (C. C. A. 1st Cir. 1921) 273 Fed. 419.

Title of assignee.—"It has been held time and again that an assignee of the entire interest in an invention and right to a patent obtains full title, when the patent is issued, and that this is so whether the patent is issued directly to him a request to that effect having been made in the assignment, or

whether it is issued to the inventor, no such request having been made in the assignment." *Becker v. General Chain Co.*, (C. C. A. 1st Cir. 1921) 273 Fed. 419.

Vol. VII, p. 188, sec. 4897. [First ed., vol. V, p. 494.]

Effect of issuance of patent to third person.

—The right to make a renewal of an application is not affected by the fact that during the period of forfeiture a patent was issued to a third party, where an abandonment in fact has not been established. *Wells v. Honigmann*, (App. Cas. D. C. 1920) 267 Fed. 743.

Effect of disclaimer.—A disclaimer as to claims made on the original application does not preclude a party from making a renewal of application provided it was made before the public or a third party has come into possession of the invention. *Wells v. Honigmann*, (App. Cas. D. C. 1920) 267 Fed. 743.

Question of fact.—To same effect as original annotation, see *Wells v. Honigmann*, (App. Cas. D. C. 1920) 267 Fed. 743.

Vol. VII, p. 193, sec. 4904. [First ed., vol. V, p. 499.]

Language claim broadly construed.—A prior applicant is entitled under the law to a construction of the claim in issue as broad as the language will permit. *Speed v. Kirby*, (App. Cas. D. C. 1921) 270 Fed. 699. See also *Dewson v. Tomlinson*, (App. Cas. D. C. 1921) 269 Fed. 879.

Third party as inventor.—In an interference proceeding the issue is the priority between the parties to the proceeding, and the losing party has no standing to contend that a third party is really the prior inventor. *Erben v. Yardley*, (App. Cas. D. C. 1920) 267 Fed. 345.

Dates in preliminary statement — Effect.—"It is always a suspicious circumstance in a case of interference that, after the claim of one of the parties has been fully disclosed and fixed as of a specified date, the other should then seek by amendment of his preliminary statement to show a date of invention different from that in the original statement and prior to it and to the date of his opponent. Amendment upon so important a point should not be allowed in such a case, unless it is shown that the interests of justice plainly demand it; for upon the determination of these dates it depends, in the majority of cases, which party is entitled to the patent, and a change of memory is comparatively easy, when self-interest dictates a different date." *Earles v. Gomber*, (App. Cas. D. C. 1921) 273 Fed. 353.

Omission.—Where the junior applicant failed to allege in his preliminary statement a date of conception prior to the senior party's filing date it has been held proper to award priority to the senior party, cause

not being shown, after notice why such a course should not be pursued. *Wright v. Halle*, (App. Cas. D. C. 1921) 273 Fed. 355.

Sole issue in interference.—To same effect as original annotation, see *De Forest v. Miller*, (App. Cas. D. C. 1921) 269 Fed. 718.

Issues construed in light of application.—To same effect as original annotation, see *Cox v. Headley* (App. Cas. D. C. 1920) 265 Fed. 981; *White v. Cottrell*, (App. Cas. D. C. 1921) 270 Fed. 877.

Reduction to practice.—The fact that one of the parties to an interference proceeding was the first to conceive the invention and the first to reduce it to practice is sufficient ground upon which to base an award of priority to him. *Erben v. Yardley*, (App. Cas. D. C. 1920) 265 Fed. 345.

A decision will be made awarding priority to the senior applicant in an interference proceeding where it appears that he first conceived the invention and that his application for a patent was filed before the junior party reduced the invention to practice. *Brown v. McIntosh*, (App. Cas. D. C. 1920) 265 Fed. 1011; *Jenks v. Geiger*, (App. Cas. D. C. 1921) 273 Fed. 360.

Priority will be accorded a senior applicant where it appears that by completion he must be accorded conception and there was a constructive reduction to practice and the junior applicant did not claim a reduction to practice until several months later. *Smurr v. James*, (App. Cas. D. C. 1920) 269 Fed. 673.

A person who was the first to conceive and the last to file, if he succeeds must do so by proving an actual reduction to practice prior to any date accorded to the other party for reduction to practice, or by showing diligence on his part running from a time just prior to that when the other party entered the field down to his own date of filing. *Bissell v. Phelps*, (App. Cas. D. C. 1921) 270 Fed. 697.

To base a holding of a constructive reduction to practice of an invention upon a drawing in the face of a positive statement in the specification contrary to what was contended for, the drawing should be certain and conclusive. *Allen v. Hill*, (App. Cas. D. C. 1921) 270 Fed. 691.

Where two inventions both meet the standard set up by the issue, the poorer one, if prior in point of time, will prevail. But if either one fails to meet the required standard of the issue, it is not a reduction to practice. *Liebmann v. Newcomb*, (App. Cas. D. C. 1921) 269 Fed. 701.

Experiments after disclosure as affecting priority.—Where in an interference proceeding it clearly appears that the party first to conceive and disclose the invention, was in good faith engaged in perfecting it at the time the junior party entered the field and filed his application, he should not be deprived of the fruits of his discovery and an award of priority because his experiments were not as successful as had hoped and

because he filed his application at a later date. *Gammeter v. Backdahl*, (App. Cas. D. C. 1920) 267 Fed. 347.

Issuance of individual patent during pendency of joint application.—Where during the pendency of a joint application for a patent, one of the applicants make an individual application and obtains a patent, he gains nothing by the issuance of such patent and in a subsequent interference has the burden of proof as the junior party. *Lambert v. Hope*, (App. Cas. D. C. 1920) 267 Fed. 342.

The losing party in an interference proceeding is not entitled to claims that would dominate the claims given to his successful rival. *In re Henderson*, (App. Cas. D. C. 1921) 269 Fed. 707.

Duty of commissioner.—It is the duty of the commissioner in interference proceedings to protect the public as well as the litigant. *In re Henderson*, (App. Cas. D. C. 1921) 269 Fed. 707.

Attack on reissue application.—A question cannot be raised in interference proceedings that a reissue application is barred by intervening rights, in that it seeks to broaden the claims more than two years after the original patent was granted and is for a different invention. *Earles v. Gomer*, (App. Cas. D. C. 1921) 273 Fed. 353.

Burden of proof.—To same effect as original annotation, see *Blaine v. White*, (App. Cas. D. C. 1920) 267 Fed. 340; *Lambert v. Hope*, (App. Cas. D. C. 1920) 267 Fed. 342; *Grus v. Eynon*, (App. Cas. D. C. 1920) 267 Fed. 350; *Pembroke v. Sulzer*, (App. Cas. D. C. 1920) 265 Fed. 996; *Maremont v. Olson*, (App. Cas. D. C. 1920) 265 Fed. 1009.

A junior party whose application was filed two months after the opposing party's patent was issued has a heavy burden to show priority. *Replogle v. Kirby*, (App. Cas. D. C. 1921) 269 Fed. 862.

Where in interference proceedings an applicant, whose application was filed later than the applications of the others, proves conception and disclosure earlier than they do, he must in order to prevail also show that he was exercising diligence just before the other parties came into the field. *Halbleib v. Bendix*, (App. Cas. D. C. 1921) 270 Fed. 683.

Procedure as to trial and appeal.—When two or more parties apply for the same invention, provision is made for the declaration of an interference by the Commissioner of Patents. The procedure for taking testimony, trial and appeal through the tribunals of the Patent Office to the Court of Appeals of the District of Columbia is provided by statute or rules which have the force of statute. *Snelling v. Whitehead*, (App. Cas. D. C. 1921) 269 Fed. 712.

Suspension of proceedings.—An interference being for the sole purpose of determining priority, will not be suspended, after

testimony has been taken, for the purpose of considering public use or intervening rights. *Hayes v. Davison*, (App. Cas. D. C. 1921) 273 Fed. 325.

Estoppel by judgment.—A judgment in interference proceedings operates as an estoppel as to the things passed on. *In re Henderson*, (App. Cas. D. C. 1921) 269 Fed. 707.

Jurisdiction on review.—While the question of patentability will not be considered by the Court of Appeals of the District of Columbia in an interference appeal, the question of abandonment is always available as affecting the right of priority. *Snelling v. Whitehead*, (App. Cas. D. C. 1921) 269 Fed. 712.

Vol. VII, p. 199, sec. 4909. [First ed., vol. V, p. 501.]

Rejection condition precedent to appeal.—Under this section claims must have been twice rejected before starting the claim of appeals which ends in the Court of Appeals. *Clements v. Kirby*, (C. C. A. 6th Cir. 1921) 274 Fed. 575.

Vol. VII, p. 202, sec. 4914. [First ed., vol. V, p. 506.]

Appeal or certiorari to Supreme Court.—A decision of the Court of Appeals of the District of Columbia on an appeal from the Commissioner of Patents, which reverses the latter's decision not to cancel certain certificates of registration of a trademark, and directs the clerk of the court to certify the courts decision to the commissioner, as required by law, is not final for the purpose of appeal to or certiorari from the federal Supreme Court under Jud. Code §§ 250, 251 (see 5 Fed. Stat. Ann. (2d ed.) 913, 917). *Baldwin Co. v. R. S. Howard Co.*, (1921) 256 U. S. 35, 41 S. Ct. 405, 65 U. S. (L. ed.) —, dismissing appeal to review (1919) 48 App. Cas. (D. C.) 437, and denying writ of certiorari.

Vol. VII, p. 204, sec. 4915. [First ed., vol. V, p. 507.]

Historical.—"The subject-matter contained in section 4915 first appeared in section 16 of the Act of July 4, 1836 (5 Stat. at Large, 123). Section 16 was amended by section 10 of the Act of March 3, 1839 (5 Stat. at Large, 354). . . . It was re-enacted in section 52 of the Act of July 8, 1870 (16 Stat. at Large, 205), in the language now found in section 4915." *Becker v. General Chain Co.*, (C. C. A. 1st Cir. 1921) 273 Fed. 419.

Finality of decision of District of Columbia Court of Appeals.—The District of Columbia Court of Appeals in exercising its jurisdiction in patent cases becomes, for this purpose, one of the tribunals of the Patent Office, and its decision is in no sense a final

decree, which cannot be collaterally attacked, though it will be followed unless the contrary is established by convincing testimony. *Clements v. Kirby*, (C. C. A. 6th Cir. 1921) 274 Fed. 575.

Mandamus to the commissioner to compel him to receive and consider claims is not a prerequisite to the right to bring a suit under this section. *Clements v. Kirby*, (C. C. A. 6th Cir. 1921) 274 Fed. 575.

Expenses of proceeding.—The provision in this section that "all the expenses of the proceeding shall be paid by the applicant whether the final decision is in his favor or not," applies only to those cases "where there is no opposing party" and the papers are served on the commissioner only. *Clements v. Kirby*, (C. C. A. 6th Cir. 1921) 274 Fed. 575.

Time for bringing suit.—The provision in R. S. section 4894 as to a claim being regarded as abandoned where there is a failure to prosecute the same within one year after any action thereon, is held to be inapplicable to a suit under this section begun more than a year after a decision in interference proceedings by the District of Columbia Court of Appeals. *Clements v. Kirby*, (C. C. A. 6th Cir. 1921) 274 Fed. 575.

Parties—Assignee.—"Rule 17 of the Patent Office provides that 'an applicant or an assignee of the entire interest may prosecute his own case,' and rule 5 that 'the assignee of the entire interest of an invention is entitled to hold correspondence with the office to the exclusion of the inventor.' Under the latter rule it is held that upon the request of such an assignee the inventor shall be excluded from participation in the proceedings. See *Stoddard's Annotated Patent Office Rules*, pp. 10, 11.

"Instead, therefore, of an assignee being unable to prosecute an application in the Patent Office under section 4895, as the defendant contends, the contrary is true, for the law authorizes and the practice and rules of the Patent Office permit it; and, as a proceeding under section 4915 is in reality a continuation of the prosecution of the original application, there would seem to be no reason why the assignee of the entire right to a patent, who is permitted to prosecute an application in the Patent Office under section 4895, should not be allowed to do so in this court under section 4915." *Becker v. General Chain Co.*, (C. C. A. 1st Cir. 1921) 273 Fed. 419.

Vol. VII, p. 211, sec. 4916. [First ed., vol. V, p. 511.]

Effect of delay—Unreasonable delay.—To the same effect as the original annotation, see *In re Lees*, (App. Cas. D. C. 1920) 269 Fed. 679.

Reissue claims, which seek to broaden the claims of the original patent, will not be allowed, except for unusual circumstances, which excuse delay. The determination of this question is one largely within the discretion of the commissioner, and will not be disturbed unless manifest error has been committed. *In re Hoiland*, (App. Cas. D. C. 1921) 270 Fed. 704.

A reissue should not be granted where several years have elapsed during which time other inventions relying on the same state of the art have patented new inventions which have gone into use and would infringe the reissue. *Diamond Drill Contracting Co. v. Mitchell*, (C. C. A. 9th Cir. 1920) 269 Fed. 261.

Inadvertence or mistake—In general.—“It is obvious that the words ‘inadvertence or mistake’ are used in the statute as the antitheses to ‘fraudulent intent,’ and that in the absence of fraud the failure of an inventor or his solicitor to put the claims in such form as will cover the entire invention is ‘inadvertence,’ within the meaning of the statute, and that to justify a reissue it is not necessary that the original patent shall be inoperative, but it is sufficient if it fail to secure to the patentee the whole of his invention.” *Perfection Disappearing Bed Co. v. Murphy Wall Bed. Co.*, (C. C. A. 9th Cir. 1920) 266 Fed. 698.

Vol. VII, p. 231, sec. 4917. [First ed., vol. V, p. 523.]

Right to disclaim.—The power to disclaim is a beneficial one, and should not be denied to an inventor, except where the power is used for a fraudulent or deceptive purpose. *Permutit Co. v. Harvey Laundry Co.*, (W. D. N. Y. 1921) 274 Fed. 937.

Time of filing disclaimer.—“It is well established that a disclaimer as to part of a patent, in good faith relied upon as valid, is effective, if made after the final decision and as a condition to granting relief. In such case, ‘unreasonable delay to file a disclaimer will not begin until that question is finally settled by the courts.’” *Excelsior Steel Furnace Co. v. Williamson Heater Co.*, (C. C. A. 6th Cir. 1920) 269 Fed. 614.

Vol. VII, p. 242, sec. 9. [First ed., vol. V, p. 502.]

Conclusiveness of decision of patent office.—To same effect as second paragraph of original annotation, see *Maremont v. Olson*, (App. Cas. D. C. 1920) 265 Fed. 1009.

To same effect as third paragraph of original annotation, see *Brown v. Tomlinson*, (App. Cas. D. C. 1920) 265 Fed. 460; *Doyle v. Tomlinson*, (App. Cas. 1920) 265 Fed. 461; *Wahl v. Wright*, (App. Cas. D. C. 1921) 273 Fed. 766.

To same effect as fifth paragraph of original annotation, see *Anglada v. Moyer*,

(App. Cas. D. C. 1921) 273 Fed. 359; *Valerius v. Pfouts*, (App. Cas. D. C. 1921) 273 Fed. 358; *Wright v. Halle*, (App. Cas. D. C. 1921) 273 Fed. 355; *Dunham v. Dyson*, (App. Cas. D. C. 1921) 272 Fed. 206; *Thomson v. Pearsons*, (App. Cas. D. C. 1921) 270 Fed. 1013; *Massey v. Ridge*, (App. Cas. D. C. 1921) 270 Fed. 879; *Ball v. Barnhurst*, (App. Cas. D. C. 1921) 270 Fed. 693; *Allen v. Hill*, (App. Cas. D. C. 1921) 270 Fed. 691; *Deforest v. Miller*, (App. Cas. D. C. 1921) 269 Fed. 718; *Dutcher v. Jackson*, (App. Cas. D. C. 1921) 269 Fed. 688; *Blaine v. White*, (App. Cas. D. C. 1920) 267 Fed. 340; *Kitselman v. Reid*, (App. Cas. 1920) 266 Fed. 256. See also *Reid v. Kitselman*, (App. Cas. D. C. 1920) 266 Fed. 255.

The rule that the court will hesitate to disturb concurrent decisions of the patent office does not apply where they do not agree either on the facts or the conclusion to be drawn therefrom. *Laughlin v. Burry*, (App. Cas. D. C. 1921) 270 Fed. 1013.

Vol. VII, p. 249, sec. 4898. [First ed., vol. V, p. 531.]

I. In general.

III. Assignments.

3. Form and requisites.

4. Recording.

5. Nature and effect.

IV. Licenses.

4. Construction.

5. Operation and effect.

6. Duration, expiration and renewal.

I. IN GENERAL (p. 250)

Proper characteristics.—Rights secured under the grant of letters patent by the United States are property protected by the constitutional guaranties, and therefore not subject to be appropriated, even for public use, without adequate compensation. *William Cramp, etc., Ship, etc., Bldg. Co. v. International Curtis Turbine Co.*, (1918) 246 U. S. 28, 38 S. Ct. 271, 62 U. S. (L. ed.) 560.

III. ASSIGNMENTS

3. Form and Requisites (p. 259)

Oral contract.—Patent rights or a license may be transferred orally, and parties may enter into an agreement by which they may act as partners without the making of a written contract. *Cline v. Horton*, (E. D. N. Y. 1921) 274 Fed. 728.

4. Recording (p. 263)

Validity of unrecorded assignment.—One who holds an unrecorded assignment of a patent may show that a subsequent assignment of the patent is invalid. *Burgess Battery Co. v. Solar Light Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 368.

5. *Nature and Effect* (p. 264)

Assignment as constituting license.—Where a patentee on assigning his rights to certain patents, reserves to himself the right to decide whom he will sue as infringer, and the assignee is entitled to only a portion of the damages recovered in such suits, the latter must be deemed to be a nonexclusive licensee and not entitled to maintain an action for infringement against the assignor. *Jockmus v. London*, (C. C. A. 2d Cir. 1920) 265 Fed. 12.

An assignment of an interest may be made and the extent of the interest is immaterial. *Nye Tool, etc. Works v. Crown Die, etc., Co.*, (N. D. Ill. 1921) 270 Fed. 587.

Previous licenses.—To the same effect as the original annotation, see *Keystone Type Foundry v. Fastpress Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 242.

Conveyance of right to sue.—To the same effect as the first paragraph of the original annotation, see *Nye Tool, etc., Works v. Crown Die, etc., Co.*, (N. D. Ill. 1921) 270 Fed. 587.

Liability of assignee for royalties.—An assignee of a license contract is under no obligation to pay royalties to the patentee in the absence of evidence of the assumption of such obligation by him. *Loose v. Bellows Falls Pulp Plaster Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 81.

IV. LICENSES

4. *Construction* (p. 275)

Construction of patent as to licensee.—A patent is entitled to a generous construction as against a licensee. *Loose v. Bellows Falls Pulp Plaster Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 81.

License to manufacture.—A license giving the licensee the right to manufacture patented articles also gives him the right to use and sell them. *Curtiss Aeroplane, etc., Corp. v. United Aircraft Engineering Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 71.

A license giving the licensee a right to manufacture a patented article, the patent on which is owned by the licensor, by which the licensee agrees to purchase all materials to be used in making the article from the licensor or persons designated by him, is not violative of section 3 of the Clayton Act (9 Fed. Stat. Ann. (2d ed.) p. 733). *Westinghouse Electric, etc., Co. v. Diamond State Fibre Co.*, (D. C. Del. 1920) 268 Fed. 121.

Stipulation not to infringe.—Where an agreement recites that the licensee has agreed not to evade or attempt to evade the patented device, this is only another way of saying that the licensee will not hereafter resort to colorable differences of construction with a view to escaping infringement and the clause is contractual. *Pressed Steel Car Co. v. Union Pac. R. Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 518.

Payment of royalties by licensee.—A licensee, paying royalties, pays on what he has

agreed to manufacture. *Loose v. Bellows Falls Pulp Plaster Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 81.

5. *Operation and Effect* (p. 279)

Estoppel of licensee.—To same effect as original annotation, see *Loose v. Bellows Falls Pulp Plaster Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 81; *Hewitt v. American Telephone, etc., Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 392.

While a licensee under a patent may not refer to the prior art for the purpose of showing that the patent is anticipated or invalid, he may do so to show that what he uses does not infringe the patent. *Pressed Steel Car Co. v. Union Pac. R. Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 518.

Where some one other than the patentee grants a license, the licensee is not estopped to dispute the validity of the patent. *Kohn v. Eimer*, (C. C. A. 2d Cir. 1920) 265 Fed. 900.

6. *Duration, Expiration and Renewal* (p. 280)

Dissolution of corporation.—To the same effect as the original annotation, see *Keystone Type Foundry v. Fastpress Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 242.

Liability for royalties.—It is a general rule that liability to pay royalties terminates on the expiration of the patent. The parties may, however, contract to the contrary. *Pressed Steel Car Co. v. Union Pac. R. Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 518.

Vol. VII, p. 283, sec. 4900. [First ed., vol. V, p. 547.]

Effect of notice.—When a person has been notified that what he is doing is an infringement of the patented right, and the person notified then disclaims any purpose to infringe, and declares his intention to desist from such infringement, if he afterwards continues or repeats it, he cannot escape the payment of damages on the plea that he was an innocent infringer without notice. *Shapiro v. Franklin Brass Foundry*, (E. D. Pa. 1921) 272 Fed. 176.

Profits not excluded.—It has been held that the word "damages" as used in this section does not have its generic meaning and that a recovery of profits which were made before notice was given may be recovered. *Shapiro v. Franklin Brass Foundry*, (E. D. Pa. 1921) 272 Fed. 176.

Finding as to compliance with section.—When there is a controversy with respect to a compliance with this section two facts must be found by the court. One is that the notice, constructive or actual, required by the statute, has been given, and the other that acts of infringement followed the notice. The duty of making neither of these findings can be delegated to a master. The finding is a judicial act, which cannot be

delegated. *Shapiro v. Franklin Brass Foundry*, (E. D. Pa. 1921) 272 Fed. 176.

Vol. VII, p. 288, sec. 4919. [First ed., vol. V, p. 552.]

- I. Who may sue for infringement.
- II. Who liable for infringement.
- V. Recovery.

I. WHO MAY SUE FOR INFRINGEMENT
(p. 289)

Right of assignee to appeal.—If one who purchases a patent after a decree for the defendant in an action for infringement is not the real owner of the patent, and of the right to prosecute the appeal, or purchase the right for an ulterior purpose, with a view to carrying on vexatious litigation, the Circuit Court of Appeals is not without power to make inquiry into such matters itself, or to direct an inquiry to be made in the district court. *F. A. Mfg. Co. v. Hayden*, (C. C. A. 1st Cir. 1921) 273 Fed. 374.

When motion to dismiss suit will be denied.—A motion to dismiss a suit for infringement on the ground that the patent is void on its face will be denied, when the motion is really arguable. *Scott v. Aristo Hosiery Co.*, (S. D. N. Y. 1920) 266 Fed. 382.

II. WHO LIABLE FOR INFRINGEMENT (p. 296)

In general.—Where defendants manufacture a device capable of an infringement use and sell it with the intent that it shall be so used, they infringe the patent, even though their device is capable of a noninfringing use, and even though they go through the form of instructing that it shall be used in a noninfringing way. *Sandusky Foundry, etc., Co. v. De Lavaud*, (C. C. A. 6th Cir. 1921) 274 Fed. 607.

Intervening defendant.—The manufacturer of a patented article may be permitted by the court to intervene in a suit against a dealer for an alleged infringement of a patent. *Continuous Extracting Press Corp. v. Eastern Cotton Oil Co.*, (E. D. N. C. 1920) 264 Fed. 340.

V. RECOVERY (p. 302)

Interest.—In *Dunkley Co. v. Vrooman*, (C. C. A. 6th Cir. 1921) 272 Fed. 468, the court said regarding the allowance of interest: "The fact that payment had been long delayed was one of the factors entering into the master's fixing of a reasonable royalty as of the date of his report. Since this was true, and since interest is not ordinarily computable on damages before liquidation, there was no error in not awarding to plaintiffs interest before the date of the master's report. The final decree might well have awarded interest after the date of the master's report, but it did not; the interval between the report and the decree was brief,

and the decree, by state statute, draws interest from its date." See also *Metallic Rubber Tire Co. v. Hartford Rubber Works Co.*, (D. C. Conn. 1920) 266 Fed. 543.

Vol. VII, p. 309, sec. 4920. [First ed., vol. V, p. 567.]

- I. Pleading and proof in general.
- II. Statutory defenses.

I. PLEADING AND PROOF IN GENERAL (p. 310)

Prior patents as anticipations.—On the question of anticipation of a later patent by an earlier one, as arising in a suit on the later patent, the criterion is the same as upon the question of validity of the earlier patent in a suit brought thereon. If the structure is inoperative, the patent upon it is not good, and it does not anticipate a later patent; but mere failure to get commercial recognition, or, indeed, failure to deserve that recognition until somewhat improved, is not inconsistent with full validity as a patent or full effect as an anticipation. Where the question is not one of full anticipation, but is whether the advance shown by the later over the earlier device is of an inventive character, the failure of the earlier to get recognition in the trade may be persuasive evidence that an apparently slight advance was more important than it seems. *Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 386.

Nonuser not defense.—"Under our laws a patentee was not obliged to manufacture the apparatus described in the patent. Its nonuse does not deprive him of the protection of the patent laws." *Morgan Constr. Co. v. Donner Steel Co.*, (W. D. N. Y. 1920) 269 Fed. 389.

Any change in the order of steps as designated in a patent does not operate to avoid an infringement. "A patent for a process is infringed by one who, without ownership or license, uses substantially the process which the patent claims; identity, whether of apparatus or materials, not being necessary to constitute infringement; but no process patent is infringed where any one of the series of acts which constitute the process is omitted, unless some equivalent act is substituted; reason seeming to indicate that one act is the equivalent of another when it works in substantially the same way to accomplish the same result." *Los Angeles Lime Co. v. Nye*, (C. C. A. 9th Cir. 1921) 270 Fed. 155.

Deviation in line not observable by general public.—If there is a slight deviation in a line, which could be pointed out by measurements of an expert, the fact that it would not be detected by observation of the general public will not avoid the infringement. *Bayley v. Krich*, (D. C. N. J. 1920) 264 Fed. 978.

The rule of shop right is stated as follows: "Where an employee makes an invention, and allows his employer to develop it with his own resources, and to market it, and establish a trade in it, he cannot, after he leaves the employer, prevent him from going on, and so compel him to lose all the investment that he has put in, and the trade he has established, unless at the outset he gives him some warning. The rule is entirely equitable; the books put in the form of an estoppel." *Beecroft v. Rooney*, (S. D. N. Y. 1920) 268 Fed. 545, holding the rule to be inapplicable in the case under consideration.

Infringement question of fact.—The matter of an infringement is in the final analysis a question of fact. *Laclede Christy Clay Products Co. v. St. Louis*, (E. D. Mo. 1921) 270 Fed. 338.

Burden of proof.—The burden is on defendants in a suit to enjoin infringement of letters patent to prove anticipation beyond a reasonable doubt. *Permutit Co. v. Harvey Laundry Co.*, (W. D. N. Y. 1921) 274 Fed. 937.

Dismissal of bill.—As to the dismissal of a bill in a suit for a patent infringement it is said: "It may be conceded at the outset that the motion to dismiss will not be sustained, except in a case sufficiently clear. Such a motion is proper practice, and may be sustained by the clear disclosures of the bill itself, the exhibits attached thereto, and the letters patent, of which profert is made. Where there is sufficient certainty that such disclosures cannot be substantially aided by testimony, it is the duty of the court to sustain the motion to obviate the necessity of increasing the expense and performing the labor of taking proofs." *Luten v. Kansas City Bridge Co.*, (W. D. Mo. 1921) 272 Fed. 533.

II. STATUTORY DEFENSES (p. 317)

The state of the art.—"Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and in equity cases without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes, and none other, to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent." *Brown v. Piper*, (1875) 91 U. S. 37, 23 U. S. (L. ed.) 200; *Kauffman v. Sodemann Heat, etc., Co.*, (E. D. Mo. 1920) 267 Fed. 435.

Public use.—That "public use," within the meaning of the statute, is a very different thing from "use by the public," is well settled. *Los Angeles Lime Co. v. Nye*, (C. C. A. 9th Cir. 1921) 270 Fed. 155.

Burden of proof.—The burden of proof is on the defendants in an infringement suit to show that the process or product of the complainant was in public use within the mean-

ing of the statute for two years prior to the filing of his application. *Los Angeles Lime Co. v. Nye*, (C. C. A. 9th Cir. 1921) 270 Fed. 155.

Vol. VII, p. 326, sec. 4921. [First ed., vol. V, p. 577.]

- I. General equitable jurisdiction.
- II. Joinder of causes of action.
- III. Pleadings.
- IV. Injunctions.
- V. Decree and award.
- VII. Limitations and laches.

I. GENERAL EQUITABLE JURISDICTION (p. 326)

Constitutionality.—This section is not violative of the Seventh Amendment to the Constitution as depriving a person of his right to trial by jury. *Filer, etc., Co. v. Diamond Iron Works*, (C. C. A. 7th Cir. 1921) 270 Fed. 489.

Jurisdiction.—Equity has a place in the administration of the patent law and shields the innocent from the consequences of practices that are unfair. *In re Henderson*, (App. Cas. D. C. 1921) 269 Fed. 707.

II. JOINDER OF CAUSES OF ACTION (p. 332)

Where there are several claims which may have been infringed it is the duty of the plaintiff to put forth all the claims that have been infringed. And the rule is the same in respect of damages and profits arising from infringements, not presented to the trial court, but which might have been so presented. *Panoualias v. National Equipment Co.*, (C. C. A. 2d Cir. 1920) 269 Fed. 630.

III. PLEADINGS (p. 334)

Supplemental bill to set up new infringements.—In *Minerals Separation Co. v. Miami Copper Co.*, (C. C. A. 3d Cir. 1920) 269 Fed. 265, it was held that there was no right of appeal from the court's order denying leave to file a supplemental bill after decree on the merits praying relief against new practices charged to infringe.

Dismissal of bill.—A motion to dismiss a bill for patent infringement on the ground that it is invalid on its face is to be determined solely from the face of the patent and does not bring up questions of infringement. "The general principles governing the dismissal of bills for patent infringement, where the patent is invalid on its face, are sufficiently familiar not to require elaborate restatement. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. ed. 991; *Fowler v. City of New York et al.*, 121 Fed. 747, 58 C. C. A. 113; *Kuhn et al. v. Lock-Stub Check Co.*, 165 Fed. 445, 91 C. C. A. 389; *Fernald v. Oneida Nat. Chuck Co.* (C. C.) 167 Fed. 559, affirmed *Fernald v. Oneida Nat. Chuck Co.*, 174 Fed. 1020, 98 C. C. A. 664; *Mallinson et al. v. Ryan*

(D. C.) 242 Fed. 951; *Bayley & Sons v. Blumberg*, 254 Fed. 696, 166 C. C. A. 194. For such a motion to prevail, the invalidity must be obvious and the question must not be fairly arguable. Where there is a really debatable pro and con, the motion must be denied." *Bonnie-B. Co. v. Giguët*, (S. D. N. Y. 1919) 269 Fed. 272.

IV. INJUNCTIONS (p. 340)

After expiration of patent.—To same effect as original annotation, see *Excelsior Steel Furnace Co. v. Williamson Heater Co.*, (C. C. A. 6th Cir. 1920) 269 Fed. 614.

Ceasing infringement and promises to abstain.—To the same effect as the original annotation, see *General Electric Co. v. Independent Lamp, etc., Co.*, (D. C. N. J. 1920) 267 Fed. 824.

Injunction against circulars.—Where although a circular is too broad yet if the defendant agrees to change it in accordance with directions by the court an injunction will not be granted. *Bonnie-B. Co. v. Giguët*, (S. D. N. Y. 1919) 269 Fed. 272.

Agents of infringer.—An injunction will be granted to restrain the sale of an infringing article by one who is selling it for another by whom it is being manufactured. *Patton v. Clegg*, (E. D. Pa. 1921) 274 Fed. 118.

Infringement after decree.—"Infringement after final decree and in violation of injunction is just as much infringement as is the same act committed before suit brought; all infringers are tort-feasors, and a plurality of infringers are joint tort-feasors, and are also liable severally." *Schey v. Giovanna*, (C. C. A. 2d Cir. 1921) 273 Fed. 515.

Supplementary injunctive relief.—It is declared that supplementary injunctive relief against past infringing practices is not allowable, the remedies against infringement after decree being damages and profits on accounting, attachment for contempt and original bill in which last remedy the right to injunctive relief is fully preserved. *Minerals Separation v. Miami Copper Co.*, (C. C. A. 3d Cir. 1920) 269 Fed. 265.

Contempt.—Where, after the issuance of an injunction in an infringement proceeding prohibiting the defendant from manufacturing and selling certain infringing devices, he manufactures another device substantially similar to the one covered by the injunction, he is guilty of contempt. *Eureka Tool Co. v. Wire Rope Appliance Co.*, (C. C. A. 8th Cir. 1920) 265 Fed. 673. Likewise, where after an injunction has been granted the defendant makes no change in the patented device except by a substitution which is a merely colorable evasion he is guilty of contempt. *Schey v. Giovanna*, (C. C. A. 2d Cir. 1921) 273 Fed. 515.

An order dismissing a proceeding in which it is sought to have a defendant adjudged guilty of contempt for the violation of an injunction against the infringement of a

patent, is not appealable. *Minerals Separation v. Miami Copper Co.*, (C. C. A. 3d Cir. 1920) 269 Fed. 266.

Questions on appeal.—An order denying a supplementary injunction in a patent infringement suit will not be disturbed by the appellate court except for an abuse of discretion. *Minerals Separation v. Miami Copper Co.*, (C. C. A. 3d Cir. 1920) 269 Fed. 265.

V. DECREE AND AWARD (p. 355)

Relief in general.—While the inventor of a very substantial advance should receive as broad a measure of protection as the language of his grant justifies, it is equally true that the defendant who has manufactured or used a device in reliance upon an express limitation in the patent, voluntarily inserted or accepted by the patentee, should be protected in his investment. *Republic Iron, etc., Co. v. Youngstown Sheet, etc., Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 386.

Estimated by advantage gained over other modes.—"The rule of comparison is settled law, and contemplates that the infringer had a choice of processes, chose that of the patent, and gained an advantage over what would have been his had he chosen otherwise. Obviously his choice is made from processes existing at the time of choice; that is, at the time of infringement, from day to day, and as alternative presents itself. He is not limited in fact to the process of the patent and processes existing only at the date of the patent, and the principle of standards does not require nor sanction that he be so limited in theory. For the advantage he actually gains, and which as profits or savings he must render to the patentee, is only that of the invention over other processes he might have chosen in lieu of the invention and did not.

"What the infringer thus gains is also what the patentee is presumed to thus lose, so far as accounting for profits is concerned, and equity is done when all such gains are taken from the infringer and given to the patentee; for thus the former loses nothing, he is not penalized, the latter is made whole, and he is not given gratuities nor rewarded beyond his present deserts, as otherwise would be the case." *Minerals Separation v. Butte, etc., Min. Co.*, (D. C. Mont. 1921) 274 Fed. 878.

Profits lost.—Where it appeared that the defendant was an old customer of the plaintiff for the patented articles and had sold many of them it was held that profits lost to the plaintiff by sales which he had lost as a result of defendant's acts were recoverable. *Filer, etc., Co. v. Diamond Iron Works*, (C. C. A. 7th Cir. 1921) 270 Fed. 489.

Effect of failure to ask for profits and damages.—In reply to the proposition that the plaintiff by not demanding profits and damages while insisting on an injunction which restrained the manufacture, sale and

use of the infringing device, reserved the right to sue elsewhere, it has been said: "No authority exists for such splitting of action, and it is opposed to fundamental rules; for a cause, once properly in a court of equity for any purpose, will ordinarily be retained for all purposes. *Camp v. Boyd*, 229 U. S. 552, 33 Sup. Ct. 785, 57 L. Ed. 1317. A 'waiver' of pecuniary recovery made at trial, while insisting on injunction, cannot be construed as a lawful segregation for future litigation of the recovery waived. Indeed, waiver implies abandonment, not reservation for future use." *Panoulas v. National Equipment Co.*, (C. C. A. 2d Cir. 1920) 269 Fed. 630.

Measure of damages based on royalties.—In *Metallic Rubber Tire Co. v. Hartford Rubber Works Co.*, (D. C. Conn. 1920) 266 Fed. 543, the court said: "Manifestly the plaintiff has been entitled to all profits realized from the infringement by the defendant, and the defendant should be held to pay those profits over, and its own conduct estops it, in my judgment, from any consideration, but the strict application of the established rules; so that, in view of the facts abundantly disclosed, under the application of rule, reason, or justice, it cannot expect to have applied the lesser punishment of assessing 1½ per cent. royalty as the measure of what this plaintiff is fairly entitled to recover, rather than the exact amount of the profits disclosed by the master's report."

Order for accounting.—The court will determine, on such preliminary inquiry as seems fitting, whether the recovery of any substantial damages or profits is so improbable as to justify declining to make the usual order for an accounting. *Sandusky Foundry, etc., Co. v. DeLavaud*, (C. C. A. 6th Cir. 1921) 274 Fed. 607.

Judgments against litigant on part of claims.—Where a litigant is defeated on some of his claims he will not be permitted to go against the same defendant and try out the other claims against the device alleged to be infringed at the time the original suit was brought. *Union Steam Pump Co. v. Manton-Gaulin Mfg. Co.*, (D. C. Me. 1921) 272 Fed. 773.

Effect of consent decrees.—"Consent decrees as to validity, scope, and infringement in patent cases are regarded as constituting no adjudication of such matters which will affect other than the parties consenting thereto. But they are intended by the parties to control their rights in respect to the matters covered thereby, and they do have that effect. The method of enforcing this result is by estopping either party from denying the binding effect of the decree so procured. When, as here, a patent is, in a consent decree, adjudged valid, and infringed by a certain machine, that decree has, as between those parties, settled that that patent is valid, and that machine is an

infringement. When thereafter complainant desires by a supplemental bill to extend the relief to another machine, which he claims is essentially the same as the one held to be an infringement, the issue thus presented is whether, in the light of the patent as valid, the new machine is essentially the old infringement." *Roberts Cone Mfg. Co. v. Bruckman*, (C. C. A. 8th Cir. 1920) 266 Fed. 986.

VII. LIMITATIONS AND LACHES (p. 370)

Laches within period of statutory limitation.—To the same effect as original annotation, see *Yates v. Smith*, (D. C. N. J. 1920) 271 Fed. 27.

Vol. VII, p. 375. [*Recovery, etc.*] [First ed., 1912 Supp., p. 286.]

Government not made general licensee.—The provisions of this act do not constitute the United States a general licensee to use patent rights when necessary for its governmental purposes, so as to preclude the owner of a patent from enjoining a contractor with the government from making and delivering articles contracted for, alleged to infringe his patent. *William Cramp, etc., Ship, etc., Bldg. Co. v. International Curtis Marine Turbine Co.*, (1918) 246 U. S. 28, 38 S. Ct. 271, 62 U. S. (L. ed.) 560; *Marconi Wireless Tel. Co. v. Simon*, (1918) 246 U. S. 46, 38 S. Ct. 275, 62 U. S. (L. ed.) 568; *Electric Boat Co. v. Lake Torpedo Boat Co.*, (C. C. A. 3d Cir. 1920) 264 Fed. 670.

Articles furnished to government.—Under this act no illegal interference with the right of a patentee can arise from the mere furnishing to the government of the apparatus which is not per se an infringement, even though its use by the government will infringe the patent. *Marconi Wireless Tel. Co. v. Simon*, (1918) 246 U. S. 46, 38 S. Ct. 275, 62 U. S. (L. ed.) 568.

Vol. VII, p. 377, sec. 4929. [First ed., vol. V, p. 600.]

Intent of section.—To the same effect as the original annotation, see *Faris v. Patsy Frok, etc., Co.*, (C. C. A. 9th Cir. 1921) 273 Fed. 900; *Knapp v. Will & Banner Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 380; *Shapiro v. Franklin Brass Foundry*, (E. D. Pa. 1921) 272 Fed. 176.

Necessity of invention.—Design patents are on as high a plane as utility patents and require as high a degree of exercise of the inventive or original faculty. *Knapp v. Will, etc., Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 380.

Under this section no patent can be issued for a mere shape, configuration, or outline of a design or pattern, unless such shape, configuration, or outline or pattern is in and of itself an ornamental design. *Faris v. Patsy*

Frok, etc., Co., (C. C. A. 9th Cir. 1921) 273 Fed. 900.

Novelty.—"A design, in order to be patentable, must be 'new, original, and ornamental.' These words convey the thought that the design must possess artistic merit and be above the commonplace." *Shapiro v. Franklin Brass Foundry*, (E. D. Pa. 1921) 272 Fed. 176.

In order that there may be novelty the thing must not have been known to any one before. *Knapp v. Will, etc., Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 380.

Amount of novelty.—Mere change in construction, displaying no originality and no added beauty, cannot be the subject of a design patent. *Baker v. Hughes-Evans Co.*, (C. C. A. 2d Cir. 1920) 270 Fed. 97.

Mere novelty of form is insufficient. Thus, a square candle is not the subject of a design patent, the requirement as to novelty being lacking. *Knapp v. Will, etc., Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 380.

Test of artistic merit.—"The judgment delivered, with respect to any design or any work of art, that it possesses artistic merit, is founded almost solely on taste. Such merit could not very well be denied to any work of art which called forth the applause of a large number of people. Mere commercial success, it is true, is not a very satisfactory test of artistic merit; but, unless the question is to be determined altogether in accordance with the tastes of the one who is pronouncing judgment, it is the best test we have, because it is the practical equivalent of the fame which attaches to a work of art. If the design satisfies the tastes of many people, by whom it is pronounced to have artistic merit, such merit cannot very well be denied to it for patent purposes, without a denial of the very reward which by the law is held out to designers. The thought is that any one who designs something which is different from the designs which have preceded it, and which, because of its attractiveness to the eye, commands a ready and large sale, shall be rewarded by the exclusive right to make and sell. The commercial success may mean lack of artistic appreciation on the part of purchasers, or it may mean artistic merit in the design. By analogy to patented articles, it is regarded as evidence of the latter. The fact finding, made and adhered to, is that the patentee, in the language of the law, invented such a design, and to him, in consequence, belongs the reward." *Shapiro v. Franklin Brass Foundry*, (E. D. Pa. 1921) 272 Fed. 176.

New combination of old elements.—While invention may reside in a new combination of old elements, yet every new combination of old elements is not patentable. "The test for invention is to be considered the same for designs as for mechanical patents; i. e., was the new combination within the range

of the ordinary routine designer?" *Knapp v. Will Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 380.

Design patent as trade-mark.—A design patent cannot be used to identify a device with the purpose of operating as a trade-mark. Hence, an anti-skidding device is not the subject of a design patent as it is exhibited on a mechanical device whose appearance cannot matter, the real question being can it accomplish what is claimed for it. *North British Rubber Co. v. Racine Rubber Tire Co.*, (C. C. A. 2d Cir. 1921) 271 Fed. 936.

Test of identity.—To same effect as original annotation, see *Borgfeldt v. Weiss*, (C. C. A. 2d Cir. 1920) 265 Fed. 268.

Equivalents.—The patentee of a design patent is entitled to the usual range of equivalents with respect to known prior unessential details. *Borgfeldt v. Weiss*, (C. C. A. 2d Cir. 1920) 265 Fed. 268.

Evidence of infringement.—Where a question of an infringement of a design patent is presented, oral evidence is never so satisfactory as the judgment of the eye, upon actual view of the original design patent and the one claimed to be an infringement thereof. *Standard Computing Scale Co. v. Detroit Automatic Scale Co.*, (C. C. A. 6th Cir. 1920) 265 Fed. 281.

Vol. VII, p. 383, sec. 1. [First ed., vol. V, p. 603.]

Right to accounting.—When a defendant admits infringement, this is evidence from which infringement can be found; and, infringement having been found, an accounting cannot be denied on the ground of a finding that the infringement was negligible in extent merely because the defendant has accompanied, or sought to qualify, his admission of infringement by loose and indefinite statements with respect to the extent of it. When a patent is found to be valid and infringed, a plaintiff has the right to a full inquiry into the extent of the infringement, and the practice is not to make this inquiry previous to the findings of validity and infringement, but to defer it until these preliminary findings have been made. *Shapiro v. Franklin Brass Foundry*, (E. D. Pa. 1921) 272 Fed. 176.

Only one penalty recoverable.—The statutory penalty cannot be recovered for the sale of each article to which the design has been applied unless there is some measuring of the infringing sales by subordinate units. *Young v. Grand Rapids Refrigerator Co.*, (C. C. A. 6th Cir. 1920) 268 Fed. 966.

Measure of profits recoverable.—Where the measure of profits cannot be ascertained a recovery of the penalty may be had. *Young v. Grand Rapids Refrigerator Co.*, (C. C. A. 6th Cir. 1920) 268 Fed. 966.

PENAL LAWS

Vol. VII, p. 423, sec. 6. [First ed.,
1909 Supp., p. 406.]

Forcible resistance essential.—Something more than setting the law at defiance is essential to the commission of the offense designated in this section. There must be a forcible resistance to the authority of the United States while endeavoring to carry the laws into execution. *Anderson v. U. S.*, (C. C. A. 8th Cir. 1921) 273 Fed. 20.

Overt act.—This section does not require an overt act as an element of the crime which it denounces. *Anderson v. U. S.*, (C. C. A. 8th Cir. 1921) 273 Fed. 20.

Conspiracies to violate Selective Service Act and Espionage Act are not subject to terms of this section. *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

Sufficiency of indictment.—The indictment must charge that the purpose of the conspiracy was the exertion of force against those charged with the duty of executing the laws of the United States, or the language used in the count must be such that from it the inference reasonably follows that that was the purpose and object of the conspiracy; and unless the count can be so construed it is bad and fails to charge the offense. *Anderson v. U. S.*, (C. C. A. 8th Cir. 1921) 273 Fed. 20.

Vol. VII, p. 460, sec. 13. [First ed.,
1909 Supp., p. 408.]

I. Origin, purpose, and construction of statute.

1. Origin and purpose.

III. Ingredients of offense.

1. In general.

V. Prosecution of offense.

2. Sufficiency of indictment.

6. Admissibility of evidence.

a. In general.

7. Sufficiency of evidence.

I. ORIGIN, PURPOSE AND CONSTRUCTION OF
STATUTE

1. *Origin and Purpose* (p. 460)

Purpose of enactment.—The thing at which this section is directed is the prevention of military or naval expeditions or enterprises against governments with whom the United States is at peace. The several things mentioned herein are merely different ways of accomplishing the general object. *Jacobson v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 399.

III. INGREDIENTS OF OFFENSE

1. *In General* (p. 462)

What constitutes offense.—"While the substantive thing aimed at in the statute is the prevention of a military enterprise within the United States against a territory or people of a friendly nation, yet the things actually punishable under the statute are very different. It is not necessary, to warrant a conviction under the statute, that there shall at any time be in existence a military expedition or enterprise. So far as a military enterprise is concerned, it is sufficient if a military enterprise was a part of the intent and purpose of those engaged in the conspiracy in the one case, and of the person or persons engaged in the doing of the things prohibited by the statute in the other case. The statute makes it an offense to 'begin' a military expedition or enterprise. Manifestly the thing that is only begun is not the completed thing. Another clause makes it an offense to 'provide or prepare the means.' Manifestly any offense under the statute may be committed by an individual." *Jacobson v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 399.

V. PROSECUTION OF OFFENSE

2. *Sufficiency of Indictment* (p. 472)

Charging offense in language of statute.—An indictment is sufficient which charges the offense in substantially the language of the statute. *Jacobson v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 399.

Consolidation of indictments.—An indictment for committing the offense specified in this section may be consolidated with an indictment for conspiracy to commit such offense. *Jacobson v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 399.

6. Admissibility of Evidence

a. *In General* (p. 473)

Evidence showing relation existing between defendants.—Evidence may be received of acts and circumstances showing the relation existing between the defendants, though it is sufficient to determine whether such evidence has any bearing on the conspiracy or the carrying out of it. *Jacobson v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 399.

7. *Sufficiency of Evidence* (p. 475)

In general.—Where the question was raised that there should have been no conviction because the evidence did not show that all that was done by the defendants did constitute a military enterprise, the court said: "Whether what the defendants did actually

reached the dignity of a military expedition or enterprise is not deemed material, if the evidence shows that, under the conspiracy charge, the conception, the thing they intended, amounted to a military expedition or enterprise, and if under the other charge the defendants did in the way charged any one or more of the things charged." *Jacobson v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 399.

Vol. VII, p. 484, sec. 19. [First ed., 1909 Supp., p. 410.]

- II. Construction.
- III. Persons protected.
- IV. "Right or privilege" protected.
- VII. Indictment.

II. CONSTRUCTION (p. 486)

The origin of this section was in the Act of May 31, 1870 (16 Stat. 141), which was re-enacted as section 5508 of the Revised Statutes. *Foss v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 891.

III. PERSONS PROTECTED (p. 486)

Witness in land office contests.—If one is protected under the statute while in the lawful custody of a United States marshal, or in giving information to a United States marshal for a violation of the laws of the United States, or in giving information to a collector of internal revenue, for violation of the revenue laws of the United States, it follows that one is protected in giving testimony before the land office in a contest which involves the rights of entrymen under the land laws of the United States. The power which is delegated to the federal government to dispose of the public lands includes the power to hear and determine contests in the land office, and the power to compel witnesses to testify in such contests, and the power to protect them while so doing, and in all such contests the United States is a party. *Foss v. U. S.*, (C. C. A. 9th Cir. 1920) 266 Fed. 881.

IV. "RIGHT OR PRIVILEGE" PROTECTED (p. 486)

Freedom to perform contracts.—In a case where defendants were charged with conspiracy to prevent by strikes and sabotage certain citizens from fulfilling their contracts with the government for war munitions and supplies the court declared that "to produce, to sell, to contract to sell to any buyer, are not rights or privileges conferred by the Constitution and laws of the United States." *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

VII. INDICTMENT (p. 490)

An indictment for a conspiracy to prevent and hinder furnishing of munitions, etc., to the United States government was held suf-

ficient in *Anderson v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 65.

Vol. VII, p. 516, sec. 32. [First ed., 1909 Supp., p. 414.]

- II. Construction and application.
 - 3. Intent to defraud.
- III. Prosecution for offense.
 - 4. Evidence.

II. CONSTRUCTION AND APPLICATION

3. Intent to Defraud (p. 519)

Purpose of section.—This section should be construed in harmony with its aim which is not merely to protect innocent persons from actual loss through reliance on false assumptions of federal authority, but to maintain the general good repute and dignity of the service itself. *Russell v. U. S.*, (C. C. A. 9th Cir. 1921) 271 Fed. 684.

III. PROSECUTION FOR OFFENSE

4. Evidence (p. 522)

False personation—Sufficiency of evidence.—Evidence that the accused went to the home of the prosecuting witness and after stating that he was "from the federal government" pulled back the lapel of his coat and showed a badge, and stated that he had been informed that the prosecuting witness had intoxicating liquor on his premises and that he had come to search for the same, whereupon he was paid a sum of money to desist, has been held to be sufficient to sustain a conviction under this section; and furthermore the fact that the accused was in fact an officer employed by the United States Navy Department was no defense, as an employee of one department of the government may be held guilty of falsely impersonating an officer of another department. *Russell v. U. S.*, (C. C. A. 9th Cir. 1921) 271 Fed. 684.

Vol. VII, p. 523, sec. 35. [First ed., 1909 Supp., p. 414.]

- V. Indictment.
 - 1. For making and presenting false claim.
 - a. Joinder of counts.
- VI. Trial.
 - 2. Evidence and variance.
 - a. Evidence.
 - b. Variance.

V. INDICTMENT

- 1. *For Making and Presenting False Claim*
 - a. Joinder of Counts (p. 528)

In a prosecution against an agent of General Land Office for making and presenting false claims against the United States by means of an itemized statement of expenses, several items of which are alleged to be false, each item may be regarded as a separate claim and violation of this section, and

set forth in separate counts in the same indictment. *Fain v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 473.

VI. TRIAL

2. Evidence and Variance

a. Evidence (p. 532)

Admissibility.—The admission in evidence of a written confession made by one of several defendants charged with conspiracy under this section has been held not to be error where the court instructed the jury that the confession was not to be "considered evidence against any one in the case" except the one by whom it was made. *Hagen v. U. S.*, (C. C. A. 9th Cir. 1920) 268 Fed. 344.

In a prosecution under this section against a special agent of the General Land Office for making and presenting false claims against the United States, there is no error in excluding testimony, offered by a special land agent called as a witness for the defense, that the rules and regulations of the Secretary of the Interior were not technically observed and followed by the agents in the field and that in the Forest Service and Agricultural Department of the United States it was the custom to use cars in the transaction of field work and to charge the expense thereof to the government. *Fain v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 473.

b. Variance (p. 533)

The fact that an indictment alleges that the defendant presented false claims and vouchers against the United States for certain amounts, where as the proof shows that the claims presented were for larger amounts but that only the amounts alleged in the indictments were false, does not constitute a fatal variance. *Fain v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 473.

Vol. VII, p. 533, sec. 36. [First ed., 1909 Supp., p. 415.]

Constitutionality.—It has been held that this section is inoperative as a criminal statute because of the indefiniteness of the punishment presented in that the preceding section to which reference is made prescribes different punishment for different offenses. *Holmes v. U. S.*, (C. C. A. 5th Cir. 1920) 267 Fed. 529. The court said:

"In the instant case, who can say what punishment the lawmakers intended? The section itself is silent as to that punishment, and refers us to section 35 to ascertain it. When we look at the last-named section, we find two punishments prescribed of very different severity: One, a fine of not more than \$5,000 or imprisonment of five years, or both; and the other a fine of not more than \$500 and imprisonment of not more than two years. It is contended for both plaintiffs in error that the lesser pun-

ishment must have been intended, because the subject-matter of the last portion of the section is germane to the subject treated of in section 36. But this contention is in our judgment untenable. In a criminal statute the citizen must not be left in uncertainty or to speculation or argument as to what acts constitute a violation, or what punishment, if any, is visited upon a violation when the terms are definite. There was no error in the view taken by the trial court."

Indictment.—An indictment which alleges that the defendant applied to his own use "certain property" of the United States government which had theretofore been furnished for military service but which in no way indicates the nature, character or value of the property is insufficient. *Edwards v. U. S.*, (C. C. A. 4th Cir. 1920) 266 Fed. 848.

Vol. VII, p. 534, sec. 37. [First ed., 1909 Supp., p. 415.]

I. Conspiracy, in general.

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1. In general.

2. "Offense against the United States."

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- X. Trial, acquittal or conviction, and punishment.
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I. CONSPIRACY, IN GENERAL

1. Definition and Nature of Conspiracy (p. 536)

Conspiracy defined.—A conspiracy is an agreement between two or more parties to do an unlawful thing, or to do a lawful thing in an unlawful manner. *Cumberland Telephone, etc., Co. v. Stevens*, (S. D. Miss. 1921) 274 Fed. 745.

Accomplishment of object of conspiracy.—It is not necessary to a conviction for conspiracy that the object of the conspiracy be accomplished. *Grayson v. U. S.*, (C. C. A. 6th Cir. 1921) 272 Fed. 553.

II. CONSPIRACY TO COMMIT OFFENSE

1. In General (p. 537)

As including attempt to commit crime.—A conspiracy to commit an offense, and an act done in pursuance and to effectuate the object thereof, may easily, if it does not necessarily comprehend an attempt to commit the crime as to which the conspiracy relates. It has been the practice where more than one person has been engaged upon an attempt to commit an offense against the United States, to use the conspiracy section of the Penal Law as a medium of prosecution of persons whose efforts at law breaking fall short of the successful accomplishment of their ultimate object. *U. S. v. Rachmil*, (S. D. N. Y. 1921) 270 Fed. 869.

Proof of names of persons unknown at time of indictment.—The names of persons, unknown to the grand jury, who participated in a conspiracy to violate certain statutes of the United States, need not be proved in order to obtain a conviction, if the conspiracy charged among the defendants and the overt acts alleged are proven. *Nee v. U. S.*, (C. C. A. 3d Cir. 1920) 267 Fed. 84.

Appointment of commission to take newly discovered evidence as discretionary.—The granting of the prayer of a petition of defendants in a prosecution under this section for the appointment of a commissioner to take newly discovered evidence, is within the discretion of the court, and its refusal to grant such petition does not constitute error where it appears that the court has not abused its discretion. *Nee v. U. S.*, (C. C. A. 3d Cir. 1920) 267 Fed. 84.

2. "Offense Against the United States" (p. 537)

Offense punishable by suit for penalty.—A conspiracy to commit any offense which, by an act of Congress, is prohibited in the interest of the public policy of the United States, although not of itself made punishable by criminal prosecution, but only by

suit for a penalty, is a conspiracy to commit an "offense against the United States," within the meaning of this section, and, provided there be the necessary overt act or acts, is punishable under the terms of this section. *U. S. v. Hutto*, (1921) 256 U. S. —, 41 S. Ct. 541, 65 U. S. (L. ed.) —, wherein the court said:

"Section 37, Criminal Code, is violated by a conspiracy 'to commit any offense against the United States' accompanied or followed by an overt act done to effect the object of the conspiracy. It does not in terms require that the contemplated offense shall of itself be a criminal offense; nor does the nature of the subject-matter require this construction. A combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful comes within the accepted definition of conspiracy. *Pettibone v. United States*, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542. The distinction between a conspiracy and the contemplated offense that forms its object has often been pointed out. *United States v. Rabinowich*, 238 U. S. 78, 85, 86, 59 L. ed. 1211, 1213, 1214, 35 Sup. Ct. Rep. 682, and cases cited. And we deem it clear that a conspiracy to commit any offense which, by act of Congress, is prohibited in the interest of the public policy of the United States, although not of itself made punishable by criminal prosecution, but only by suit for penalty, is a conspiracy to commit an "offense against the United States" within the meaning of § 37, Criminal Code, and, provided there be the necessary overt act or acts, is punishable under the terms of that section." See to the same effect, *U. S. v. Hutto*, (1921) 256 U. S. —, 41 S. Ct. 543, 65 U. S. (L. ed.) —.

A post exchange established near or on a military post is not such a lawful department of the government as will make a conspiracy transaction with it subject to an indictment under this section. *Keane v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 577.

III. CONSPIRACY TO DEFRAUD

1. Not Limited to Property Rights (p. 545)

To same effect as third paragraph of original annotation, see *U. S. v. Amster*, (E. D. N. Y. 1921) 273 Fed. 532.

IV. OVERT ACTS

2. Act of One, Act of All (p. 551)

That the overt act of one conspirator is the act of all.—To same effect as original annotation, see *Grayson v. U. S.*, (C. C. A. 6th Cir. 1921) 272 Fed. 553; *U. S. v. Bergdoll*, (E. D. Pa. 1921) 272 Fed. 498.

5. Nature and Quality of Act (p. 552)

Necessity of criminality of overt act.—The overt act alleged in an indictment for

conspiracy need not be a crime, but of itself may be innocent. *Clark v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 104.

Act as tending to consummate conspiracy.—In an indictment for conspiracy it is not necessary to allege the exact method by which the overt act would tend to consummate the conspiracy. *Clark v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 104.

VII. JURISDICTION AND VENUE (p. 556)

Venue of federal prosecution.—To same effect as fourth paragraph of original annotation, see *Harrington v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 97.

Section 42 of the Judicial Code provides that an offense begun in one district and completed in another may be tried and punished in either district; "and it is settled that in view of this section of the Judicial Code, and of section 37 of the Criminal Code, prosecutions for conspiracy may be maintained either in the district in which the conspiracy was formed or in any district in which an act was done to effectuate its object." (*Grayson v. U. S.*, (C. C. A. 6th Cir. 1921) 272 Fed. 553.

VIII. INDICTMENT

1. In General

a. Joinder of Offenses (p. 558)

It is proper to charge in different counts of an indictment a conspiracy to commit an offense against the United States where the offenses charged all belong to the same class of crimes. *Anderson v. U. S.*, (C. C. A. 8th Cir. 1921) 273 Fed. 20.

b. Parties Defendant (p. 559)

Joinder of defendants.—All the conspirators need not be joined in a single indictment but only such as may well be tried in one case should be named in any one indictment. *U. S. v. Heitler*, (N. D. Ill. 1921) 274 Fed. 401.

It is not necessary to join all the co-conspirators in an indictment or to explain why any were not indicted. *Katz v. U. S.*, (C. C. A. 1st Cir. 1921) 273 Fed. 157.

2. Charging the Conspiracy

b. Relation to Charge of Overt Acts (p. 560)

The statement of overt acts cannot be used to supply deficiencies in the charge of conspiracy.

"The charging portion of the indictment must define all the necessary elements of the conspiracy, and also all the necessary elements of the acts which are alleged to constitute either an offense under the laws of the United States or a fraud upon the United States. But the defendant cannot, by misinterpreting or assuming according to his own ideas the crime or fraud charged, present successfully a demurrer upon the theory that the indictment fails to set forth

all the elements which he thinks are necessary to support the charge which he has in mind." *U. S. v. Amster*, (E. D. N. Y. 1921) 273 Fed. 532.

3. Charging Overt Acts (p. 563)

In general.—On a prosecution for a conspiracy to defeat and evade the income tax it is necessary to allege and prove an overt act done in pursuance of and to effectuate the object of the conspiracy. Such an indictment sufficiently sets forth an overt act where it alleges the filing of a false return with the collector of internal revenue. By the filing of the return it is then placed beyond the control of the defendant and the collector in the usual course will use such return as a basis of assessing the tax. *U. S. v. Rachmil*, (S. D. N. Y. 1921) 270 Fed. 869.

4. For Conspiracy to Commit Offense

a. Sufficiency in General (p. 566)

Failure to allege division of district where offense was committed.—An indictment under this section for a conspiracy to commit an offense against the United States, is not defective because it fails to allege the division of the district where the offense was committed, except by reference to the caption. *Harrington v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 97.

Conspiracy to violate Selective Service Act.—Indictment held sufficient, see *Anderson v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 65.

Conspiracy to violate Lever Act.—A count in an indictment which charges a conspiracy under this section to violate subdivision (a) of section 9 of the Lever Act (1918 Supp. Fed. Stat. Ann. 185), charges a conspiracy to commit the offense of conspiracy and should be quashed. *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683.

b. Duplicity (p. 566)

A count in an indictment for conspiracy against the United States is not duplicitous because the object and purpose of the conspiracy charged therein is the commission of more than one offense against the United States. *Anderson v. U. S.*, (C. C. A. 8th Cir. 1921) 273 Fed. 20.

j. Scheme to Defraud by Use of Mails (p. 569)

An indictment setting forth fraudulent representations to induce the purchase of mining stock which representations were known to the defendants to be false and fraudulent and that to effect the object of the scheme the defendants placed or caused to be placed certain letters in the mail which letters are set forth, is sufficient under this section. *Rowe v. Boyle*, (C. C. A. 9th Cir. 1920) 268 Fed. 809. See also

Tjosevig v. Boyle. (C. C. A. 9th Cir. 1920) 268 Fed. 813.

p. Unlawfully Bringing in Chinese (p. 577)

In *Kaphan v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 323, in which in one indictment it was charged that Kaphan and others conspired to bring into the United States, and to cause to be brought into and to aid and abet the bringing into and landing in the United States, through the port of San Francisco, Chinese persons who were not lawfully entitled to enter or remain in the United States; in the other (6273) he, with others, was charged with having conspired to willfully and unlawfully conceal, remove, mutilate, obliterate, and destroy records, papers, and other documents filed and deposited in a public office, to wit, the immigration office at Angel Island, Cal., the court said: "It is said that the indictment (6272) is defective, in that there is no allegation as to what Kaphan did with the records which he would use in bringing and causing to be brought into the United States Chinese persons not entitled to enter or remain in the United States. The point is not well taken. The indictment, after alleging that Kaphan with others conspired to do the things charged as heretofore stated, averred that in furtherance of the conspiracy and to effect the object thereof one of the defendants, Yow, delivered to another defendant, Akers, certain letters addressed to Chinese applicants for admission to the United States awaiting examination to enter the United States at the immigration station at Angel Island, Cal., and that the letters contained questions and answers to be used by the applicants as a means of gaining admission to the United States. The indictment was drawn under section 37 of the Penal Code, and section 11 of the Chinese Immigration Act (section 11, Act May 6, 1882, as amended by Act of July 5, 1884). Section 11 provides that any person who shall knowingly bring into or cause to be brought into the United States, or aid or abet the landing in the United States, from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor. Inasmuch as the charge was for conspiring to violate the section just referred to, it was unnecessary to allege in detail what Kaphan did with the records which were delivered, and which contained questions to be used by the applicants as a means of gaining admission to the United States. . . . In the charge of conspiracy to violate . . . section [128 of the Penal Code] it was unnecessary to set forth what was done with the files or whether the Chinese were actually entitled lawfully to enter the United States. The material matter was whether there was an unlawful conspiracy to conceal, remove, or destroy records and documents filed in the immigration office at Angel Island, Cal., and whether defendant was a guilty member of such conspiracy."

q. Interstate Shipment of Intoxicating Liquors (p. 578)

In *Grayson v. U. S.*, (C. C. A. 6th Cir. 1921) 272 Fed. 553, it was held to be unnecessary to allege that the shipments constituting the overt acts were made for beverage purposes.

5. For Conspiracy to Defraud

h. Fraud in Public Contracts (p. 589)

Fraudulent bids.—In *U. S. v. Amster*, (E. D. N. Y. 1921) 273 Fed. 532, an indictment charging conspiracy to defraud the United States by collusively presenting three false and fraudulent bids for tea the highest of which bids was below the market price, was held sufficient.

IX. EVIDENCE

2. Admissibility and Competency in General (p. 591)

To same effect as first paragraph of original annotation, see *Nee v. U. S.*, (C. C. A. 3d Cir. 1920) 267 Fed. 84.

Acts in pursuance of conspiracy.—In a prosecution under this section for a conspiracy to violate the Act of December 17, 1914 (4 Fed. Stat. Ann. (2d ed.) 177), evidence that one of the defendants sent a check to a person in Canada, who received from the custom officials there drugs of the nature specified in the indictment, either as agent of a drug company or as a principal, is admissible. *Nee v. U. S.*, (C. C. A. 3d Cir. 1920) 267 Fed. 84.

Effect of dismissal of indictments against part of defendants.—Where indictments against part of the defendants, charged with a conspiracy to commit an offense against the United States by a violation of the postal laws, have been dismissed the failure to prove either the necessary intent or action in respect of the use of the mail as to some of the defendants does not eliminate from the conspiracy or fraudulent scheme those who did not happen to go the statutory length of using or causing to be used the postal establishment of the United States in the execution of what all the defendants intended to accomplish, to wit, the defrauding of a portion of the public, and evidence showing their participation in devising the scheme is nevertheless proper. *Lefkowitz v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 664.

3. Knowledge, Motive or Intent

b. Other Offenses (p. 594)

On the trial of an indictment for conspiracy to defraud the United States by the use of counterfeiting stamping devices in a factory engaged in the manufacture of shoes for the government, the general rule applies that on the trial for one offense evidence of another distinct and unrelated offense committed by the defendant is not admissible, unless it is offered for one of the purposes which constitute exceptions to this

general rule. On such a trial evidence of other offenses is not admissible to show guilty knowledge where neither guilty knowledge nor intent are in issue. *Macdonald v. U. S.*, (C. C. A. 1st Cir. 1920) 264 Fed. 733.

But on a prosecution under this section for conspiracy to deal in and sell morphine sulphate, a derivative of opium, in violation of the registration and tax provisions of the Act of December 17, 1914 (4 Fed. Stat. Ann. (2d ed.) 177), evidence is admissible of a violation of the state law, where it appears that the evidence of such violation was concealed in the same way and in the same place that evidence of the offense against the federal law was charged to be concealed. *Nee v. U. S.*, (C. C. A. 3d Cir. 1920) 267 Fed. 84.

5. Variance (p. 595)

Where an indictment charges persons named with having conspired "with divers other persons to said grand jurors unknown" it is not a fatal variance that evidence offered would have shown that the names of such persons were known to the grand jurors, where the means are set out with sufficient particularity and the various overt acts give dates, places and names with so much particularity that no defendant could be taken by surprise by any of the testimony offered by the government the defendant thus being informed of the nature and cause of the accusation as required by the Constitution of the United States. *U. S. v. Heitler*, (N. D. Ill. 1921) 274 Fed. 401.

6. Acts and Declarations of Co-conspirators (p. 596)

To same effect as original annotation, see *Harrington v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 97.

Acts of conspirators as showing common design.—The common design, which is the essence of the conspiracy, may be shown by the doing of different acts by various actors, from which a mutual understanding may be inferred. *U. S. Silverthorne*, (W. D. N. Y. 1920) 265 Fed. 853.

8. Overt Acts (p. 598)

To same effect as original annotation, see *Tacon v. U. S.*, (C. C. A. 5th Cir. 1921) 270 Fed. 88.

9. Testimony of Accomplices (p. 598)

To same effect as first paragraph of original annotation, see *U. S. v. Heitler*, (N. D. Ill. 1921) 274 Fed. 401; *Harrington v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 97.

10. Weight and Sufficiency (p. 598)

In general.—"A charge of conspiracy is one that is not easily susceptible of direct proof, nor is it essential to establish conspiracy that actual proof be offered of a definite plan or agreement entered into by conspirators. It is sufficient if the evidence shows such a concert of action in the commission of the unlawful act, or such other

facts and circumstances upon which the natural inference arises, that the unlawful, overt act was in furtherance of a common design, intent, and purpose of the alleged conspirators to commit the same." *Davidson v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 285.

To establish a conspiracy to violate a certain criminal statute, the evidence must convince a jury that defendants did something other than participate in the substantive offense which is the object of the conspiracy. *U. S. v. Heitler*, (N. D. Ill. 1921) 274 Fed. 401.

See also *Peterson v. U. S.*, (C. C. A. 9th Cir. 1921) 274 Fed. 929; *Hardy v. U. S.*, (C. C. A. 5th Cir. 1920) 269 Fed. 134; *Clark v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 104.

Sufficiency of evidence on a prosecution under Reed Amendment, see *Grayson v. U. S.*, (C. C. A. 6th Cir. 1921) 272 Fed. 553; *Block v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 524.

X. TRIAL, ACQUITTAL OR CONVICTION, AND PUNISHMENT

3. Instructions (p. 601)

Testimony of accomplices.—In a prosecution under this section the failure of the court to instruct the jury as to the value of the testimony of an accomplice, and to call its attention to the danger of placing too much reliance upon such testimony, and to their rights to require corroborating testimony before giving credence to such evidence, is not error. *Nee v. U. S.*, (C. C. A. 3d Cir. 1920) 267 Fed. 84, wherein it was said:

"The point made by the defendants and refused by the court was as follows:

"The testimony of an accomplice should be received with caution and scrutinized with great care by the jury, who should not rely upon it, unless it produces in their minds the most positive conviction of its truth."

"In support of this point the defendants relied on *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B. We are not familiar with any rule warranting an instruction in this form. While the Supreme Court said in the case cited, that

"It is the better practice of a trial judge in instructing a jury to caution them to scrutinize the testimony of an accomplice," that court expressly ruled in the same case that mere failure so to do is not reversible error. Nor do we see the pertinency of the defendants' contention that the jury should have been cautioned not to credit the testimony of an accomplice unless sustained by corroborating evidence, in view of the proof of the overt acts averred. *Gretsch v. United States* (C. C. A. 3d) 242 Fed. 897, 898, 155 C. C. A. 485; *Knoell v. United States* (C. C. A. 3d) 239 Fed. 165, 152 C. C. A. 66.

"This we think disposes of this assignment. If, however, there was sufficient substance in the contention to embody it in an

assignment of error, it disappears from the case on the evidence that Gamble, Smith and Acker, who purchased drugs from one or the other of the defendants, were not, under authority of *Wallace v. United States*, 243 Fed. 300, 156 C. C. A. 80, accomplices. They were purchasers, and as such were not amenable to the Act. In consequence, any rule of caution with respect to the testimony of accomplices does not apply to their testimony."

6. *Effect of Acquittal as Bar* (p. 602)

To the same effect as the original annotation, see *Harris v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 785.

An acquittal on the charge of committing one of the overt acts alleged in the indictment is not a bar to a prosecution for a conspiracy to commit such act. *Moorehead v. U. S.*, (C. C. A. 5th Cir. 1921) 270 Fed. 210. The court said: "To sustain the charge made against Shackelford by the count on which he was convicted, it was not necessary to prove his participation in the theft of which he was acquitted. All that was required to sustain that charge was proof that the defendants conspired as alleged, and that, to effect the object of the conspiracy, any one of them committed or participated in the theft alleged. The plea under consideration amounted to the assertion by the defendant Shackelford that he was not subject to be convicted of the alleged conspiracy because he had been acquitted of another and different offense not necessary to be proved to sustain the conspiracy charge. We are of opinion that that plea was bad because the former acquittal it set up was of an offense other than the one charged in the instant case, the same evidence not being required to sustain both charges. There was not the required identity between the offense presently charged and the one which was the subject of the alleged acquittal. The fact that both charges related to and grew out of one transaction made no difference."

But where on a charge for conspiracy the government elected to prove as a part of the charge the larceny of certain goods which it failed to prove, it is held that there can be no subsequent prosecution for a larceny of the same goods. *U. S. v. Clavin*, (E. D. N. Y. 1921) 272 Fed. 985.

Vol. VII, p. 602, sec. 39. [First ed., 1909 Supp., p. 416.]

I. Construction and application, in general.

4. "Official function."

II. Prosecution for offense.

3. Indictment.

5. Evidence.

I. CONSTRUCTION AND APPLICATION, IN GENERAL

4. "Official Function" (p. 604)

Baggage porter on railroad under federal control.—Bribery or attempted bribery of a

baggage porter while the railroad was under the control of and operated by the United States is not comprehended by the provision of this section, making it a criminal offense to bribe or attempt to bribe an officer of the United States, or a person acting for or on behalf of the United States in an official function under or by the authority of a department or office of the government. *Krichman v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 514, 65 U. S. (L. ed.) — (*reversing* (C. C. A. 2d Cir. 1920) 263 Fed. 538, which *affirmed* (S. D. N. Y. 1919) 256 Fed. 974), wherein the court said: "In order to sustain the conviction, the bribe must have been given to an officer of the United States, or to a person acting for or on behalf of the United States in an official function under or by the authority of a department or office of the government.

"Clearly, the porter was not an officer of the United States. *United States v. Maurice*, 2 Brock. 96, Fed. Cas. No. 15,747; *United States v. Hartwall*, 6 Wall. 385, 393, 18 L. ed. 830, 832. We need not dwell upon this point, as the government concedes that the porter was not an officer within the meaning of the statute.

"The point to be decided depends upon whether, when the bribe was offered to the porter, he was acting for the United States in an official function. The decided cases do not afford much aid in reaching a solution of this problem, and in our view the cases cited in the opinion in the courts below throw little light upon the subject. The statute creating the offense was passed long before there was any thought of the government taking over the railroads. That does not prevent its application if the thing done offends against it. It is, however, a circumstance proper to be considered in determining whether the situation is one intended to be dealt with by Congress.

"The act aims to punish the attempted bribery or bribery of officials and those exercising official functions under or by the authority of a department or office of the government. Not every person performing any service for the government, however humble, is embraced within the terms of the statute. It includes those, not officers, who are performing duties of an official character. As was well suggested by Judge Ward in his dissenting opinion in the circuit court of appeals, not every employee of the government is covered by the act, but a limitation is made, applying to those acting in official functions. And he added: 'The construction adopted by the court gives these words no meaning. They might as well, or indeed better, have been omitted, because window-cleaners, scrub women, elevator boys, doorkeepers, pages,—in short, anyone employed by the United States to do anything,—is included.'

"The government admits that the construction contended for will include the em-

ployees suggested by Judge Ward. Indeed, the construction given by the courts below would bring within the statute every employee acting under the Director General in the operation of the railroads. We are unable to accept this construction of a criminal statute."

Government inspectors in a plant where goods were manufactured under contract for the United States during war, were held to be performing official duties for the United States within the meaning of this section. *Sears v. U. S.*, (C. C. A. 1st Cir. 1920) 264 Fed. 257.

II. PROSECUTION FOR OFFENSE

3. Indictment (p. 606)

Overt acts.—See section 37, IV, 5, *supra*, p. 692.

Charging offense.—It is proper to charge the same offense specified in an indictment in different ways in the several counts; the differences mainly having relation to the official name or title of the person sought to be bribed. And an indictment under this section need not charge that the property concerning which an indictment was offered was the property of the United States. This is not necessary under the statute under which the prosecution is had. It would have been as much an offense to bribe an officer under the circumstances here, in handling the property of a stranger, passing through government channels, intended for government use, as if it actually belonged to the United States. *Sneierson v. U. S.*, (C. C. A. 4th Cir. 1920) 264 Fed. 268.

5. Evidence (p. 606)

Errors in admission of evidence.—Where the guilt of the accused is clearly and conclusively established under this section independent of any error in the admission of evidence, such an error will be regarded as harmless on appeal by virtue of section 209 of the Judicial Code as amended by Act of Feb. 26, 1919 (1919 Supp. Fed. Stat. Ann. p. 231). *Sneierson v. U. S.*, (C. C. A. 4th Cir. 1920) 264 Fed. 268.

Sufficiency of evidence.—In *Sneierson v. U. S.*, (C. C. A. 4th Cir. 1920) 264 Fed. 268, it was said as to the evidence of the official duties and character of a person whom it was alleged there had been an attempt to bribe, much time was spent in the contention that Fox's appointment, his authority especially to act in reference to the disposition of the nitrate of soda bags, and the relation that he occupied between the Atlas Powder Company and the United States ammonia nitrate plant, should all have been shown, either by specific act of Congress, or copies of records of the War Department, pursuant to section 882 of the Revised Statutes. Assuming the way indicated to have been proper, can there be any reason why the same facts could not have been proven by

other competent evidence of those having personal knowledge of the matters to which they deposed? Why should not the witness Fox testify as to what his official duties were, and be allowed to introduce the original evidence of his appointment, and the original instructions issued to him? Moreover, he was the official in possession of and having control of the bags, the subject of the alleged bribery. He was the person, after the official correspondence in relation thereto, and inspection of the bags, that the defendant saw proper to offer and pay the bribe to, to secure a fraudulent advantage against the United States; and the defendant should not now, when the government and the party sought to be bribed are endeavoring to punish him for the great wrong attempted to be perpetrated, be heard to interpose mere flimsy and fallacious objections, in order to escape liability for the crime committed.

Vol. VII, p. 607, sec. 41. [First ed., 1909 Supp., p. 416.]

Inspector of Emergency Fleet Corporation as agent of United States.—The United States Shipping Board Emergency Fleet Corporation, controlled and managed as it was by its own officers, and appointing its own servants and agents, who became directly responsible to it, must be regarded as an entity separate from the United States, notwithstanding the ownership by the government of all its capital stock, and a person employed by such Fleet Corporation as an inspector is not an agent of the United States, within the meaning of this section. *U. S. v. Strang*, (1921) 254 U. S. 491, 41 S. Ct. 165, 65 U. S. (L. ed.) —.

Vol. VII, p. 612, sec. 47. [First ed., 1909 Supp., p. 418.]

Construction.—"Section 47 of the Criminal Code relates to the same subject-matter and defines a crime kindred in its nature to the crime defined in section 46, and is therefore subject to the same construction, as to the value of the thing taken, as the construction given section 46." *Clark v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 329.

Larceny defined.—If, at the time of getting possession lawfully, the one to whom property is intrusted has the intention of appropriating it to his own use, the crime thus committed is the crime of larceny. *Tredwell v. U. S.*, (C. C. A. 4th Cir. 1920) 266 Fed. 350.

Embezzlement defined.—Where one comes lawfully into the possession of property, and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is the crime of embezzlement. *Tredwell v. U. S.*, (C. C. A. 4th Cir. 1920) 266 Fed. 350.

Embezzlement and larceny.—In *Tredwell v. U. S.*, (C. C. A. 4th Cir. 1920) 266 Fed. 350, the contractors engaged to perform the transportation service employed defendant, who was a stevedore, to unload the nitrate from the vessels, reload it into the cars, and bill the cars to the munition plants as directed by the Ordnance Department. The defendant billed a number of cars to certain fertilizer companies and other consumers, to whom he sold the nitrate through a broker. In the instances in which this was done he sent fictitious bills of lading to the officers in charge of the munition plants, thus apparently complying with the directions of the department, though of course the diverted nitrate never reached its proper destination. This being the method of operation, it was claimed that the property came lawfully into the possession of defendant under his employment by the contractors, and therefore it was not larceny, but embezzlement, if he appropriated some part of it to his own use. The court said: "The first answer to the contention is this: Granted that defendant had lawful possession of the nitrate for the purposes of his employment, we think it clear that such possession ceased when the loading of the cars was completed, and that the property then passed into the possession of the railroad company. When he thereupon caused it to be billed to his own customers, instead of the munition plants, his diversion of the property was in substance a felonious taking of it from the railroad company, and this brought his act within the accepted definition of larceny. There was evidence to the effect that defendant, as agent of the contractors and with the government's consent, had the custody of the nitrate for the government up to the time it was delivered to the railroad, and that he was the agent of the railroad in loading it into the cars. Therefore, when the nitrate was placed in the cars, it was in the custody and possession of the railroad, and under control of defendant as the railroad's agent, and not as the government's agent. It follows that his conversion of the nitrate at any time after that was not the embezzlement of property which he held for the government, but the stealing of government property in the hands of the railroad.

"There is another and equally conclusive answer. Where one comes lawfully into the possession of property, and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is the crime of embezzlement; but if, at the time of getting possession lawfully, the one to whom property is intrusted has the intention of appropriating it to his own use, the crime thus committed is the crime of larceny."

Checks.—A government pay check may be the subject of larceny by reason of the intrinsic value of the paper, but its value is by no means the measure of the defend-

ant's guilt. And where pay checks of postal employees are placed on a table near the desk of the superintendent of employees and under his supervision and control, each pay check is still in the possession of the government until the particular employee for whom it is intended has taken possession of his check and signed the pay roll as required. *Clark v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 329, wherein it was held that a government pay check might be regarded as a "record" or "voucher" within the meaning of those words as used in this section, this conclusion being reached in the case of a mail carrier's pay check. The court said: "This check is signed by the postmaster and countersigned by the assistant postmaster. It not only authorized the bank to pay, out of the funds of the United States on deposit in that bank, the amount named therein to the mail carrier in whose favor it was drawn, but in effect certified the amount due him from the United States for his services. It is not substantially different from a separate pay voucher, signed and attested by the postmaster and assistant postmaster, that might be presented by the mail carrier at the window of the post office cashier for payment. To all intents and purposes it is a 'voucher,' within the meaning and intent of section 47, of the Penal Code.

"Not only is it a voucher, but it is in fact, and was no doubt intended to be, a record of payment by the United States to this mail carrier of the amount due him. In the ordinary course of business, it evidenced that payment as fully as any other record could evidence it. It was all-sufficient as a record of payment, without the receipted pay roll. That it had not yet been delivered to the payee, or canceled and returned to the bank, cannot change its character in that respect, if in fact it was intended, at the time it was written to serve the dual purpose of voucher and record of payment."

Vol. VII, p. 626, sec. 65. [First ed., 1909 Supp., p. 422.]

Officer acting under void search warrant.—A defendant cannot be convicted of resisting with a deadly weapon a person authorized to make searches or seizures where the warrant under which the officer acts is void. "It is only when the officer resisted is authorized by valid warrant to make search and seizure that the statute under which the indictment is preferred may be invoked." *U. S. v. Pitotto*, (D. C. Ore. 1920) 267 Fed. 603.

Sufficiency of indictment.—An indictment under this section must set out the authority under which the search and seizure was made in order to be good, as indictments under this section do not fall within the class of cases where the charge may be made in the language of the statute creating the

offense. *U. S. v. Hallowell*, (W. D. Wash. 1921) 271 Fed. 795.

Vol. VII, p. 650, sec. 97. [First ed., 1909 Supp., p. 430.]

Officers within section.—In reply to the contention that this section relates only to embezzlement by revenue officers, it has been said: "We see no force in the contention that section 97 of the Criminal Code relates only to embezzlement by internal revenue officers. While the first clause of the section is so limited, this clause is followed by the express and unequivocal provision for the punishment of 'any officer of the United States * * * who shall embezzle or wrongfully convert to his own use any money' the custody of 'which may have come into his possession or under his control' by virtue of his official employment or authority. The fact that the headline to the section as contained in the Criminal Code reads 'Embezzlement by internal revenue officer; punishment for,' cannot change the positive provision of the statute, which, indeed, before its incorporation into the Criminal Code, had no such headline. The question, however, is in our opinion set at rest by *United States v. Davis*, 243 U. S. 570, 37 Sup. Ct. 442, 61 L. Ed. 906, where a deputy clerk of a District Court of Hawaii was held punishable under section 97 of the Penal Code for embezzlement of fees deposited by litigants to secure payment of costs; and see the *Weitzel* Case at page 543, of 246 U. S. (38 Sup. Ct. 381, 62 L. Ed. 872)." *Weitzel v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 101, wherein an indictment under this section was objected to on the ground that the accused, the receiver of an insolvent national bank, was not an "officer of the United States." The court said: "Each indictment is criticized as fatally defective because, as asserted, the receiver of an insolvent national bank, appointed by the Comptroller of the Currency, is not an officer of the United States and in its employment. We think this objection foreclosed by the decision of the Supreme Court in *United States v. Weitzel*, 246 U. S. 533, 38 Sup. Ct. 381, 62 L. Ed. 872, where, on review of an order dismissing a demurrer to an indictment charging this plaintiff in error, under section 5209 of the Revised Statutes, with embezzlement and making false entries as an agent of the bank here in question, it was held (affirming the judgment of the District Court) that 'the receiver, unlike a president, director, cashier or teller, is an officer, not of the corporation, but of the United States.' True, it was not necessary to an affirmance of the judgment below that the Supreme Court should affirmatively define the actual legal status of the receiver. It is enough that it unequivocally did so. That this was a considered conclusion is evidenced by the citation of several prior decisions of that court, holding the receiver of a na-

tional bank to be an officer of the United States.

"While these prior decisions might be differentiated from the case under consideration, in that they did not deal with identical relation involved here, the Supreme Court in fact applied them to that identical relation. It is thus not important to consider whether plaintiff in error was such an officer as is defined in article 2, § 2, of the federal Constitution. *Lamar v. United States*, 240 U. S. 60, 65, 36 Sup. Ct. 255, 60 L. Ed. 526. It is also unnecessary to consider the argument that section 97 of the Criminal Code is shown to be inapplicable by its noninclusion in the National Banking Act (Act June 3, 1864, c. 106, 13 Stat. 99), especially in view of what is said in the *Weitzel* Case, 246 U. S. 542, 543, 38 Sup. Ct. 381, 62 L. Ed. 872, regarding the Act of Feb. 3, 1879 (20 Stat. 280), which is substantially section 97 of the Criminal Code. Nor are we impressed by the fact that Congress, subsequent to the decision of the Supreme Court in the *Weitzel* Case, so amended section 5209 of the Revised Statutes as to make the receiver of a national banking association liable under the banking act for embezzlement or misapplication of any of the assets of his trust. Such amendment does not, in our opinion, indicate more than a congressional intent to supply a defect in the National Banking Act itself."

Vol. VII, p. 655, sec. 109. [First ed., 1909 Supp., p. 433.]

Officer in Reserve Corps on inactive status.

—An attorney holding a commission in the Officers' Reserve Corps, and on inactive status therein, is not barred from prosecuting a claim in the Court of Claims by this section. *Simmons v. U. S.*, (1920) 55 Ct. Cl. 56.

Vol. VII, p. 670, sec. 125. [First ed., 1909 Supp., p. 437.]

V. Oath "authorized" by "law."

IX. Evidence.

XI. Questions of fact and law.

V. OATH "AUTHORIZED" BY "LAW" (p. 674)

Bankruptcy proceedings.—A false answer made by the president of a corporation under examination in bankruptcy to the effect that certain money received had been used to pay the creditors of the corporation was held material in *Epstein v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 282.

IX. EVIDENCE (p. 678)

Taking of oath and qualifications of officer.

—Proof that the oath was taken before the officer alleged and proof that such officer was qualified to administer the oath are essential to a conviction under this section.

Levy v. U. S., (C. C. A. 3d Cir. 1921) 271 Fed. 942.

XI. QUESTIONS OF FACT AND LAW (p. 679)

To the same effect as the first paragraph of original annotation, see *Epstein v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 282.

Vol. VII, p. 684, sec. 128. [First ed., 1909 Supp., p. 438.]

Indictment.—In *Kaphan v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 323, in determining the sufficiency of an indictment alleging a violation of this section it was said: "The indictment follows the statute and pleads as overt acts the delivery of certain letters addressed to Chinese applicants for admission to the United States awaiting examination at the immigration station, and that certain of the defendants did deliver such letters to certain Chinese applicants, and that to effect the object of the conspiracy one of the defendants paid to another defendant \$45, and that one of the defendants at the immigration station did abstract from the files of the record room certain official files of the government of the United States, pertaining to certain Chinese persons and delivered the files to one of the defendants. In the charge of conspiracy to violate section [128 of the Penal Code], it was unnecessary to set forth what was done with the files or whether the Chinese were actually entitled lawfully to enter the United States. The material matter was whether there was an unlawful conspiracy to conceal, remove, or destroy records and documents filed in the immigration office at Angel Island, Cal., and whether defendant was a guilty member of such conspiracy."

Vol. VII, p. 688, sec. 135. [First ed., 1909 Supp., p. 440.]

I. In general.

III. Words defined.

3. "Obstruct" and "impede."

5. "Witness."

VIII. Assaulting witness.

I. IN GENERAL (p. 689)

Purpose.—The purpose of Congress in enacting this section was not to charge witnesses with duty or liability, but to protect them and the administration of justice from corruptly threatening and intimidating acts by third persons. *Smith v. U. S.*, (C. C. A. 8th Cir. 1921) 274 Fed. 351.

III. WORDS DEFINED

3. "Obstruct" and "Impede" (p. 689)

Attempt to influence juror.—Experimental approaches to the corruption of a petit juror in the discharge of his duty, though before he was selected or sworn, are, without regard to success or failure, within the scope of this section. *U. S. v. Russel*, (1921) 255 U. S. 138, 41 S. Ct. 260, 65 U. S. (L. ed.) —, wherein the court said: "Necessarily, the

first impression of the case is that defendant had some purpose in his approach to Lucy Russell and in the proposition he made to her. What was it, and how far did he execute it? Counsel admits that defendant's purpose was to 'find out what his [W. D. Russell's] attitude was towards the defendants to be tried.' And that this (we are stating the effect of counsel's contention) was only in preparation of a sinister purpose; that the defendants in the case did not wish to undertake, or, to use the language of the indictment, did not 'want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal.' And this, counsel says, 'only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation,' and 'could be interpreted only . . . to be preparation [italics counsel's] for an 'endeavor' or 'attempt' to influence the juror, but falls far short of an actual endeavor to do so.'

"Counsel enters into quite a discussion, with citation of cases, between preparation for an attempt and the attempt itself, and charges that there is a wide difference between them.

"We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based. The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror, but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section. Guilt is incurred by the trial,—success may aggravate, it is not a condition of it.

"The indictment charges that defendant knew that William D. Russell was a petit juror, in the discharge of his duty as such juror, and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn. *State v. Woodson*, 43 La. Ann. 905, 9 So. 903. The court, hence, erred in sustaining the demurrer and dismissing the indictment."

Attempting to obtain statement of facts from witness.—It is not an unlawful attempt to influence or impede a witness, or the due administration of justice, for one to seek to obtain from a witness a statement of the facts as he believes them to be, without the exercise of undue influence, even though such a statement may conflict with

prior testimony given by the one making the statement. Such an effort is not regarded with favor, because of the temptation to influence the witness unduly; but the mere request for a statement believed to be true does not offend against the statute under which this indictment was drawn, because it is not corrupt conduct. *Harrington v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 97.

5. Witness (p. 690)

Persons included in term "witness."—"The terms of the statute, the evil it was enacted to prevent, and the protection it was intended to provide, leave no doubt that under its true interpretation each of those who are subpoenaed to come, of those who are called and accept the call to come without subpoenas, of those who are prompted to come by their interests, of those who expect to come, and of those who are selected and expected to come to testify in any case in any court of the United States, falls within the class described by the terms 'any witness, in any court of the United States.'" *Smith v. U. S.*, (C. C. A. 8th Cir. 1921) 274 Fed. 351.

VIII. ASSAULTING WITNESS (p. 691)

A person may be convicted under this section for assaulting a witness who has testified in a case where such witness is on his way to testify in rebuttal, although the accused testifies that he did not know that the witness was to testify again. *Smith v. U. S.*, (C. C. A. 8th Cir. 1921) 274 Fed. 351, holding that in such a prosecution it is no defense that the witness was not under subpoena, or other order or direction of the court, and might lawfully have refused to come on the telegraphic call to the court, or might have departed therefrom, and was not a witness in the court, within the meaning of this section. The court said: "Many, probably a majority, of all the witnesses who testify in courts of justice, do so without the service of a subpoena or other order of the court, pursuant to the request of the parties to the litigation or to the promptings of interest. They, however, are not less witnesses than those who testify under subpoenas. The corrupt threatening or forceful influencing or intimidation of witnesses who testify without subpoenas is not less pernicious than that of witnesses under orders of the court, and a construction which would limit the protection of this section to the latter class of witnesses is too narrow and unreasonable."

Vol. VII, p. 695, sec. 140. [First ed., 1909 Supp., p. 441.]

IV. "Obstruct."

X. Proof.

IV. "OBSTRUCT" (p. 696)

Purpose and construction.—"It is undoubtedly the purpose of this statute not

only to prevent any persons from knowingly and willfully obstructing, resisting, and opposing an officer in the execution of a writ, but also to protect the person of public officers while they are in the discharge of their official duties. Such officer is not required to disclose to every one or any one he meets that he is then and there engaged in serving such writ or process. On the contrary, whoever assaults and beats him, knowing him to be such officer, does so at his peril, if it should later appear by the evidence that the officer was, at the time of such assault, beating, or wounding, actually engaged in the service of a writ, warrant, or other judicial process, regardless of whether the accused knew that fact or not. Any other construction of this particular provision of this section of the Criminal Code would make it meaningless and practically impossible of enforcement. In the great majority of cases the government would be unable * * * to prove that the accused had knowledge that the officer was in possession of such writ or warrant, or that he was engaged in and about its execution." *Coleman v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 468.

What constitutes obstructing.—The fact that the person for whom the warrant was issued was not in the immediate vicinity at the time the offense set forth in this section was committed is not important. If it were not then and there the purpose of the officer in making the trip to arrest the person named in the warrant then the mere fact that he had such a warrant in his possession would furnish no basis for the prosecution. On the other hand, if it were conceded or proven that this officer of the United States was on his way to execute this warrant, that the accused had full knowledge of that fact, and that with such knowledge he willfully obstructed, resisted, or opposed him in the execution of this writ at any point along the line of travel to the residence or the location of the person named in the warrant, it would be idle to say that such an offense would not come within the purview of this statute. Such a construction would permit persons of evil design to ambush an officer on his way to execute a writ, and thereby knowingly and willfully obstruct, resist, oppose, and even prevent the officer from the performance of his official duties, without being subject to the penalty imposed by the provisions of this section. *Coleman v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 468.

X. PROOF (p. 701)

Burden of proof.—"This section expressly provides that the offense charged in the first count of this indictment must be knowingly and willfully committed by the accused. The burden is upon the government to establish these essential elements by the degree of proof requisite in criminal cases." *Coleman v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 468.

Sufficiency of evidence.—Under the express terms of this section it is sufficient to sustain a verdict of guilty, if the proof shows that the accused knew at the time he committed the assault and battery upon a person that such person was an officer of the United States, provided, however, that such person was then engaged in serving this warrant, or any other legal or judicial writ or process issued out of any court of the United States or by a United States commissioner. *Coleman v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 468, wherein it was held that the evidence was insufficient to show a violation of this section.

Vol. VII, p. 705, sec. 148. [First ed., 1909 Supp., p. 443.]

War savings certificates and war saving certificate stamps become obligations of the United States only when a stamp or stamps shall have been affixed to the certificates and the name of the owner or owners shall have been written upon the certificate. Such certificates, when so made up and completed are obligations or securities of the United States within the purview of this section. And they must be deemed to be altered, within the meaning of this section, when the stamps have been removed from the certificates to which they have been annexed, with intent to defraud, or to utter and pass the same (the stamps) as true and genuine. It is not significant whether the stamps so detached are transferable or not transferable. But it is significant that the person so having such altered obligations is attempting to deal with them with the intent to defraud, or as true and genuine. "It is not an alteration or forgery of such war savings certificates, fully made up, to erase or remove the serial number thereof, because such serial number is not a material element of the obligation. The obligation is just as potent in the hands of the holder without as with the serial number. But if the certificate has been registered, as provided by the departmental regulations, and given a registration number, it would, without question, constitute a forgery or an alteration to erase or remove the registration number with intent to defraud, within the meaning of the sections of the Penal Code referred to, because such number is made an essential element to the validity of the obligation. The purpose of affixing the number or numbers is for identification of the obligation at the post office where payable, and for the protection of the government, to ward against payment to the wrong person, or double payment, as well as for the protection of the lawful owner and holder of the certificate or certificates." *U. S. v. Rossi*, (D. C. Ore. 1920) 268 Fed. 620.

Indictment—Setting forth instrument.—An indictment for forging or altering a government obligation, or for passing the same or having it in possession with intent to defraud, or to pass it as true and genuine,

should set forth the obligation in *hæc verba*, or some potent reason should be alleged showing why that cannot be done. *U. S. v. Rossi*, (D. C. Ore. 1920) 268 Fed. 620.

Altering war savings certificate.—An indictment purporting to charge the defendant with having erased or effaced the registration and identification number of a war savings certificate is bad where it does not allege by appropriate averments that such certificates have been previously registered. Such an indictment for altering a war savings certificate is not predicated upon any violation of the departmental regulations respecting war savings certificates, or disobedience of any of such regulations. The charges are predicated alone upon a violation of the designated sections of the Penal Code. The regulations have to do with the regularity and validity of war savings certificates as obligations of the United States, and when the war savings certificates become such obligations, then the sections of the code denouncing alteration, purchase, sale, transfer, possession, or utterance, with the intent to defraud, or to pass as true and genuine, become applicable. If the validity of the paper itself were attacked, that would be quite another thing. Then it would be pertinent to examine the act and the regulations to determine whether the certificates were legal and valid obligations of the United States. It requires no pleading of the statute or the regulations for a regular presentation of the subject for consideration. The court takes judicial notice of these. *U. S. v. Rossi*, (D. C. Ore. 1920) 268 Fed. 620.

Sufficiency of evidence.—Under an indictment charging a person together with five others with a conspiracy falsely to make and alter United States War Savings Certificates and United States War Savings Certificate Stamps and to publish, utter and sell such altered obligations, a conviction was reversed where there was testimony that altered stamps were found in the possession of the plaintiff in error, and that he had pleaded guilty to an indictment which charged him with having in his possession such altered stamps with the intention to pass and sell them; but there was no testimony or evidence of any kind to show that he conspired with his codefendant, or with any one, to steal or alter such stamps, or that there was any concert of action between the plaintiff in error and any of the defendants, or that there was a conspiracy. *Peterson v. U. S.*, (C. C. A. 9th Cir. 1921) 274 Fed. 929.

Vol. VII, p. 712, sec. 151. [First ed., 1909 Supp., p. 445.]

I. Scope of section.
V. Indictment.

I. SCOPE OF SECTION (p. 712)

War savings certificates and war saving certificate stamps.—Such obligations must

be deemed to be altered, within the meaning of this section, when the stamps have been removed from the certificates to which they have been annexed, with intent to defraud, or to utter and pass the same (the stamps) as true and genuine. It is not significant whether the stamps so detached are transferable or not transferable. But it is significant that the person so having such altered obligations is attempting to deal with them with the intent to defraud, or as true and genuine. "It is not an alteration or forgery of such war savings certificates, fully made up, to erase or remove the serial number thereof, because such serial number is not a material element of the obligation. The obligation is just as potent in the hands of the holder without as with the serial number. But if the certificate has been registered, as provided by the departmental regulations, and given a registration number, it would, without question, constitute a forgery or an alteration to erase or remove the registration number with intent to defraud, within the meaning of the sections of the Penal Code referred to, because such number is made an essential element to the validity of the obligation. The purpose of affixing the number or numbers is for identification of the obligation at the post office where payable, and for the protection of the government, to ward against payment to the wrong person, or double payment, as well as for the protection of the lawful owner and holder of the certificate or certificates." *U. S. v. Rossi*, (D. C. Ore. 1920) 268 Fed. 620.

V. INDICTMENT (p. 713)

In general.—An indictment for forging or altering a government obligation, or for passing the same or having it in possession with intent to defraud, or to pass it as true and genuine, should set forth the obligation in *hæc verba*, or some potent reason should be alleged showing why that cannot be done. *U. S. v. Rossi*, (D. C. Ore. 1920) 268 Fed. 620.

Vol. VII, p. 716, sec. 154. [First ed., 1909 Supp., p. 445.]

War savings certificates and war saving certificate stamps become obligations of the United States only when a stamp or stamps shall have been affixed to the certificate and the name of the owner or owners shall have been written upon the certificate. Such certificates, when so made up and completed are obligations or securities of the United States, within the purview of this section. And such obligations must be deemed to be altered, within the meaning of this section, when the stamps have been removed from the certificates to which they have been annexed, with intent to defraud, or to utter and pass the same (the stamps) as true and genuine. It is not significant whether the stamps so detached are transferable or not

transferable. But it is significant that the person so having such altered obligations is attempting to deal with them with the intent to defraud, or as true and genuine. *U. S. v. Rossi*, (D. S. Ore. 1920) 268 Fed. 620, wherein it was said: "It is not an alteration or forgery of such war savings certificates, fully made up, to erase or remove the serial number thereof, because such serial number is not a material element of the obligation. The obligation is just as potent in the hands of the holder without as with the serial number. But if the certificate has been registered, as provided by the departmental regulations, and given a registration number, it would, without question, constitute a forgery or an alteration to erase or remove the registration number with intent to defraud, within the meaning of the sections of the Penal Code referred to, because such number is made an essential element to the validity of the obligation. The purpose of affixing the number or numbers is for identification of the obligation at the post office where payable, and for the protection of the government, to ward against payment to the wrong person, or double payment, as well as for the protection of the lawful owner and holder of the certificate or certificates."

Indictment.—An indictment for forging or altering a government obligation, or for passing the same or having it in possession with intent to defraud, or to pass it as true and genuine, should set forth the obligation in *hæc verba*, or some competent reason should be alleged showing why that cannot be done. *U. S. v. Rossi*, (D. C. Ore. 1920) 268 Fed. 620.

Vol. VII, p. 729, sec. 169. [First ed., 1909 Supp., p. 450.]

Constitutionality.—Making the conscious and willful possession without lawful authority, of a die in the likeness or similitude of one used or designated for making genuine coin of the United States, a criminal offense, as was done by this section, was a valid exercise by Congress of the power conferred by the clause of U. S. Const., art. 1, § 8, investing Congress with power to coin money and regulate the value thereof, such power being in no wise limited by the following clause relating to the punishment for counterfeiting. *Baender v. Barnett*, (1921) 255 U. S. 224, 41 S. Ct. 271, 65 U. S. (L. ed.) —.

Purpose.—The object and purpose of the law was to prevent the counterfeiting of the coin of the United States. *Cole v. U. S.*, (C. C. A. 8th Cir. 1920) 269 Fed. 250.

Scienter necessary.—A possession which is not conscious and willing is not included and made criminal by the provisions of this section. *Baender v. Barnett*, (1921) 255 U. S. 224, 41 S. Ct. 271, 65 U. S. (L. ed.) —, wherein the court said: "The statute is not intended to include and make criminal a pos-

session which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense, and not in one which works manifest injustice or infringes constitutional safeguards. In so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts."

"Die" and "mold."—"Congress must be presumed to have known that the words 'die' and 'mold,' while for some purposes indicating different instruments, so far as the making of the coins of the United States was concerned, the instrument used might be called a die or mold interchangeably. . . . That the words 'die' and 'mold' may be used interchangeably to indicate the same instrument is shown by standing authority. . . . Congress did not intend to use the words 'die' and 'mold' in a technical sense, but intended to prevent the making or having in possession an instrument, whether called a die or mold, of the likeness and similitude as to the design or the inscription thereon of any instrument designated for the coining or making of any of the genuine coins of the United States, whether called a die or mold." *Cole v. U. S.*, (C. C. A. 8th Cir. 1920) 269 Fed. 250, wherein it was held that the indictment was sufficient.

Vol. VII, p. 754, sec. 194. [First ed., 1909 Supp., p. 457.]

II. PROCEDURE

2. Indictment or Information (p. 759)

Allegation as to specific pieces of money.—An indictment which charges the specific amount alleged to have been stolen "a more correct and complete description of the kind and character of said money being to the grand jurors unknown," is not subject to demurrer because it fails to describe the specific pieces of money or coin which made up the total amount taken. *Ossendorf v. U. S.*, (C. C. A. 7th Cir. 1921) 272 Fed. 257. The court said: "Although this assignment of error is not argued in the brief, it was urged in the oral argument, and we were asked to consider it as though fully presented in the brief. We have done so, and conclude that the indictment was not demurrable because of failure to describe the coins or other money taken. While particularity in the description of the property is desirable, to require the impossible would be absurd. In this case the safe was broken into and the money stolen. The postmaster had the record of the total amount of cash on hand, but not of the specific coins that made up the total. The grand jurors could not, therefore, 'on oath' specify the coins with greater particularity. Their position was made known to the defendant by the statement in the indictment just quoted. This was all the government was required to allege and all the defendants could expect."

Vol. VII, p. 788, sec. 211. [First ed., 1909 Supp., p. 462.]

1. GENERAL CONSIDERATION (p. 790)

Matter "tending to incite murder, arson or assassination."—The exclusion of a publication from the press as being of the character described in this section does not constitute a censorship of the press, but merely evidences the unwillingness of the government to lend its aid to those who would destroy it in the dissemination of "matter of a character tending to incite arson, murder, and assassination." Thus, where a publication constantly has sought to imbue its readers with the idea that it is their duty to overthrow the government, disregard all law, and seize for themselves the property and belongings of others, irrespective of means and regardless of consequences, it is held that postal privileges may properly be refused. *Burleson v. U. S.*, (App. Cas. D. C. 1921) 274 Fed. 749.

Vol. VII, p. 803, sec. 212. [First ed., 1909 Supp., p. 463.]

Indictment.—Under the provision of this section making it a punishable offense to mail "matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which," is any indecent, lewd, obscene, libelous, scurrilous, or defamatory matter or epithet, an indictment has been held sufficient though there is no allegation as to the contents of the envelope. *U. S. v. Anderson*, (D. C. Mont. 1920) 263 Fed. 696. The court said:

"The evil at which the statute aims is not contents, but envelopes, neither greater nor less by reason of contents or absence of them. The object is not regulation of contents, but of envelopes. The intent is not to penalize mailing matter in denounced envelopes, but mailing the envelopes themselves; and all to the end that not only may postal patrons be protected from defamation exposed to postal employees, but also that postal employees may be protected from obscenity exposed to and thrust upon them. There may be none to defame; the address may be fictitious or absent; for matter is mailable though not addressed.

"The gist of the offense is the exposed objectionable matter itself in due course of mail, not that it is exposed inclosing other matter. The statutory words, 'matter otherwise mailable,' in view of the legislative intent and object, may reasonably be taken, not as defining the offense, but only as 'words that are but circumstances and conveyance in the putting of the case,' and not controlling construction. See *Potter's Dwaris*, 246 et seq. Strict construction is not absolute in the case of all penal statutes, nor in all terms thereof.

"Intent and object ascertained, words may

be given their fullest meaning, and common sense applied to avoid absurdity. Laws for the suppression of a public wrong, or to effect a public good, or to supply a remedy for a general mischief, are not always in the strict sense penal laws, to be given strict construction. *Taylor v. U. S.*, 3 How. 210, 11 L. Ed. 559; *Potter's Dwarrris*, 261; *Endlich, Stats.* § 337. An envelope without contents is in its nature so far a postal card that in that aspect it is within the statute. The instant case is within the mischief of the statute, and, having in mind the rule illustrated by *Lacher's Case*, 134 U. S. 624, is believed also sufficiently within the letter of the statute, unless construction that sticks in the bark be adopted."

Vol. VII, p. 812, sec. 215. [First ed., 1909 Supp., p. 464.]

III. Essentials.

3. Scheme or artifice to defraud, etc.
 - a. What constitutes.

4. Use of mails.

IV. Procedure.

2. Indictment.

- a. In general.
- b. Scheme to defraud.
- c. Use of mails.
- d. Intent.

4. Trial.

- b. Evidence and instructions.
- c. Question for jury.

6. Appeals.

III. ESSENTIALS

3. Scheme or Artifice to Defraud, etc.

a. What Constitutes (p. 816)

Schemes included.—Under this section "as it now stands, any kind or species of scheme or artifice to defraud is punishable in the national courts, if and whenever for the purpose of executing that scheme the postal establishment is used in the statutory manner and form. Under such a statute no reason can exist why a scheme or artifice to defraud the United States . . . should not be punishable thereunder when—perhaps especially when—the United States mail is used in the prosecution of a scheme to defraud the United States." *Gould v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 506.

Success of scheme immaterial.—The statute does not make the guilt or innocence of one who devises such a scheme dependent on its actual success. *Bryon v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 769; *Grant v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 443.

Pecuniary loss to government.—An agreement to defraud need not contemplate any pecuniary loss on the part of the government. *Gould v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 506.

Impossibility of execution of scheme.—The objection that on its face the scheme was impossible of execution and that no

one would have been deceived thereby is without merit. *Byron v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 769.

Erroneous statement of point of law.—In a case where it was contended that an erroneous statement concerning a point of law was not indictable, it was said: "If such a statement is honestly made, of course, no criminal charge will stand; but if there is a willful misstatement, made deliberately and with intent to deceive, and with a purpose to perpetrate a fraud, it is plain the statement may become an essential element in crime." *Byron v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 769.

False claim mailed by partner.—A person who knows of the preparation by his partner of a false claim for services rendered by the partnership and of the mailing of that claim and a letter accompanying it to the person whom it is sought to defraud may be convicted under this section. *Estelle v. U. S.*, (C. C. A. 5th Cir. 1920) 268 Fed. 530.

4. Use of Mails (p. 825)

Mailing of letter, etc., as element of offense.—The mailing of any letter or writing for the purpose of executing the fraudulent scheme is what the statute makes an element of the offense. *Byron v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 769. See also *Smith v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 665.

IV. PROCEDURE

2. Indictment

a. In General (p. 823)

A motion for a bill of particulars in the case of an indictment under this section is addressed to the discretion of the court and ordinarily is not reviewable. *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14.

b. Scheme to Defraud (p. 828)

How alleged.—It is not necessary in an indictment under this section that the scheme itself appear to be fraudulent on its face or that it alleged that any one has actually lost money or been defrauded. *Rowe v. Boyle*, (C. C. A. 9th Cir. 1920) 268 Fed. 809. See also *Tjosevig v. Boyle*, (C. C. A. 9th Cir. 1920) 268 Fed. 813.

It is not necessary to allege or to prove that the letters mailed in pursuance of the scheme to defraud under this section of the Penal Code are calculated to be effective in carrying out the scheme. *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14.

"The particulars of the scheme are matters of substance, and must be set forth with sufficient certainty as to its existence and character that the indictment will fairly acquaint the defendant with the scheme charged against him; but the gist of the offense in the mailing of the letter, writing, or article in pursuance of the scheme, and the scheme itself need not be pleaded with

all the certainty as to time, place, and circumstance that is required in charging the gist of the offense, the mailing of the matter in execution or attempted execution of the scheme." *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14.

Illustrations.—Where the only allegation in the indictment as to the specific means by which defendants were to fraudulently obtain possession of the draft or its proceeds is that—

"By trickery, artifice, chicanery, cheating, and by making false and fraudulent statements, representations and pretenses, and by other artifices, false representations, pretenses and deceptions, to the grand jurors unknown, to the said Fred Kaiser, the defendants would obtain possession of the said draft," etc., a demurrer challenging the sufficiency of this statement should be overruled. *Grant v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 443.

In case of a prosecution under this section where the substance of the scheme charged was not the mere use of a corporate name similar to the name of an existing association, but to use it so as to have the credit and reputation of the other company in order to obtain goods not intended for defendant, and for which he would not pay, the failure to allege that the unincorporated partnership or association, then doing business and in actual operation, was duly organized, was held not to be prejudicial to the defendant, and make the indictment fatally defective, in view of the provisions of R. S. sec. 1025 (2 Fed. Stat. Ann. 2d ed. p. 681). *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14.

An indictment has been held sufficient under this section where it alleges the nature, etc., of the scheme with sufficient particularity to acquaint the defendant with the value, etc., of the charges made. *Green v. U. S.*, (C. C. A. 8th Cir. 1920) 266 Fed. 779.

c. Use of Mails (p. 833)

Scheme to be effected through use of mails.—An indictment is insufficient which charges that the defendant did devise and intend to devise a scheme and artifice to defraud the United States and that in furtherance of such scheme he used the United States mail to forward an application for employment which contained false and fraudulent statements and promises, and that the purpose of the defendant in making such false representations was to defraud the United States by reason of his employment by the addressee, thus exempting himself from military duty under the Selective Service Law (Act May 18, 1917, 9 Fed. Stat. Ann. (2d ed.) 1136). *Underwood v. U. S.*, (C. C. A. 6th Cir. 1920) 267 Fed. 412. The court said: "At the time alleged in the indictment the Selective Service Law contained no provision whatever exempting an employee of the Young Men's Christian

Association from its terms and provisions. Had Underwood succeeded in securing employment with the Young Men's Christian Association through any fraudulent scheme or artifice, the fact that he was so employed would not then in any way have operated to exempt him from military duty under the provisions of that act or in any way to hinder or delay the United States government in raising an army and navy for its defense."

An indictment charging the use of the United States mail in furtherance of a scheme to defraud in that the accused sought to obtain employment through the mail on the basis of a salary and expenses by means of a letter containing false statements and representations, is insufficient where the primary purpose of the accused was to secure employment, and there is no averment in the indictment that he did not intend to perform any services or that whatever services he might perform by reason of such employment would have been of no value or of materially less value than the salary and expenses. *Underwood v. U. S.*, (C. C. A. 6th Cir. 1920) 267 Fed. 412.

The use of the mails in the execution of a scheme to defraud is held to be sufficiently alleged where after setting forth the scheme and its purpose the indictment further states that "the defendant . . . did willfully, . . . and for the purpose of executing the aforesaid scheme or artifice to defraud," mail a writing styled an appeal. The court said in such a case: "Of course, it cannot be said that on its face the paper called notice of appeal indicated any intention to defraud or was in execution of such an intention. But if one with corrupt intent has devised a scheme to defraud by getting money from people through deceit and misrepresentation, and for the purpose of carrying out a described scheme or artifice puts a writing in the mails, it is not material whether the writing is valid." *Byron v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 769.

d. Intent (p. 834)

Charging intent unnecessary.—It is not necessary for an indictment to charge that the scheme to defraud devised by the defendants was intended to be effective by the use of the post office establishment of the United States. *Smith v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 665, holding an indictment to be sufficient which charged such a scheme and that, for the purpose of executing it, newspapers and letters were placed and caused to be placed by them in the post office of the United States to be carried by the post office establishment to certain persons named in the indictment.

4. Trial

b. Evidence and Instructions (p. 838)

Admissibility in general.—On a prosecution for conspiracy to defraud by the use

of the mails great latitude is allowed in the introduction of testimony, as in most instances the offense can only be established by circumstantial evidence. *Smith v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 665.

Declarations and admissions.—It is proper to permit a witness to testify to representations made in his presence by the defendant to a person named as one of the "victims" in the indictment. *Bryon v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 769.

Intent—In general.—It is competent to show every part and parcel of the business conducted by the defendants, or the method of conducting it, calculated to shed light on the intent and purpose of its managers. *Lefkowitz v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 664.

Similar schemes.—Evidence of participation of the defendants in a prior similar scheme to defraud has been held admissible although there is no proof that the prior scheme involved a use of the mails. *Grant v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 443.

Documentary evidence—Copies of writings.—In a prosecution under this section copies of writings, where the original are shown to have been in the possession of the defendant or companies controlled by him, are admissible without notifying the defendant to produce the originals. *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14.

Overt acts.—The admission of testimony as to overt acts of some of the defendants before the conspiring has been established has been held to be within the discretion of the court. *Smith v. U. S.*, (C. C. A. 8th Cir. 1920) 267 Fed. 665.

In *Grant v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 443, special delivery letters and telegrams addressed to two of the defendants were held admissible as being acts in the furtherance of the scheme to defraud.

Sufficiency.—In *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14, the evidence was held sufficient to sustain a conviction under this section where the scheme charged was the use of a corporate name similar to the name of an existing association so as to have the credit and reputation of the other company in order to obtain goods not intended for defendant and for which he would not have to pay.

c. Question for Jury (p. 843)

Intent and purpose.—The question of intent and purpose are for the jury. *Byron v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 769.

6. Appeals (p. 844)

Insufficiency of evidence as to one of several counts.—A judgment of conviction under this section will not be reversed for insufficiency of the evidence, if it is sufficient to support one of several counts in the indictment and the penalty imposed is not

in excess of that which could be imposed under that count. *Savage v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 14.

6. Appeals (p. 844)

Where defendant was convicted on both counts of an indictment under this section and the judgment imposed could have been inflicted on either count, the judgment should not be reversed on account of any defect in or failure of proof as to one of the counts if the other count is good. *Grant v. U. S.*, (C. C. A. 6th Cir. 1920) 268 Fed. 443.

Vol. VII, p. 851, sec. 225. [First ed., 1909 Supp., p. 468.]

Evidence—Different offence.—Evidence of a failure to deposit money order funds with the depository designated is not admissible on the trial of one charged with embezzling postal funds. *Youmans v. U. S.*, (C. C. A. 5th Cir. 1920) 264 Fed. 425. The court said:

"The prosecution offered in evidence rule 1241 of the Postal Laws and Regulations of the Post Office Department, which in substance requires all postmasters to remit daily to the depository designated by special instructions to each office all surplus money order funds, unless the amount is less than \$50, in which case no remittance is required. The evidence was duly objected to, on the grounds that it was not material, and because the defendant was not charged with failing or refusing to remit or deposit money order funds when required to do so. The defendant excepted to the overruling of the objection and the admission of the evidence. Other evidence adduced, considered in the light of the existence of the rule mentioned, tended to prove the defendant guilty under that part of section 225 of the Criminal Code, which makes a postmaster guilty of embezzlement if he fails or refuses to remit or deposit postal funds when required to do so by regulations of the Post Office Department. The admission of the rule under the circumstances stated was calculated to make the impression on the jury that, in determining the question of the defendant's guilt or innocence of the charge made in the indictment, they could consider his guilt of conduct other than that so charged against him. The indictment charged him with willfully and feloniously converting to his own use postal money order funds. His guilt of conduct other than that charged was not a matter proper to be considered by the jury. A violation of the rule in question was not within the issues to be tried. An effect of the admission of it in evidence was to enable the jury to consider the defendant's guilt in a respect not a proper subject of inquiry in the case on trial."

Transcript.—The certificate attached to the transcript must show that it is a true copy of the books of the auditor of the Post Office Department. *Youmans v. U. S.*, (C. C. A. 5th Cir. 1920) 264 Fed. 425.

Vol. VII, p. 861, sec. 237. [First ed., 1909 Supp., p. 472.]

Transportation to Porto Rico.—In *Ayala v. U. S.*, (C. C. A. 1st Cir. 1920) 268 Fed. 296, it was held that as there was no substantial evidence that the defendant had brought or caused the lottery lists and tickets to be brought from Santo Domingo, which was an essential part of the government's case, the conviction of the defendant in the lower court should be set aside. The reasons for the decision sufficiently appear in the following extract from the opinion:

"The only evidence upon which the defendant was convicted was that he was found with these lists and tickets, and that when they were demanded from him he threw them overboard. There was no direct evidence, as stated by the court, that he had any accomplices aboard the Santiago de Cuba, or that he had been in any way connected with bringing the lists or tickets from Santo Domingo. There was evidence that the steamer had touched at San Juan and Mayaguez, upon the island of Porto Rico, before it came to Ponce, and from the defendant's possession of the lists and the lottery tickets, and his conduct, the inference could as well have been drawn by the jury that the tickets and lists were obtained at San Juan, or Mayaguez, or that the defendant had obtained them in the harbor of Ponce from somebody aboard the steamer Santiago de Cuba, as that he had caused them to be brought from Santo Domingo. While it was the province of the jury to weigh the evidence, and to draw all reasonable inferences that might be drawn therefrom, we do not think, when inferences as consistent with innocence as with guilt may be drawn from the proven facts, it can be said that there was substantial evidence to support a verdict of guilty. The attempt of the plaintiff to destroy the evidence against himself evidently had great weight with the jury.

"It is pointed out in *Hickory v. United States*, 100 U. S. 408, 416, 16 Sup. Ct. 327, 40 L. ed. 474, that evidence of acts of concealment 'are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption of guilt; they are mere circumstances, to be considered and weighed in connection with other proof, with that caution and circumspection which their inconclusiveness when standing alone require.'

"In our view of the case, we do not deem it necessary to discuss the other errors assigned, because we feel that there was no

substantial evidence that the defendant had brought or caused the lists and lottery tickets to be brought from Santo Domingo, which was an essential part of the government's case."

Vol. VII, p. 863, sec. 238. [First ed., 1909 Supp., p. 472.]

Shipments within section.—This section has reference only to shipments by a common carrier. *One Truck Load of Whisky v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 99.

Vol. VII, p. 864, sec. 239. [First ed., 1909 Supp., p. 473.]

Transportation within prohibition of section.—This section refers to transportation by any person as well as by a common carrier. *One Truck Load of Whisky v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 99.

Vol. VII, p. 865, sec. 240. [First ed., 1909 Supp., p. 473.]

Relation to sections 238 and 239.—This section must be considered as in aid of and supplemental to sections 238 and 239 of the Penal Laws. *One Truck Load of Whisky v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 99.

Construction.—In construing a statute of this character creating a new offense the rule applies that it should not be extended to include acts which may or may not have been within the legislative intent. *One Truck Load of Whisky v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 99.

Shipment—What constitutes.—Where the owner of whisky did not give up its custody but hired a truck and driver from a firm which was in the business of letting for hire trucks with drivers for the transportation of merchandise, it was held that in thus carrying the whisky from one state to another there was not a shipment within the meaning of the statute. *One Truck Load of Whisky v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 99.

A shipment as baggage is within this section. *Shannon v. Hines*, (1921) 205 Mo. App. 629, 226 S. W. 283.

Carrier excused from delivery.—A carrier is not liable for failure to deliver a package shipped in violation of this section. *Shannon v. Hines*, (1921) 205 Mo. App. 629, 226 S. W. 283.

Right to seize.—"The trial court also declared the law to be that if the trunk contained whisky and was checked for transportation as an interstate shipment then the seizure of the whisky by the United States revenue officer and its confiscation by him was a proper and lawful act. This, we think, is correct, at least so far as the seizure is concerned, in view of section 240,

U. S. Criminal Code, above quoted, and which prohibits any one from shipping or causing to be shipped from one state to another any 'package of or package containing' intoxicants in a disguised or secret manner, and which further declares that 'such liquors shall be forfeited to the United States and may be seized,' etc. Whether such liquor could be confiscated without first being condemned by legal proceedings makes no difference here, since defendant had nothing to do with the destruction of the liquor after its seizure. The lawful seizure of the liquor destroys defendant's liability therefor, though its destruction was without authority of law." *Shannon v. Hines*, (1921) 205 Mo. App. 629, 226 S. W. 283, in which case, however, it was said, "the whisky could readily have been removed from the trunk and its other contents. It was so removed, in fact, and destroyed, and the officer then confiscated and converted to his own use the trunk and its entire contents. The same was held at the defendant's depot only a day and was then taken to a private house, and after being kept there some time was again removed, no one knows where. This, it seems to us, was unlawful and is not justified by the United States statute above quoted, and which did justify the seizure of the whisky."

Indictment.—It is held that an indictment under this section need not allege that the state into which the liquor was shipped was dry territory, it being declared that it is sufficient answer to an objection on such ground to say that the law presumes that all of the alleged conspirators had knowledge of the prohibitory statute referred to. *Richards v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 654.

Evidence.—In *Richards v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 654, the evidence was held sufficient to show a conspiracy in violation of this section.

Vol. VII, p. 890, sec. 272. [First ed., 1909 Supp., p. 481.]

III. THIRD PARAGRAPH

1. Lands Reserved or Acquired

a. In General (p. 896)

Allegation of character of public use.—*Brown v. U. S.*, cited under this catchline in 1920 Supplement at p. 716 was reversed in (1921) 256 U. S. —, 41 S. Ct. 501, 65 U. S. (L. ed.) —, but not on the point discussed in the 1920 Supplement. The court however referred to that point in language as follows:

"The petitioner was convicted of murder in the second degree, committed upon one Hermis at a place in Texas within the exclusive jurisdiction of the United States, and the judgment was affirmed by the circuit court of appeals. 168 C. C. A. 258, 257 Fed.

46. A writ of certiorari was granted by this court. 250 U. S. 637, 63 L. ed. 1183, 39 Sup. Ct. Rep. 494. Two questions are raised. The first is whether the indictment is sufficient, inasmuch as it does not allege that the place of the homicide was acquired by the United States 'for the erection of a fort, magazine, arsenal, dockyard, or other needful building,' although it does allege that it was acquired from the state of Texas by the United States for the exclusive use of the United States for its public purposes, and was under the exclusive jurisdiction of the same. Penal Code of March 4, 1909, chap. 321, § 272, subd. 3, 36 Stat. at L. 1088, 7 Fed. Stat. Ann. (2d ed.) p. 890. Constitution, art. 1, § 8. In view of our opinion upon the second point, we think it unnecessary to do more than to refer to the discussion in the court below upon this."

Vol. VII, p. 905, sec. 273. [First ed., 1909 Supp., p. 481.]

II. JUSTIFIABLE OR UNJUSTIFIABLE HOMICIDE

4. Self-defense (p. 909)

A person attacked by another with a knife does not, as a matter of law, exceed the bounds of lawful self-defense if he stands his ground and kills his assailant, where he has sufficient reason to believe that he is in imminent danger of death or grievous bodily harm from his assailant. *Braun v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 501, 65 U. S. (L. ed.) 618, reversing (C. C. A. 5th Cir. 1919) 257 Fed. 46, 168 C. C. A. 258.

Vol. VII, p. 916, sec. 274. [First ed., 1909 Supp., p. 482.]

Admissibility of evidence.—See *Sinclair v. U. S.*, (App. Cas. D. C. 1920) 265 Fed. 991.

Instructions.—In a prosecution for manslaughter for causing the death of a person by the negligent operation of an automobile, it is not error for the court to refuse to charge that, if the jury find that the proximate cause of the death was the breaking of a part of the steering wheel of the automobile thereby rendering it useless, they should acquit, since such a charge omits the element of the defendants' carelessness. Nor is it error for the court to refuse to give an instruction substantially covered by one already given on its own motion. *Sinclair v. U. S.*, (App. Cas. 1920) 265 Fed. 991.

Vol. VII, p. 936, sec. 288. [First ed., 1909 Supp., p. 485.]

Guilty knowledge.—The essence of the offense penalized by this section is guilty knowledge, and such knowledge may be brought home to the defendant by circumstantial evidence. *Degnan v. U. S.*, (C. C. A. 2d Cir. 1921) 271 Fed. 291.

Vol. VII, p. 945, sec. 292. [First ed., 1909 Supp., p. 486.]

II. ENDEAVOR TO MAKE REVOLT (p. 947)

Agreement to refuse to obey orders.—This section covers an endeavor or conspiracy to make a revolt by such combination and co-operation in refusal to obey as deprives the master of his authority and command or amounts to resistance or prevention of his free and lawful exercise of his authority and command. Thus, the agreement of the entire crew of a ship anchored in a port of refuge before the end of a voyage to refuse to obey the orders of the master, and their united action in carrying out the agreement while remaining on board, is endeavoring to make a revolt. *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15. The court said:

"This was not usurpation of the command from the master, for there was no effort to take charge of the ship. But evidently it was a successful endeavor to deprive him of authority and command on board, and to resist and prevent him in the free and lawful exercise of his command. The united action of a crew in refusing to yield obedience to the lawful command of the master deprives him of the authority and command he was in duty bound to exercise. This is as much resistance and prevention of the free and lawful exercise of his authority and command as an undertaking by a crew to deprive him of any inanimate instrumentality necessary to the command and management of the ship. A master may have possession of the ship alone, but he cannot be in command of it if the crew unite in refusing to carry out his orders."

Mistaken belief or ignorance of crew as defense.—Regarding this question the court, in *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15, said:

"There is authority for the position that seamen's refusal to obey the master under mistaken belief, having reasonable foundation, in the existence of a fact which, if it existed, would justify their refusal, is not criminal. *United States v. Givings*, 25 Fed. Cas. 1331. But the defendants were ignorant of no fact necessary to constitute the crime. The most that can be said for them is that, in doing the acts which constituted crime, they deliberately took the risk of their own opinion of the law, in the face of the warning of the master and the American consul. It is not even claimed that they were ignorant of the existence of the statute, but only that they relied on their own construction of it, that they were entitled to discharge before they had reached the port of destination merely because the term of 6 months had expired, which we have seen was without reasonable foundation in the language of the statute or in the decisions of the courts. Confidence in their construction of

the statutes may be a ground for such judicial clemency as was actually exercised in this case—the sentence being two days' imprisonment and a fine of \$50, without costs—or for executive clemency. It is not a ground of acquittal."

Vol. VII, p. 951, sec. 293. [First ed., 1909 Supp., p. 486.]

Agreement to refuse to obey commands.—This section covers the offense of revolt by such combination and co-operation in refusal to obey as deprives the master of his authority and command or amounts to resistance or prevention of his free and lawful exercise of his authority and command. *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15.

Vol. VII, p. 976, sec. 328. [First ed., 1909 Supp., p. 494.]

III. INDIAN RESERVATION (p. 978)

Jurisdiction.—A federal court has no jurisdiction of a Coeur d'Alene Indian charged with the murder of another member of the same tribe within the limits of the Coeur d'Alene Indian reservation in Idaho. *Eugene Sol Louie v. U. S.*, (C. C. A. 9th Cir. 1921) 274 Fed. 47.

Vol. VII, p. 984, sec. 332. [First ed., 1909 Supp., p. 495.]

Offenses against internal revenue.—Under this section which makes one a principal who at the common law would have been an accessory before the fact, it has been held that a physician who issues a prescription which is illegal under the Harrison Narcotic Law [4 Fed. Stat. Ann. (2d ed.) p. 177] may be prosecuted and convicted as a principal, and in such a case it is not necessary to set out the facts by which he aided or advised and procured the commission of the crime. *Harris v. U. S.*, (C. C. A. 2d Cir. 1921) 273 Fed. 785.

Keeping house of ill fame in violation of Selective Service Act.—A person charged with having set up a hotel as a house of ill fame and with being the keeper of it was held to be liable as a principal regardless of whether he was the owner or lessee of the hotel or a participant in its conduct. *Hunter v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 235.

Indictment.—In a prosecution under this section for aiding and abetting in a violation of section 2 of the Harrison Act the acts of the principal become the acts of the accessory or aider, and such accessory may be charged in the indictment as having done the act himself, and punished accordingly, and exceptions in that act in favor of physicians need not be negated. *Di Preta v. U. S.*, (C. C. A. 2d Cir. 1920) 270 Fed. 73.

1919 Supp., p. 291. [*Making or presenting false claims, etc.*]

Allegation of ownership.—An indictment for conspiracy to violate this section by

purloining property from railroad cars which alleged ownership in the government was held sufficient, the government at the time being in control of the railroads. *Fowler v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 15.

PORTO RICO

Vol. VII, p. 1267, sec. 14. [First ed., vol. V, p. 767.]

Procedure and rights in bankruptcy proceedings under Law of Procedure of 1886 in Porto Rico, see *Franceschi v. Mercado*, (C. C. A. 1st Cir. 1920) 269 Fed. 954.

Vol. VII, p. 1273, sec. 33. [First ed., vol. V, p. 772.]

Presumption as to appointment and confirmation of judge.—Where an objection was raised that the district judge of Porto Rico was without jurisdiction as his appointment had not been confirmed, it was said: "The last assignment of error is that Judge Sepulveda was without jurisdiction to try the case. The Supreme Court found that there was no evidence that the appointment of Judge Sepulveda had not been confirmed when he heard the case, and in this we concur. It is true that he announced that he had notice of his appointment, but had not been notified that the appointment had been confirmed; but, if it had not been confirmed, this could have been easily proven. This was not done, and the presumption must stand that he had been legally appointed and confirmed." *Fordham v. Marrero*, (C. C. A. 1st Cir. 1921) 273 Fed. 61.

1918 Supp., p. 626, sec. 41.

Jurisdiction—Diversity of citizenship of parties.—The District Court of the United States for the District of Porto Rico has no jurisdiction of a suit by a citizen of Spain domiciled in Porto Rico against a defendant also resident in Porto Rico. *Diez v. Green*, (C. C. A. 1st Cir. 1920) 266 Fed. 890.

Where the defendant is a citizen of Porto Rico, to confer jurisdiction on the federal District Court, a plaintiff must allege and prove, not only that he is a foreign citizen or a citizen of the United States, but that he is not domiciled in Porto Rico. *Porto Rico R., Light, etc., Co. v. Diaz Mor*, (C. C. A. 1st Cir. 1920) 266 Fed. 516.

Where in an action in the District Court of the United States for Porto Rico there are no allegations or proof that the parties on either side of the controversy are citizens or subjects of a foreign state or states not domiciled in Porto Rico, or that they are citizens of a state, territory, or district of the United States not domiciled in Porto Rico, the requisite diversity of citizenship to confer jurisdiction on the federal District Court for Porto Rico is wanting. *Vere v. Bianchi*, (C. C. A. 1st Cir. 1920) 266 Fed. 367, applying the rule in an action where the complainant alleged that the plaintiff was a citizen of the republic of France now residing in Porto Rico and that the defendants were residents of Porto Rico.

POSTAL SERVICE

Vol. VIII, p. 20, sec. 396. [First ed., vol. VI, p. 6.]

Mail truck subject to local speed regulations.—The various federal statutes relating to post routes and the fixing of schedules by the Post Office Department for the carrying of the mails do not prevent the application to a mail truck of a state statute prescribing the maximum speed of automobiles on public highways. *Hall v. Com.*, (Va. 1921) 105 S. E. 551.

Vol. VIII, p. 46, sec. 3841. [First ed., vol. V, p. 798.]

Mail truck subject to local speed regulations.—The various federal statutes relat-

ing to post routes and the fixing of schedules by the Post Office Department for the carrying of the mails do not prevent the application to a mail truck of a state statute prescribing the maximum speed of automobiles on public highways. *Hall v. Com.*, (Va. 1921) 105 S. E. 551.

Vol. VIII, p. 71, sec. 1. [*Clerks and carriers graded, etc.*] [First ed., 1909 Supp., p. 522.]

Reduction of salaries of letter carriers.—See annotation under Vol. VIII, p. 956, sec. 6, *infra*, p. 727.

Vol. VIII, p. 98, sec. 14. [First ed., vol. V, p. 830.]

Constitutionality.—Federal legislation conferring upon the Postmaster General power to revoke the second-class mail privilege enjoyed by a newspaper which that official finds, after a hearing fairly conducted, systematically to have contained false reports and false statements published with intent to interfere with the success of the military operations of the federal government, to promote the success of its enemies, and to obstruct its recruiting and enlisting service, in violation of the Espionage Act of June 15, 1917 [1918 Supp. Fed. Stat. Ann. 120 et seq.], is not unconstitutional, either as not affording the publisher a trial in a court of competent jurisdiction, or as infringing the constitutional freedom of speech and press, or as taking property without due process of law. *U. S. v. Burleson*, (1921) 255 U. S. 407, 41 S. Ct. 352, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282.

Revocation of privilege.—Admission to second-class mail privileges is obtained for a publication only by a permit issued by the Postmaster General after a hearing and upon a showing made, satisfactory to him or his authorized assistants, that it contains and will continue to contain only mailable matter, and that it will meet the various statutory and other requirements.

The power of the Postmaster General to suspend or revoke second-class mail privileges is a necessary incident to his power to grant such privileges.

If a newspaper enjoying second-class mail privileges comes to be so edited that it contains other than mailable matter, it is the plain intention of Congress that it shall no longer be carried as second-class mail. *U. S. v. Burleson*, (1921) 255 U. S. 407, 41 S. Ct. 352, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282.

Violation of Espionage Act.—Authority to revoke the second-class mail privileges of a newspaper which, contrary to the Espionage Act of June 15, 1917 [1918 Supp. Fed. Stat. Ann. p. 120 et seq.], systematically contained false reports and false statements, published with intent to interfere with the success of the military operations of the federal government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service, was conferred upon the Postmaster General, not merely as to a single issue of such paper, but until a proper application and showing shall be made for a renewal of such privilege, by the provision of title 12 of that act that any newspaper published in violation of any of its terms shall be "nonmailable," and shall not be "conveyed in the mails or delivered from

any postoffice or by any letter carrier," when read in connection with the declaration of R. S. § 396 [8 Fed. Stat. Ann. (2d ed.) 20], that it is the duty of the Postmaster General to superintend regularly all the business of the Post Office Department, and to execute all laws relating to the postal service, and with the federal legislation classifying the mails, which deals only with "mailable matter." *U. S. v. Burleson*, (1921) 255 Fed. 407, 41 S. Ct. 352, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282.

Hearing before revocation.—A newspaper publisher whose second-class mail privileges have been revoked for the publication of articles that offended against the Espionage Act of June 15, 1917 [1918 Supp. Fed. Stat. Ann. 120 et seq.], was accorded a hearing which, if fairly conducted, satisfies the requirements of due process of law, where due notice was given of the time and character of the hearing, the publisher was represented thereon by its president, and, so far as appears, all that it desired to say or offer was heard and received. *U. S. v. Burleson*, (1921) 255 U. S. 407, 41 S. Ct. 352, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282.

Review of revocation.—The conclusion of the Postmaster General that the second-class mail privileges of a newspaper should be revoked, which rests upon his finding, after a hearing fairly conducted, that such newspaper has systematically contained false reports and false statements published with the intent to interfere with the military operation of the federal government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service, in violation of the Espionage Act of June 15, 1917 [1918 Supp. Fed. Stat. Ann. p. 120 et seq.], will not be disturbed by the courts unless they are clearly of the opinion that his conclusion is wrong. *U. S. v. Burleson*, (1921) 255 U. S. 407, 41 S. Ct. 352, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282.

Vol. VIII, p. 137, sec. 3929. [First ed., vol. V, p. 872.]

III. ASCERTAINMENT AND DETERMINATION BY POSTMASTER GENERAL (p.143)

Scope of Postmaster General's authority.—It was not the design of this section and R. S. sec. 4041 [8 Fed. Stat. Ann. (2d ed.) 231] to vest the Postmaster General with authority to determine between contradictory views held in apparent good faith upon a subject the merits or demerits of which may fairly be said to be a matter of opinion among those who ought to know. *Leach v. Carlisle*, (C. C. A. 7th Cir. 1920) 267 Fed. 61.

Vol. VIII, p. 163, sec. 3962. [First ed., vol. V, p. 893.]

Mail truck subject to local speed regulations.—The various federal statutes relating to post routes and the fixing of schedules by the Post Office Department for the carrying of the mails do not prevent the application to a mail truck of a state statute prescribing the maximum speed of automobiles on public highways. *Hall v. Com.*, (Va. 1921) 105 S. E. 551.

Vol. VIII, p. 181, sec. 8. [First ed., 1914 Supp., p. 321.]

Readjustment of compensation by Postmaster General as discretionary.—The Postmaster General has exclusive jurisdiction to readjust the compensation of star route and screen-wagon contractors under this section, and unless there has been a clear abuse of his official discretion the court has no jurisdiction to consider the claim. Thus, where a mail contract provides for increases in the mails, increased service, and necessary additional trips, and increases caused by the establishment of the parcel post system are not so great as to materially change the contract, the contractor cannot maintain an action for additional compensation. *Halstead v. U. S.*, (1920) 55 Ct. Cl. 317.

Vol. VIII, p. 181, sec. 3964. [First ed., vol. V, p. 900.]

Mail truck subject to local speed regula-

tions.—The various federal statutes relating to post routes and fixing of schedules by the Post Office Department for the carrying of the mails do not prevent the application to a mail truck of a state statute prescribing the maximum speed of automobiles on public highways. *Hall v. Com.*, (Va. 1921) 105 S. E. 551.

Vol. VIII, p. 182, sec. 3965. [First ed., vol. V, p. 901.]

Mail truck subject to local speed regulations.—The various federal statutes relating to post routes and the fixing of schedules by the Post Office Department for the carrying of the mails do not prevent the application to a mail truck of a state statute prescribing the maximum speed of automobiles on public highways. *Hall v. Com.*, (Va. 1921) 105 S. E. 551.

Vol. VIII, p. 205. [*Readjustment of rates, etc.*] [First ed., 1909 Supp., p. 523.]

Purpose of act.—To same effect as 1918 Supplement annotation, see *Mo., etc.*, *R. Co. v. U. S.*, (1920) 55 Ct. Cl. 405.

1918 Supp., p. 639, sec. 1.

A state statute passed to take advantage of the provisions of this act, was sustained and construed in *Williamson County v. Franklin, etc.*, *Turnpike Co.*, (1921) 143 Tenn. 628, 228 S. W. 714.

PRISONS AND PRISONERS

Vol. VIII, p. 277, sec. 5539. [First ed., vol. VI, p. 35.]

Compensation to prison officers.—Under this section and several California statutes it has been held that "all moneys coming into the hands of the sheriff for the support of federal prisoners is for the use of the county, and that it was and is the duty of the sheriff to account for and pay over to the county treasurer all money so received by him, and to put in his claim to the county for expenses incurred for support of federal prisoners in the same manner and at the same rates as for prisoners committed by the state of California, and that it is the function of the board of supervisors, as the constituted business agents of the county, to contract with the federal authorities as to the compensation to be demanded for caring for federal prisoners while confined in the county jail." *Los Angeles County v. Cline*, (Cal. 1921) 197 Pac. 67.

Vol. VIII, p. 278, sec. 5541. [First ed., vol. VI, p. 36.]

Sentence of one year or less.—This section only authorizes imprisonment in a penitentiary where the imprisonment is for a longer term than one year. *Braden v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 441.

Vol. VIII, p. 295, sec. 1. [*United States Penitentiary at Atlanta, etc.*] [First ed., vol. VI, p. 30.]

Persons convicted of infamous crimes.—A person convicted in a United States court of an infamous offense may be sentenced for a year or more at Atlanta although there is no provision for hard labor imposed in defining the punishment for such offense. *Rogers v. Desportes*, (E. D. S. C. 1920) 268 Fed. 83, *affirmed* (C. C. A. 4th Cir. 1920) 268 Fed. 308.

PUBLIC CONTRACTS

Vol. VIII, p. 355, sec. 3733. [First ed., vol. VI, p. 119.]

Notice of restricted cost.—The provisions of this section, R. S. sec. 3732, and the Act of June 30, 1906, ch. 3914, sec. 9 [3 Fed. Stat. Ann. (2d ed.) 153], prohibit the making of a contract with the United States for work in excess of a specific appropriation therefor by Congress, and where a contractor enters into an agreement for such work he must be held to have notice of the law, especially where the contract itself provides that the work shall be done "within the limits of available funds." *Sutton v. U. S.*, (1920) 55 Ct. Cl. 193.

Vol. VIII, p. 374. [*Bonds of contractors, etc.*] [First ed., vol. VI, p. 125.]

I. Construction.

4. Labor and materials included.

III. Rights and liabilities of sureties.

VI. Action on bond.

I. CONSTRUCTION

4. Labor and Materials Included (p. 379)

Effect of priorities.—This section does not affect the priority of labor and materialmen recognized by the government in a contract for public work entered into before its adoption. *Belknap Hardware, etc., Co. v. Ohio River Contract Co.*, (C. C. A. 6th Cir. 1921) 271 Fed. 144, *reversing* (W. D. Ky. 1920) 264 Fed. 676.

Transporting stone.—There may be a recovery on the bond of a public contractor for the rent of a derrick or lighter used in transporting stone from a quarry to the place of deposit designated in the contract. *U. S. v. Port Deposit Quarry Co.*, (D. C. Md. 1921) 272 Fed. 698.

Dredging necessary to enable barges to approach a pier so as to be loaded with stone for transportation in connection with the construction of a breakwater, is within the terms of this section. *U. S. v. Taylor Co.*, (E. D. N. C. 1920) 268 Fed. 635.

III. RIGHTS AND LIABILITIES OF SURETIES (p. 381)

Subrogation.—Where the bonding company actually meets its obligation in the full amount of the penal sum does not by so doing discharge the claims of materialmen in full it cannot stand in their stead as a general creditor, and prove claims for the partial payments it made; but before it can claim reimbursement for such payments it must wait until the general creditors have had their claims paid in full. *American Surety Co. v. Finletter*, (C. C. A. 3d Cir. 1921) 274 Fed. 152.

Deferred payments due contractor.—A

bonding company may under its contract with the contractor be entitled to deferred payments due to the contractor. *American Surety Co. v. Finletter*, (C. C. A. 3d Cir. 1921) 274 Fed. 152.

VI. ACTION ON BOND (p. 384)

Action in equity.—A suit in equity cannot be maintained under this action. *Belknap Hardware, etc., Co. v. Ohio River Contract Co.*, (C. C. A. 6th Cir. 1921) 271 Fed. 144, *reversing* (W. D. Ky. 1920) 264 Fed. 676.

Final settlement of the contract.—To the same effect as the first paragraph of the original annotation, see *U. S. v. Arnold*, (D. C. Conn. 1920) 268 Fed. 130, holding that a letter from the Bureau of Yards and Docks together with other correspondence showed a "final settlement" as of the date of the letter, and that the final date of settlement was not affected by the fact that a few minor details which were trivial in their nature were considered subsequent to such date.

Staying suit.—The fact that the United States in its own right has brought suit on a bond is not ground for staying a suit brought by individuals in the name of the United States in another district. *U. S. v. Brown*, (M. D. Pa. 1920) 266 Fed. 555, the court said:

"Defendant requests the court to stay proceedings until final determination of the suit commenced in the district of Vermont, upon the ground that under the act of Congress the United States shall have priority in the enforcement and collection of its claim. The United States has not joined in the request, and as for the defendant surety company, who has obtained this rule, it is enough to say that the court will see to it that it shall pay no more than the face of the bond, whether to the United States, or the plaintiff claimants or both, according to its liability. Though the claims of plaintiffs as against the defendant contractor are determined in this suit, the liability of the defendant surety company upon its bond being fixed, the application or apportionment of the penalty of the bond in proportional ratio found due each claimant, including the United States, if necessary, may well be hereafter controlled by the court. . . . Whether the United States may also maintain its action in Vermont, or whether two actions may be maintained at the same time in different places on the same bond, one by the United States and another by creditors of the contractor, need not be decided here."

1919 Supp., p. 304, sec. 1.

Section as repealing Act of August 10, 1917, ch. 53.—This act did not repeal sec-

tion 10 of the Act of August 10, 1917, ch. 53. [1918 Supp. Fed. Stat. Ann. 185.] U. S. v. McGrane, (C. C. A. 3d Cir. 1921) 270 Fed. 761.

Scope of act.—"If the language of section 1 is to be limited to such claims as arise upon an 'agreement' by an officer or agent, acting under the authority of the Secretary of War or of the President, for the acquisition or use of lands or for damages resulting from notice of such use, or for the production, etc., of equipment, material, or supplies, or services, or facilities, or other purposes connected with the prosecution of the war, then certainly claims arising outside of any agreement, just as claims arising outside of any exercise of authority by the Secretary of War or the President, in the conduct of the war, would not be repealed by this statute, which provides for the payment of such 'adjustments' as might be made respecting these particular sorts of 'agreement.' An 'implied' agreement evidently means an 'implied' contract based on an 'agreement' for the transaction. The other language of the section contradicts the idea that the words refer to an entire obligation, into which no element of the meeting of minds as to the contract has entered at any stage.

"... Section 1 authorizes payment of such claims (of the nature covered by the section) as may be adjusted by the Secretary of War. The evident purpose of this statute was to protect those parties who had entered into contracts with the government, that had been undertaken in good faith and for immediate needs, but which had not been expressly authorized by act of Congress, or which had not been contracted in exact accordance with the statute law.

"Contracts of this sort were thus validated and payment provided for, when in effect agreed upon and approved by the Secretary of War and recommended for payment. Such claims could not be paid, except under this statute. Decisions of the Comptroller of the Treasury, vol. 25, part 2, p. 398. In order to come under this statute they must be filed with the Secretary of War before July 31, 1919." *Benedict v. U. S.*, (E. D. N. Y. 1920) 271 Fed. 714.

Time for filing.—In order to come within this statute claims which could not be otherwise paid except by virtue of its terms must be filed with the Secretary of War before the date fixed by the statute. *Benedict v. U. S.*, (E. D. N. Y. 1920) 271 Fed. 714.

Claims affected by failure to file.—The failure to file claims which could not be paid except under this statute forecloses only those claims which would not be paid under this law unless allowed by the Secretary of War. If other statutes provide for a method of collection, then the parties would not be foreclosed from all chance of recovery, but

they would be foreclosed from taking these claims up with the Secretary of War and obtaining judgment from the Treasurer of the United States on his certificate. *Benedict v. U. S.*, (E. D. N. Y. 1920) 271 Fed. 714, wherein it was said:

"General jurisdiction of the Court of Claims includes matters from many other branches of the government than the War Department. Section 10 of the Fuel and Food Act relates to supplies for the army and navy. Section 1 of the Act of March 2, 1919, is limited to settlements by the Secretary of War for matters occurring under his authority, or that of the President, in conducting the war. The general authority of the President in the conduct of the war would include the maintenance of the navy or any other public use connected with the common defense. Thus the Secretary of War may have been given authority by section 1 to adjust the requisitioning of supplies by an officer of the navy, or even by an officer of some other department, as, for instance, the Department of State, in connection with the prosecution of the war, for the purpose of the common defense. But all such claims are for property obtained under an 'agreement' which 'has not been executed in the manner prescribed by law.'

"A requisition, like a taking by eminent domain, is not a taking under agreement. Acquiescence on the part of a loyal citizen to the taking of his property by the sovereign is not the equivalent of the making of a contract, or the entering into of an agreement, in the legal sense of that term, for the obtaining of the property in question. A requisition is a one-sided exercise of authority, which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest be entered or not, the obligation to repay is the same."

1919 Supp., p. 305, sec. 2.

Section as repealing Act of August 10, 1917, chap. 53.—This section does not repeal the Act of August 10, 1917, chap. 53, sec. 10, [1918 Supp. Fed. Stat. Ann. 185], giving jurisdiction over claims for property requisitioned for war purposes to the District Courts or the Court of Claims. *Benedict v. U. S.*, (E. D. N. Y. 1920) 27 Fed. 714.

Decision of Secretary of War as condition precedent to bringing suit.—Section 1 of this act requires that all claims filed thereunder must be finally decided by the Secretary of War before suit can be brought thereon in the Court of Claims, and that such suit must be brought in the manner prescribed by this Act. The claim should not be transmitted to the court under Judicial Code, sec. 148 [5 Fed. Stat. Ann. (2d ed.) 662]. *U. S. Bedding Co. v. U. S.*, (1920) 55 Ct. Cl. 459.

PUBLIC DEBT

Vol. VIII, p. 407, sec. 3701. [First ed., vol. VI, p. 143.]

Exemption absolute.—"The effect of this statute, we think, must be that in any scheme of state or municipal taxation such securities must be eliminated from consideration in any equation to reach the taxable property, or, at least, when they are included, compels a deduction as such for the amount of the exempt bonds." *Waco v. Amicable L. Ins. Co.*, (Tex. 1921) 230 S. W. 698.

1918 Supp., p. 675, sec. 1.

Interim negotiable certificates.—"We hold this provision gave the Secretary of the Treasury power, as one of the terms and conditions subject to which he might issue said bonds, to first issue negotiable interim certificates therefor. They were appropriate and adapted to expedite the raising of the funds by the sale of the bonds for cash in advance, and the subsequent delivery of the bonds, when prepared. The bonds themselves were to be negotiable, and to give the subscribers of such bonds negotiable certificates therefor would, and without doubt did, greatly facilitate subscriptions for the bonds, in that the subscribers would receive, when they paid their money to the government, a negotiable obligation of the government, which would pass current and be as valuable as the bonds they subscribed and paid for, and which they could use in place of and with equal facility as the bonds, until they received such bonds." *Security Nat. Bank v. People's Bank*, (Mo. 1921) 230 S. W. 87, wherein it was further said:

"But it is said by learned counsel that, in order to make such certificates negotiable, the terms used therein should conform to the common law or to the statute law of the state where issued, which, in this state, required an instrument to be payable at a certain time, and in money, in order to be negotiable. Whereas, these certificates called for the delivery of other obligations of the government, to wit, Liberty Bonds, at an uncertain time, to wit, when said bonds were prepared and the certificates therefor surrendered.

"But we hold that it is not necessary to inquire of the statutes of this state or the

common law of England as to making such securities negotiable. * * *

"What the statutes of this state or the English common law provided or required is, therefore, not relevant or germane to the question whether by their terms said interim certificates were negotiable. The only pertinent inquiry is, Did the government of the United States, through the language used by its Secretary of the Treasury, intend to make them negotiable—pass current from hand to hand, from bearer to bearer, without indorsement—to be 'couriers without luggage,' as has been somewhere said by this court? In order to be interim certificates at all, it was necessary that they should be exchangeable for bonds at some time certain or uncertain. There was no law of the United States prohibiting the provisions for such exchange being contained therein, or in any manner prescribing or limiting the contents of such certificates or any negotiable securities to be issued by the United States. Being authorized by the act of Congress to make such certificates negotiable, in his discretion, if the Secretary of the Treasury used language intended to convey the idea that they were to be negotiable, that is the end of the inquiry and the end of the discussion.

"We hold that the Secretary did so intend, and that such certificates were made negotiable by their terms. Such certificates expressly provide that 'Upon surrender of this Interim Certificate the bearer hereof will be entitled to receive, when prepared, definitive bonds in the amount of — dollars, bearing interest from June 15, 1917. This certificate, and all rights under and by virtue hereof, shall pass by delivery.' Also, that 'there must be no writing on this certificate until it is presented for exchange for bonds.' So that, clearly, the certificates, with the title to the bonds called for, were intended to pass by delivery without indorsement, the same as a bond or note payable to bearer. It was, indeed, expressly provided that the 'bearer' of the certificate should on its surrender be entitled to receive the Liberty Bonds mentioned therein. Nothing could be clearer than that they were intended to be, and therefore they were negotiable instruments."

PUBLIC LANDS

Vol. VIII, p. 491, sec. 453. [First ed., vol. VI, p. 212.]

III. Conclusiveness of decision of land department.

IV. Supervisory authority of Secretary of Interior.

III. CONCLUSIVENESS OF DECISION OF LAND DEPARTMENT (p. 493)

In general.—To the same effect as the first paragraph of the original annotation, see *Muck v. Weyerhaeuser Timber Co.*, (C. C. A. 9th Cir. 1921) 273 Fed. 409.

Interpretation of survey notes.—A decision of the land department interpreting survey notes has been held conclusive in a suit to settle a disputed boundary. *Muck v. Weyerhaeuser Timber Co.*, (C. C. A. 9th Cir. 1921) 273 Fed. 409.

Judicial notice will be taken of a decision of the land department. *Santa Fe Pac. R. Co. v. Payne*, (App. Cas. D. C. 1920) 267 Fed. 653, 656.

IV. SUPERVISORY AUTHORITY OF SECRETARY OF INTERIOR (p. 494)

Conclusiveness of decision.—The findings of the Secretary of Interior in a matter properly before him, are binding on the courts unless there is an absence of evidence to support them. *Stockley v. U. S.*, (C. C. A. 5th Cir. 1921) 271 Fed. 632.

Review of finding by register.—Supervision of the action of the local register and receiver in accepting or rejecting final entries of homesteads is vested by this section in the Commissioner of the General Land Office and the Secretary of the Interior, and the fact that no appeal is taken from the action of such registers and receivers does not deprive them of jurisdiction to review the same. *Stockley v. U. S.*, (C. C. A. 5th Cir. 1921) 271 Fed. 632.

Vol. VIII, p. 497, sec. 458. [First ed., vol. VI, p. 216.]

Application to Indian lands.—The provisions of this section are applicable to patents in fee for allotted Indian lands. *U. S. v. Caster*, (C. C. A. 8th Cir. 1921) 271 Fed. 615.

Recordation—Effect.—When a patent is recorded as required by this section the title passes to the grantee and the fact that the evidence of the transfer of title, the patent, remains in the hands of the officers of the government cannot restore the titles to the government of the United States nor defeat that of the grantee. *U. S. v. Caster*, (C. C. A. 8th Cir., 1921) 271 Fed. 615.

Vol. VIII, p. 555, sec. 2290. [First ed., vol. VI, p. 290.]

Sufficiency of evidence as to making of contract with third person, see *Jones v. U. S.*, (C. C. A. 9th Cir. 1920) 265 Fed. 235.

Vol. VIII, p. 557, sec. 2291. [First ed., 1914 Supp., p. 386.]

VII. DECEASE OF ENTRYMAN (p. 568)

Succession of heirs to inchoate homestead right. To same effect as original annotation, see *Gunberg v. Juveland*, (N. D. 1920) 179 N. W. 375.

Liens created by entryman. A mortgage and seed lien agreement, which have been executed by a deceased entryman, who dies before making final proof, are not liens upon such real estate, and are not assumed by or enforceable against the heirs who receive patent for and take said land under the provisions of this section. *Gunberg v. Juveland*, (N. D. 1920) 179 N. W. 375.

Vol. VIII, p. 585, sec. 2302. [First ed., vol. VI, p. 321.]

Land known to be valuable for its minerals.—To the same effect as original annotation, see *Stockley v. U. S.*, (C. C. A. 5th Cir. 1921) 271 Fed. 632.

Vol. VIII, p. 586, sec. 2304. [First ed., vol. VI, p. 322.]

Mandamus.—It seems that if the Secretary of Interior acts arbitrarily in refusing to issue a patent under this section or section 2306, mandamus will lie to compel its issuance: but where he acts within the domain of his discretion his action is not subject to review. *U. S. v. Lane*, (App. Cas. D. C. 1919) 266 Fed. 1005; *Hoy v. Lane*, (App. Cas. D. C. 1919) 266 Fed. 1008.

Vol. VIII, p. 588, sec. 2306. [First ed., vol. VI, p. 324.]

"Soldier's additional right."—The right given by this section to a soldier who has entered on less than 160 acres to receive as much more land as may be necessary to make up the 160 acres is called a "soldier's additional right." *U. S. v. Lane*, (App. Cas. D. C. 1919) 266 Fed. 1005; *Hoy v. Lane*, (App. Cas. D. C. 1919) 266 Fed. 1008.

Vol. VIII, p. 591, sec. 2307. [First ed., vol. VI, p. 327.]

Right of disposal by will.—In declaring that no power exists to dispose of a soldier's homestead right by will it has been said:

"Section 2307 declares that, in case of the death of any person 'who would be entitled to a homestead' under section 2304, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, 'shall be entitled to all the benefits enumerated in this chapter.' This, of course, includes those given by section 2306 of the chapter. It does not say that the widow or the children shall be entitled to the right in the event the father had not willed it away, but their right to it is made to accrue upon his death. If it was the intention of Congress that the right could be disposed of by will, or, in the event of no will, should descend to the father's heirs, why the provision with respect to the widow and children? It seems to us that there is room for the construction that under these statutes the right is not subject to testamentary disposition, but, when not exercised or transferred by the soldier in his lifetime, passes to the widow or orphan children, as the case may be. And, if there is, we cannot say that the Secretary was guilty of an arbitrary act in holding that the right could not be willed." *U. S. v. Lane*, (App. Cas. D. C. 1919) 266 Fed. 1005; *Hoy v. Lane*, (App. Cas. D. C. 1919) 266 Fed. 1008.

Vol. VIII, p. 591, sec. 2309. [First ed., vol. VI, p. 328.]

Forfeiture of right acquired by agent's entry.—The privilege secured by an agent's entry is forfeited unless within six months thereafter the soldier makes entry and actually commences settlement and improvement. *Shanks v. Lane*, (App. Cas. D. C. 1920) 269 Fed. 206. The court said: "Stress is laid by the appellant on that part of section 2309 which says that the soldier may file the declaration 'as in pre-emption cases.' From this he argues that it has the same effect as in such cases. In support of his position he calls attention to the decision in *Whitney v. Taylor*, 158 U. S. 85, 95, 15 Sup. Ct. 796, 800 (39 L. Ed. 906), wherein it is said that the 'declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title.'

"This does not help him. There is little, if any, analogy between a declaratory statement under the pre-emption law and the one in the case before us. 'The pre-emptor must personally before "filing" have actually entered upon the land, must have commenced settlement and improvement.' *United States v. Morehead*, supra, 243 U. S. 615, 37 Sup. Ct. 461, 61 L. Ed. 926. Nothing of that nature is demanded here. May it not be said with reason that the provision relied on deals only with the manner of filing, not with its effect?

"Believing that the construction placed upon the sections by the Secretary is not un-

reasonable, and hence that he did not act arbitrarily, we are constrained, in the light of the aforementioned decisions, to affirm the judgment of the lower court, at the cost of the appellant."

Vol. VIII, p. 598, sec. 2. [First ed., vol. VI, p. 300.]

Thirty days after land restored to entry.—The long-continued, practical construction by the Land Department of the provision of this section, that "in all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands," as giving a successful contestant, when, at the date of the notice, the land, by reason of an existing withdrawal, is not open to entry, thirty days after the land is restored to entry within which to exercise his preferred right of entry, will not be disturbed by the courts. *McLaren v. Fleischer*, (1921) 256 U. S. —, 41 S. Ct. 577, 65 U. S. (L. ed.) —, affirming (1919) 181 Cal. 607, 185 Pac. 967. See further to the same effect, *Culpepper v. Ocheltree*, (1921) 256 U. S. —, 41 S. Ct. 579, 65 U. S. (L. ed.) —, affirming (1919) 181 Cal. 788, 185 Pac. 971.

Vol. VIII, p. 627, sec. 2357. [First ed., vol. VI, p. 333.]

Lands outside scope of proviso.—"Neither by direct declaration nor by any fair implication did Congress intimate an intention to fix the sale price of all reserved lands—odd numbered sections as well as even numbered ones; on the contrary, the proviso has to do only with alternate reserved lands, and the history of the several railroad land grants made prior to 1873, and particularly those grants in aid of the construction of Western roads, the line of each of which passed through extensive military and Indian reservations, would indicate that the term 'alternate' was used advisedly, and that the legislative purpose was to restrict the price fixing provision to the alternate sections reserved within given territory which was made subject to the operation of the respective grants. In other words, the double minimum value (\$2.50 per acre) was intended to apply only to those sections reserved by the government alternate to the sections granted in aid of a railroad construction." *Reagan v. Boyd*, (1921) 59 Mont. 453, 197 Pac. 832, holding the proviso to be inapplicable to certain lands ceded to the United States for an Indian Reservation and thereafter thrown open to settlement by an act specifically fixing the price.

Vol. VIII, p. 657, sec. 1. [First ed., 1912 Supp., p. 321.]

Lien lands selected by a state by virtue of Act of Feb. 28, 1891, amending §§ 2275, 2276 (see 8 Fed. Stat. Ann. (2d ed.) 765), are not affected by this act. *Wyoming v. U. S.*, (1921) 255 U. S. 489, 41 S. Ct. 393, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1920) 282 Fed. 675.

Withdrawals by President.—The power of the President to withdraw lands from entry, settlement, or other forms of appropriation, without special authority conferred by this section, is well settled. *Stockley v. U. S.*, (C. C. A. 5th Cir. 1921) 271 Fed. 632.

The action of the Secretary of the Interior is a proper method of exercising the power of the President in withdrawing public lands, and is to be taken as his act. *Stockley v. U. S.*, (C. C. A. 5th Cir. 1921) 271 Fed. 632.

Vol. VIII, p. 657, sec. 2. [First ed., 1914 Supp., p. 340.]

Purpose and construction generally.—This act is remedial and should be construed to effectuate its purpose. *U. S. v. Standard Oil Co.*, (S. D. Cal. 1920) 285 Fed. 751.

Diligent prosecution of work.—A claim that the defendants were at the time land was withdrawn making preparations by assembling material and employing labor for the future development of the property, has been held not to show "diligent prosecution of work" within the meaning of this act, where it did not appear that any work or preparation therefor was designed or intended for the development of the particular property in question as distinguished from the defendant's other holdings. *U. S. v. Chanslor-Canfield Midway Oil Co.*, (S. D. Cal. 1918) 266 Fed. 142. See also *U. S. v. Standard Oil Co.*, (S. D. Cal. 1920) 285 Fed. 751, for work held sufficient to meet requirements of statute.

Work done upon precise land.—The fact that no work was being done on the precise land in controversy at the time of its withdrawal is immaterial, where it appears that it was part of a group or unit owned by the same claimant and that work was being done on several contiguous claims which was beneficial to the whole group. *U. S. v. Standard Oil Co.*, (S. D. Cal. 1920) 285 Fed. 751, wherein it was said: "No work was being done on the identical quarter section in controversy at the time of the withdrawal, or for some two or three months thereafter, except the moving of the derrick in October, 1909; but I do not regard that as a controlling fact in the case. The evidence to my mind shows that the work being done at the time of the withdrawal and continued thereafter was intended to and did directly benefit all the claims, and that the several contiguous claims were owned and being developed by the Oil Company in good faith as a group or unit, in a practical, business-

like, and economical way, and 'it has long been the established law respecting such claims,' says the Court of Appeals in *Consolidated Oil Co. v. U. S.*, 245 Fed. 623, 157 C. C. A. 635, that, where two or more contiguous ones are held by the same person or persons, work done in good faith upon any one of them, or outside of the boundaries of either of them, which directly tends to the development or benefit of all of the claims for mining purposes, should be held applicable to each and all of such claims.' See, also, *U. S. v. Thirty-Two Oil Co.*, supra; *U. S. v. Honolulu Cons. Oil Co.*, (D. C.) 249 Fed. 168.

"A clear and it seems to me an accurate statement of the law applicable to the facts in this case is to be found in the opinion of the Commissioner of the General Land Office, of date February 11, 1919, in the Honolulu Case, as follows:

"'Work leading to the discovery of oil or gas may consist of labor and improvements actually performed and used in the common development of several mining claims, provided it is clearly shown that there exists a common ownership, that the work is of such a character as to be clearly adapted to and intended for a unit development, that the inclusion of each particular claim composing such unit is clearly apparent from the physical facts on the ground, and that the nature of the common development is consistent and its extent commensurate with the character and area of the group of claims proposed to be developed as a unit. If labor and expenditures have been applied in the manner accepted generally and in accordance with good business practice, all conditions considered, one act following another in logical and orderly sequence, as dictated by experience and reasonable judgment, with the object of reaching and discovering the oil or gas measures lying within the claim or group of claims, then due diligence has been shown, and the requirements of the act met in this respect, provided that at the date of withdrawal and continuously thereafter to discovery on each particular claim either (a) such common development and improvement leading to discovery as may be properly and directly credited in part to each particular claim, pursuant to the principles above stated, or (b) development and improvement work leading to discovery on the particular claim itself, are continued diligently and without interruption, on a scale commensurate with the extent of the unit development and in accordance with good economic practice, the required continuity of such common or particular development and improvement to be determined from the work and improvements actually done and made on the ground.'

"Applying these principles to the case in hand, I am of the opinion that the defendants have brought themselves within the saving clause of the Pickett Act."

Effect of withdrawal on subsequent claims.—An order withdrawing public lands, sub-

ject to existing valid claims, "from settlement and entry or other form of appropriation" prevents a subsequent mineral location from conferring any right on any one claiming under it. *Mason v. U. S.*, (C. C. A. 5th Cir. 1921) 273 Fed. 135; *Norvell v. U. S.*, (C. C. A. 5th Cir. 1921) 273 Fed. 142.

Liability of trespassers after withdrawal.—It has been held that one who takes oil from public land with knowledge that it has been withdrawn "from settlement and entry or other form of appropriation" is liable for the oil so taken and is entitled to no deduction for the expense incurred in getting the oil. *Mason v. U. S.*, (C. C. A. 5th Cir. 1921) 273 Fed. 135; *Norvell v. U. S.*, (C. C. A. 5th Cir. 1921) 273 Fed. 142.

Vol. VIII, p. 663, sec. 2395. [First ed., vol. VI, p. 363.]

I. Surveys in general.

II. Field books and plats.

I. SURVEYS IN GENERAL (p. 664)

Meander lines—As boundary lines.—The cases support the rule "that in general meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river the purchaser takes title up to the water line. But they no less certainly establish the principle that facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights." *Producers' Oil Co. v. Hanzan*, (1915) 239 U. S. 325, 35 S. Ct. 755, 59 U. S. (L. ed.) 1330; *Lane v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 290; *Greene v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 145, wherein it was said: "That the government has the right to make new surveys and correct errors in former one does not in any way limit the above general rule or create a different rule where such new survey is made."

"The right of the government to make such new surveys is clear; but, where the United States has previously parted with the title, a new survey does not conclude a prior purchaser from asserting whatever title he has acquired by his older patent as against one claiming under the new survey."

But meander lines and not water courses are held to be boundaries where there is no body of water within a reasonable distance therefrom or where there is no body of water at all or where there is gross fraud. *Lane v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 290.

Effect of incorrect survey.—Although the meander lines should show the sinuosities of the banks of the water course a survey is not invalidated by the failure to include within

the meander lines small irregular areas of lands. *Lane v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 290.

II. FIELD BOOKS AND PLATS (p. 668)

Plat as part of patent.—To the same effect as the original annotation, see *Greene v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 145.

Vol. VIII, p. 669, sec. 2396. [First ed., vol. VI, p. 367.]

Provision exclusive.—There is no other provision of law for the running of meander lines along a water course. *Lane v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 290.

Ascertaining unmarked boundaries.—"The law requires that boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners." *Hickey v. Daniel*, (1921) 99 Ore. 525, 195 Pac. 812.

Effect of mistake or fraud.—The rule that where a patent granting public land refers to a plat for identification of the land granted, and the plat so referred to shows that such land is bounded by a lake or other body of water, the surveyed line along what the plat indicates is the border of such water, is treated as a meander line, with the result that the water, and not such meander line, is the boundary of the land granted, is not controlling in case of mistake or fraud. *Jeems Bayou Hunting, etc., Club v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 18, wherein it was said: "It is well settled that where public land was improperly omitted from a survey in consequence of the surveyor, influenced by such a mistake or fraud, treating as under water what at the time of his survey actually was high land within the limits of the area which was the subject of his survey, the Land Department, upon discovering the error, has power to deal with the land so improperly omitted, to cause it to be surveyed, and lawfully to dispose of it. *Lee Wilson & Co. v. United States*, 245 U. S. 24, 38 Sup. Ct. 21, 62 L. Ed. 128. The existence and exercise of such power are not inconsistent with the rights of one who acquired a subdivision of land included in such survey under a patent containing a reference to the surveyor's plat, which falsely indicated that the land patented, along the whole or part of the line surveyed around it, bordered on a body of water, when in fact that line was remote from any body of water."

Vol. VIII, p. 671, sec. 2397. [First ed., vol. VI, p. 369.]

Equalizing area of lots.—The north half of section 4, township 16 north, range 15, Wagoner county, was subdivided by the official government geological survey in lots 1, 2, 3, and 4, but the lines between said lots were not established, and the owners of

lot 2 petitioned the county surveyor of Wagoner county to establish the dividing line between lots 1 and 2, and the county surveyor in making his survey was unable to find or locate the northeast or northwest corner of said section, and reported them as lost or obliterated corners, and proceeded to establish said corners, and in establishing the same the width of the section, as determined by him, was 5,326.4 feet, and, in establishing the lines between the different lots, established the lines making lot 1, 1,326.5 feet wide, lot 2, 1,326.8 feet wide, lot 3, 1,326.8 feet wide, and lot 4, 1,346.3 feet wide, doing so by using certain meandering corners established on said section along the Arkansas river. This method was held to be erroneous since by virtue of section 1711, Rev. Laws 1910, and R. S. §§ 2396, 2397, and the rules and regulations of the General Land Office in regard to re-establishing of subdivision lines, the county surveyor in locating the dividing lines between said lots should have divided the total width of the section by four and made each lot the same width, or a distance of 1,331.6 feet wide, and the dividing line between lots 1 and 2 should be established 1,331.6 feet west from the east line of said section. *Overton v. Leonard*, (1920) 79 Okla. 219, 192 Pac. 221.

Vol. VIII, p. 678. [*Resurveys or retracements, etc.*] [First ed., 1912 Supp., p. 322.]

Effect of first proviso.—"A map from the government records was given in evidence, showing that the land in controversy is part of section 5 of said township and range. Appellants contend that this map was not competent evidence, because, as they claim, it was a resurvey made under the act of March 3, 1909 (35 U. S. Stats. 845), which act provides that no resurvey made thereunder 'shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands' affected thereby. The map itself shows that the survey which it delineates was made in February and March in the year 1912. A letter of instructions from the commissioner of the land office to the United States surveyor general in California regarding this alleged resurvey of which letter we may take judicial notice (*S. P. Co. v. Lipman*, 148 Cal. 491, 83 Pac. 445; *S. P. R. R. Co. v. Wood*, 124 Cal. 485, 57 Pac. 388), under date of August 14, 1912, shows that the map was made for the purpose of ascertaining and designating the tracts of land in certain townships, including the one in controversy, which under the grant aforesaid had been selected and listed for patent to the Southern Pacific Railroad Company under said grant. Furthermore, the only interest which the defendants claim in defense was under a desert land entry made by Alvin R. Meserve in 1907, and the evidence shows that on appeal by Meserve

to the secretary of the interior this entry was canceled on February 28, 1912, prior to the completion of said resurvey and prior to the issuance of the patent to the Southern Pacific Railroad Company. It would seem, therefore, that whatever may be the state of the title of the plaintiff, the defendants had no title whatever except such as comes from the bare possession at the time said resurvey was made, and hence the same could not impair their rights." *Southern Pac. Land Co. v. Meserve*, (Cal. 1921) 198 Pac. 1055.

Vol. VIII, p. 692, sec. 1. [First ed., vol. VI, p. 392.]

"The relation of the federal government to the state government in the reclamation of desert lands arises out of the fact that the federal government owns the lands, and Congress is invested by the Constitution with the power of disposing of the same, while the state has been given jurisdiction to provide for the appropriation and beneficial use of the waters of the state which necessarily includes a use for the reclamation of such lands." *Twin Falls Salmon River Land, etc., Co. v. Caldwell*, (C. C. A. 9th Cir. 1921) 272 Fed. 356.

Vol. VIII, p. 698, sec. 4. [First ed., vol. VI, p. 397.]

"The relation of the federal government to the state government in the reclamation of desert lands arises out of the fact that the federal government owns the land, and Congress is invested by the Constitution with the power of disposing of the same, while the state has been given jurisdiction to provide for the appropriation and beneficial use of the waters of the state which necessarily includes a use for the reclamation of such lands." *Twin Falls Salmon River Land, etc., Co. v. Caldwell*, (C. C. A. 9th Cir. 1921) 272 Fed. 356.

Maintenance charges.—The irrigation maintenance charges embodied in the contract whereby a state sells to a settler lands granted under this act, are a part of the purchase price and cannot be increased by the public service commission so as to affect existing contracts. *Central Oregon Irr. Co. v. Public Service Commission*, (Ore. 1921) 196 Pac. 832.

Discrimination in favor of corporation operating under act.—A statute permitting the amendment of by-laws by a smaller proportion of the stockholders to corporations organized for the operation of irrigation systems under the Carey Act than is permitted in the case of corporations engaged in similar enterprises but which have procured their canal systems from sources other than Carey Act Construction Companies, is invalid. *Crom v. Frahm*, (1920) 33 Idaho 314, 193 Pac. 1013.

Lien reduced in proportion to water supplied.—Where an irrigation company fails

to furnish the amount of water contracted for it cannot foreclose its lien for the full amount contracted, but the lien will be reduced to conform to the actual amount of water furnished, and accepted and used by the settler. *Twin Falls Oakley Land, etc., Co. v. Martens*, (C. C. A. 9th Cir. 1921) 271 Fed. 428.

Vol. VIII, p. 699. [*Plan of irrigation to be filed, etc.*] [First ed., vol. VI, p. 397.]

Irrigation company empowered to contract with respect to water.—A state in accepting the provisions of this act is empowered to make all necessary contracts to cause the lands to be reclaimed, and to "induce their settlement and cultivation in accordance with and subject to the provisions of the act. Accordingly, it has been held that a construction company building an irrigation project under the act could be and was empowered by the state act together with the federal act to make and execute a contract assuming responsibility to the settler to furnish a specific quantity of water and for deferred payments. *Twin Falls Oakley Land, etc., Co. v. Martens*, (C. C. A. 9th Cir. 1921) 271 Fed. 428.

Error in estimate of quantity of water.—Effect on contracts.—The fact that a state engineer in passing on an irrigation project initiated by a proposer erred in his judgment as to the amount of water available, will not relieve a construction company, contracting with settlers to furnish a specified amount of water, from its responsibilities under the contracts. *Twin Falls Oakley Land, etc., Co. v. Martens*, (C. C. A. 9th Cir. 1921) 271 Fed. 428.

Vol. VIII, p. 699. [*Patents for re-claimed lands, etc.*] [First ed., vol. VI, p. 397.]

State statutes.—For construction of state statute accepting the benefits of this statute, see *Twin Falls Oakley Land, etc., Co. v. Martens*, (C. C. A. 9th Cir. 1921) 271 Fed. 428.

Conclusiveness of finding of Land Department.—While in a proceeding to ascertain whether patents should issue, the finding of the Land Department on the question whether the water supply is ample is conclusive, it is not conclusive on the question whether an irrigation company has provided water at the rate required by its contract with a settler. And in a suit by the irrigation company to purchase a lien for water rights wherein it appeared that because of contracts to furnish water to other settlers on unpatented land the company was unable to furnish the required amount to the settlers on the patented land, equity will not be bound by the decision of the Land Department, and may

make a decree based on the total acreage for which obligations to furnish water exist, both patented and unpatented. *Twin Falls Oakley Land, etc., Co. v. Martens*, (C. C. A. 9th Cir. 1921) 271 Fed. 428.

Vol. VIII, p. 700, sec. 1. [First ed., vol. VI, p. 398.]

Determination of question of reclamation.—The question of whether or not a particular tract of land has been reclaimed, is one fact which must be determined by the General Land Office rather than by the courts. *Twin Falls Salmon River Land, etc., Co. v. Davis*, (C. C. A. 9th Cir. 1920) 267 Fed. 382.

Right and extent of lien.—The lien of a construction company which contracted with the state to build irrigation works can only extend to the acreage for which it furnishes an adequate quantity of water. *Commonwealth Trust Co. v. Smith*, (C. C. A. 9th Cir. 1921) 273 Fed. 1; *Twin Falls, etc., Co. v. Davis*, (C. C. A. 9th Cir. 1920) 267 Fed. 382.

Contract holders necessary parties.—In *Commonwealth Trust Co. v. Smith*, (C. C. A. 9th Cir. 1921) 273 Fed. 1, a suit to foreclose a lien was brought by a construction company which had contracted with the state to build irrigation works and to sell shares or water rights as provided to the person or persons filing upon the lands, and also to the owners of other lands not described which were susceptible of irrigation from the system, the shares or water rights to be sold on terms provided, and the management and control of the canal system to be transferred to the purchasers of such shares or water rights. It was held that all contract holders were necessary parties to the suit. The court said:

"It is obvious that many persons—that is, contract holders—are and will necessarily be affected by the inadequacy of the water supply considered in relation to the amount that it was at first supposed could be made available. They are affected in several ways. Some will and can get no water at all, as their holdings are entirely outside of the reduced delimitations. Others, and a major portion of them, perhaps all, will be required to take and accept fewer acre feet per acre of water than they have contracted for, and some are bound to be affected in ways not now apparent by the readjustment of the water supply to the delimited area. Then there is the contention of the plaintiff that all the water users who will finally be entitled to water must be required to pay, not \$40 per share for each share or interest in the system, but \$60 and a greater sum according as the acreage subject to irrigation from the system is reduced by delimitations made, or that will of necessity be required to be made, to meet the inadequacy of the supply of water available for irrigation purposes.

It is the very theory and purpose of the bill of complaint, as becomes apparent from a reading of it, to enforce the alleged lien for the larger amount, so as to require the diminished area to bear the burden of the entire cost of construction. It is obvious, therefore, that in a comprehensive, equitable, and fair readjustment of the matters pertaining to the unfortunate situation, all the contract holders will be affected in a greater or less degree, and that the rights of each shareholder are more or less dependent upon the rights of every other shareholder. This manifestly and necessarily will affect in greater or less degree the extent and dignity of the rights and holdings of a very great number, if not all, of the contract holders of shares under the project. So it would appear that a final decree cannot be made or entered in the case at bar without affecting materially perhaps all the contract holders in the project, or at least without leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. The suit, considered in respect to the correlative rights involved, is not one for foreclosure merely, but by nature resembles more nearly one for specific performance, the termination of which will perforce of its very consequences affect in some measure all the contract holders by reason of the inability of the construction company fully to perform on its part."

Vol. VIII, p. 702, sec. 1. [First ed., 1909 Supp., p. 550.]

Residence on land as essential.—The Desert Land Acts do not require residence on the land. The principal requirements are that the claimant shall file a plat showing the mode of contemplated irrigation and shall expend a prescribed amount per acre in making permanent provision for such irrigation, and in addition thereto shall cultivate one-eighth of the land. *Cox v. Hart*, (C. C. A. 9th Cir. 1921) 270 Fed. 51.

Acts giving preference right.—A person's acts in posting notice, running furrows around the entire tract, cultivating tracts both upon the east half and the west half of her claim, constructing ditches, instituting irrigation, setting stakes, and in laying out lines for future irrigation, have been held sufficient to prove *possessio pedis* upon the whole tract whereupon to maintain ejectment, and it is unnecessary that she should have placed improvements upon every acre of the tract. *Cox v. Hart*, (C. C. A. 9th Cir. 1921) 270 Fed. 51.

Vol. VIII, p. 708, sec. 2479. [First ed., vol. VI, p. 399.]

III. LANDS SUBJECT TO GRANT (p. 712)

Attempt by state to grant lands not within act gives no right to the grantee of the state.

Maginnis v. Hurlbutt, (Cal. App. 1920) 193 Pac. 606, wherein the question whether lands are "swamp and overflowed" is apparently considered to be a question of fact.

Land abutting on river.—If a plat shows a river which actually exists and the federal government conveys to a state under this Act land purporting to abut on the meander lines of the river, the state's title must be held to include the land abutting on the river even though the river does not extend to the meander lines shown on the plat. *Tuesburg Land Co. v. State*, (Ind. App. 1921) 131 N. E. 530.

Vol. VIII, p. 716, sec. 2480. [First ed., vol. VI, p. 404.]

Decision by Secretary of Interior as to character of land.—To same effect as original annotation, see *De Proft v. Heydecker*, (1921) 297 Ill. 541, 131 N. E. 114.

Burden of proving that land is swamp.—To same effect as original annotation, see *De Proft v. Heydecker*, (1921) 397 Ill. 541, 131 N. E. 114.

Vol. VIII, p. 759, sec. 1. [First ed., vol. VI, p. 449.]

Severed portions of patented land.—It is evident from the act itself that the 5-year period for the bringing of actions to cancel patents was not intended to protect grantees of small portions of the lands patented, where the patent was attacked in time and decreed invalid. If such grantees are bona fide purchasers, they were protected by elaborate provisions of the act by which they could secure title from the government. *Huntington v. Donovan*, (Cal. 1920) 192 Pac. 543.

Vol. VIII, p. 761, sec. 2. [First ed., vol. VI, p. 450.]

Bona fide purchasers.—The burden is on a person claiming to be a bona fide purchaser to show his good faith. *Huntington v. Donovan*, (Cal. 1920) 192 Pac. 543, holding the purchaser in question was not protected for two reasons: "First, at the time of his purchase the United States land office records showed a valid desert land entry thereon; second, at that time the patent under which he claims had been declared null and void, and the decree was of record in the office of the clerk of the United States district court of Los Angeles."

Vol. VIII, p. 765, sec. 2275. [First ed., vol. VI, p. 462.]

When title vests.—A state, having accepted the proposal of Congress that, if any designated sections of public land passing under the school-land grant to the state, should be included within a public reservation, it

might waive its right to them, and select instead other vacant, unappropriated, non-mineral public land of equal acreage, under the direction of the Secretary of the Interior, and having complied with the terms of proposal, became invested with the equitable title to the selected land, and the Secretary of the Interior and the Commissioner of the General Land Office could not disapprove and reject such selection on the ground that the selected land was, two years later, included in a temporary executive withdrawal as possible oil land, under the Act of June 25, 1910, (see 8 Fed. Stat. Ann. (2d ed.) 657) and still later was discovered to be mineral land, that is, to be valuable for oil. The validity of the selection must be determined according to the conditions as of the time when the waiver and selection were made. *Wyoming v. U. S.*, (1921) 255 U. S. 489, 41 S. Ct. 393, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1920) 262 Fed. 675.

Vested right in lieu lands.—A state having accepted the proposal by Congress that, if any designated sections of public land passing under the school-land grant to the state should be included within a public reservation, the state might waive its right to them and select instead other land of equal acreage, under the direction and subject to the approval of the Secretary of the Interior, and having complied with the terms of such proposal, acquired a vested right in the selected lieu land which the officers of the Land Department could not lawfully cancel or disregard merely because the base tract—the one to which the right was waived—had, subsequent to such selection, been eliminated from the reservation by a change in its boundaries. *Payne v. New Mexico*, (1921) 255 U. S. 347, 41 S. Ct. 333, 65 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 80, 258 Fed. 980.

Vol. VIII, p. 779, sec. 1. [First ed., vol. VI, p. 374.]

Filing application as a withdrawal from selection as lieu lands.—The mere filing by the state of Idaho, under this Act of an application for a survey, did not so far withdraw the lands from the public domain as to make ineffective a selection by a railway company under the Act of March 2, 1890, [8 Fed. Stat. Ann. (2d ed.) 985] in lieu of lands relinquished to the United States,—especially where, if valid for any purpose, the application merely gave an option to select which was never exerted. *Edward Rutledge Timber Co. v. Farrell*, (1921) 255 U. S. 268, 41 S. Ct. 328, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1919) 258 Fed. 161, 169 C. C. A. 229 which *reversed* (D. C. Idaho 1918) 271 Fed. 766.

Mandamus to review decision of Secretary of Interior as to selections by individuals.—The decision of the Secretary of the Interior that, under this Act, directing the reservation of certain public lands from adverse

appropriation by settlement or otherwise during a specified period within which a state had the exclusive right to select the lands, selections filed by individuals during that period should not be rejected, but should be held suspended until final adjudication of the rights of the state, is not so clearly erroneous as to be reviewable by writ of mandamus. *U. S. v. Payne*, (1920) 254 U. S. 343, 41 S. Ct. 131, 65 U. S. (L. ed.) —, *affirming* (1919) 48 App. Cas. (D. C.) 279.

Vol. VIII, p. 785, sec. 2477. [First ed., vol. VI, p. 498.]

Highways to which section applies.—"Section 2477 of the Revised Statutes of the United States goes no further than to grant a right of way for the 'construction' of a highway across public lands; it does not extend to the entire tract of land and cannot constitute a 'dedication by the owner of the land,' as contemplated by that portion of section 1340, Revised Codes, relied on by counsel. * * * It is inconceivable that it was the intention of Congress and of the Legislature to say that two or more persons crossing at random on each of a dozen trails across an open quarter section of land could constitute an acceptance of the government grant as to each of such trails, and the entire quarter section thus become but a series of irregular and divergent rights of way. The grant is but an offer of the right of way for the construction of a public highway on some particular strip of public land, and can only become fixed when a highway is definitely established and constructed in some one of the ways authorized by the laws of the state in which the land is situated." *State v. Nolan*, (1920) 58 Mont. 167, 191 Pac. 150.

Highways established on section lines.—Under U. S. Rev. St. § 2477, granting the right of way for highways over public lands not reserved for public use, and the act of the Legislative Assembly of Dakota Territory (chapter 33, Laws 1871), declaring all section lines in the territory of Dakota to be public highways as far as practicable, public highways were located and established upon all section lines within the territory where it was practicable to construct highways. *Huffman v. West Bay Tp.*, (N. D. 1921) 182 N. W. 459.

Acceptance by user.—"The government, by the enactment of section 2477 of the Revised Statutes, offered to the public the right of way for such highways across the public lands as may be found to be necessary; but this offer can only be accepted by the 'construction' of a public highway in some one of the ways in which they can be legally established, and becomes effective as a right of way only when the road is thus finally constructed. If, therefore, the offer is accepted by user under the laws of this state, that user must be shown to have continued over the exact route claimed, for the statu-

tory period." *State v. Nolan*, (1920) 58 Mont. 167, 191 Pac. 150.

Vol. VIII, p. 798, sec. 4. [First ed., vol. VI, p. 506.]

Appropriation subject to prior rights.—The rights of a railroad company under the Act do not attach until it has complied with the provisions of this section and the departmental regulations made to carry it into effect, and if at the time of filing the plat required by such a regulation a homestead entry has been made, and the railroad location is approved "subject to all valid existing rights", the homestead entry prevails. *Great Northern R. Co. v. Steinke*, (N. D. 1921) 183 N. W. 1013.

Vol. VIII, p. 805, sec. 19. [First ed., vol. VI, p. 509.]

A suit to set aside the approval of the Secretary or the Interior on the ground of fraud and mistake may be maintained. And even if the approval of the Secretary was given with full knowledge of all the facts such a suit may be maintained as in that event he exceeded his authority and the validity of his approval may be thus challenged. *U. S. v. Kern River Co.*, (C. C. A. 9th Cir. 1920) 264 Fed. 412.

Vol. VIII, p. 810, sec. 2. [First ed., vol. VI, p. 512.]

"Development of power."—A right of way for a canal for the development of power can only be obtained under this provision when such development is subsidiary to the main purpose of irrigation. *U. S. v. Kern River Co.*, (C. C. A. 9th Cir. 1920) 264 Fed. 412.

Vol. VIII, p. 816, sec. 1. [*Inclosure, etc.*] [First ed., vol. VI, p. 533.]

Drilling of oil wells.—Where the evidence adduced is consistent with the conclusions that the drilling of wells on the land in question and the taking oil therefrom were unaccompanied by any intention on the part of the defendants, or either of them, to violate any law or to do any wrongful act, and that the defendants acted under a mistake of fact as to the location of the boundary of the land described in the lease, and without knowledge of the facts which require the conclusion that title to the land in question has not passed out of the United States, it has been declared that the measure of liability for the oil taken from the land in question is the value of that oil, less the cost of producing it. *Jeems Bayou Hunting, etc., Club v. U. S.*, (C. C. A. 5th Cir. 1921) 274 Fed. 18.

Vol. VIII, p. 822, sec. 3. [First ed., vol. VI, p. 536.]

Constitutionality.—Regarding the constitutionality of this section, it has been said: "The constitutionality of that portion of section 3 of the act under which the indictment was found is questioned upon the ground that it not only covers cases which it is within the power of Congress to act upon, but also cases in which Congress has not the power to act upon. But the question presented by the record pertains to the power of Congress to pass the statute which prohibits the doing of the things charged against plaintiff in error. To that there can be but one answer. That Congress can exercise control over the public lands is thoroughly well established. Section 3, art. 4, Constitution. And surely Congress may exercise power necessary for the protection of the public lands, including as an incident the prosecution and punishment of persons who obstruct passage or transit over the public lands." *McKelvey v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 410.

Obstruction by use of firearms.—"If one not himself in good faith claiming a right under the land laws, or not in lawful authority, by the use of firearms intimidates a person and orders him not to cross over the unoccupied public lands, he obstructs free passage over such lands, and so violates the provisions of section 3 of the law, and is liable to any punishment, if any has been provided by the penalty provision, which is section 4." *McKelvey v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 410.

Sufficiency of indictment.—It is not necessary to the sufficiency of an indictment under this section that it should negative the proviso therein. *McKelvey v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 410.

Evidence.—On a prosecution for obstructing passage over public lands in violation of this section it was held that testimony of the register of the United States Land Office concerning certain official plats of townships in which the public lands in question were situated, was competent as tending to prove whether the particular lands described in the indictment were public lands of the United States or had been entered and were private, and that the fact that a part of two townships shown upon the plats was owned privately did not affect the competency of the testimony with respect to the lands described in the indictment and related to the case on trial. *McKelvey v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 410.

Vol. VIII, p. 824, sec. 4. [First ed., 1909 Supp., p. 547.]

"Any person."—This section "should not be construed too narrowly or in a way to nullify the words which make the section applicable to any person who violates the

provisions of the act or who aids and abets in any violation thereof. In providing that any person who violates any provision of the act, whether as owner, part owner or agent, is to be deemed guilty, the legislative body did not intend to restrain the applicability of the generality of the words 'any person' to such only as are specifically enumerated, as would have been the case if the clause contained the *videlicet* which is used to limit or qualify the generality of the preceding term. *Voegthy v. School Directors*, 1 Pa. 330. As the evident intent of the whole act was to protect the public lands, in order that persons might lawfully occupy or pass over them, it is not to be supposed that one who has no pretended claim of right or ownership or agency can by threats and intimidation prevent one from driving stock across the public lands, and yet escape liability upon the ground that he is excluded as not within the enumerated classes, although he comes within the general category of any persons violating the act." *McKelvey v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 410.

Vol. VIII, p. 867, sec. 7. [First ed., vol. VI, p. 525.]

Receipt "in final entry."—The mere receipt of the money by the receiver until the papers are accepted as a final entry by the register and receiver and the register's certificate issued, is not a receipt "on final entry" within the meaning of this section. *Stockley v. U. S.*, (C. C. A. 5th Cir. 1921) 271 Fed. 632.

Bona fide purchasers.—The burden is on a person claiming to be a bona fide purchaser to show his good faith. *Huntington v. Donovan*, (Cal. 1920) 192 Pac. 543, holding the purchaser in question was not protected for two reasons: "First, at the time of his purchase the United States land office records showed a valid desert land entry thereon; second, at that time the patent under which he claims had been declared null and void, and the decree was of record in the office of the clerk of the United States district court of Los Angeles."

Mandamus to compel issuance of patent.—**Effect of pendency of suit to cancel.**—The pendency, when mandamus is sought, of a suit in equity brought by the United States to cancel for fraud the receiver's receipt issued on a final homestead entry, does not afford a sufficient justification to the Secretary of the Interior and the Commissioner of the General Land Office which will preclude the enforcement of their plain ministerial duty under this section to pass the entry to patent. *Payne v. U. S.*, (1921) 255 U. S. 438, 41 S. Ct. 368, 65 U. S. (L. ed.) —, *affirming* (1919) 48 App. Cas. (D. C.) 547.

Fraud in procurement of entry.—Fraud in the procurement of the allowance of a final homestead entry and of the issuance of the receiver's receipt does not relieve the

Secretary of the Interior and the Commissioner of the General Land Office of their plain duty under this section, enforceable by mandamus, to pass the entry to patent. *Payne v. U. S.*, (1921) 255 U. S. 438, 41 S. Ct. 368, 65 U. S. (L. ed.) —, *affirming* (1919) 48 App. Cas. (D. C.) 547.

Vol. VIII, p. 869, sec. 8. [First ed., vol. VI, p. 526.]

Severed portions of patented land.—It is evident from the act itself that this 5-year period for the bringing of actions to cancel patents was not intended to protect grantees of small portions of the lands patented, where the patent was attacked in time and decreed invalid. If such grantees were bona fide purchasers, they were protected by elaborate provisions of the act by which they could secure title from the government. *Huntington v. Donovan*, (Cal. 1920) 192 Pac. 543.

Effect of laches in discovering fraud.—Laches in discovering the fraud will prevent the application of the rule that, until the discovery of the fraud, the six years' limitation prescribed by this section does not begin to run. But the allegations in a bill brought by the United States, long after the event, to cancel patents for coal lands and conveyances by the entrymen because of fraud in the entry and the purchase of the same by persons acting ostensibly for themselves, but really as the representatives of a corporation, and for its sole account and benefit, should not be held, on motion to dismiss, to show such laches on the part of the government in discovering the fraud as to prevent the application of such rule, even conceding that the conveyances from the entrymen to the corporation, as alleged, following almost immediately the initiation of the right to purchase, and preceding the patents, the uniformity of the method employed, and the surrounding circumstances, and the facts alleged as to the possession of the land by the corporation at the time of the purchase by the entrymen, and subsequent to their conveyances, the propinquity to the field of operations of the corporation, and its exploitation by the corporation for the purpose of taking coal therefrom, in and of themselves, would, if known, have constituted badges or indications of fraud of such a character as to give notice to the United States, or at least to put it on inquiry, where the averments of concealment and other allegations in the bill are susceptible of the construction that the conveyances—though not alleged not to have been seasonably recorded—were secret, and that the possession of the corporation was clandestine, and that its operations as to the property were of the same character, because not conducted in its own name, but by persons interposed with the very object of concealment. *U. S. v. Diamond Coal, etc., Co.*, (1921) 255 U. S. 323, 41 S. Ct. 335, 65 U. S.

(L. ed.) —, *reversing* (C. C. A. 8th Cir. 1918) 254 Fed. 266, 165 C. C. A. 554.

Action to set aside approval to right of way for canal purposes.—An action to set aside the approval of the Secretary of the Interior to a right of way for canal purposes on the ground of fraud and mistake is not subject to the limitation in this section. The term "patent," when applied to a grant of public lands, has a well-defined meaning. "It is a well-established rule that statutes of limitations do not run against the sovereign, in the absence of some express statutory provision to the contrary, and if the statute is made applicable to a class of suits only it will not be extended to other cases by implication. It was well known to Congress that grants of public lands are not always made by patent. Indeed, the grant of the right of way in question made by the same act is of that character. And had Congress intended that the bar of the statute should apply, not only to patents, but to all legislative grants, it would have so provided in express terms. Again, if this be treated merely as a suit to restrain the unauthorized use or occupation of the forest reserve, the statute can have no application." *U. S. v. Kern River Co.*, (C. C. A. 9th Cir. 1920) 264 Fed. 412.

A bill by United States for reformation of a patent was held to state sufficient grounds in *U. S. v. Hudson*, (C. C. A. 9th Cir. 1920) 269 Fed. 379.

1918 Supp., p. 712. [*False representations, etc.*]

Nature of false representations.—The statute does not make it criminal for one to misrepresent the quality of the water and the soil, and an instruction which authorizes the jury to consider a representation of such a character in weighing the evidence of the seller and the defendant and further specially instructs them that there can be no conviction for such misrepresentations, is proper. *Anderson v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 677.

Evidence.—On a prosecution for violation of this section the government may introduce witnesses to describe the topography and general position of the lands pointed out to the settler. Such evidence directly relates to the question whether the land pointed out was or was not the land which the settler entered after the defendant had been with him. *Anderson v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 677.

PUBLIC OFFICERS AND EMPLOYEES

Vol. VIII, p. 953. [*Suits against public officers, etc.*] [First ed., vol. VI, p. 614.]

Filing of supplemental bill.—Where a motion to file a supplemental bill was made but the judge suggested that the matter be deferred until a motion to dismiss the predecessor's supplemental bill should be disposed of and the motion and supplemental bill were in the clerk's hands with his notation thereon of the date when they came into his possession and they remained in his custody thereafter and the defendant's counsel had notice of the motion, were acquainted with the contents of the bill and did not object nor intend to object to the mere filing, it was held that what was done was equivalent of a formal filing and a taking of the motion under former advisement. *Rankin v. Miller*, (D. C. Del. 1918) 266 Fed. 236.

Vol. VIII, p. 955. [*Government employees, etc.*] [First ed., 1912 Supp., p. 79.]

A receiver of a national banking association, appointed by the Comptroller of the Currency, is required to report the condition of the banking association in his charge, as such receiver, to the Comptroller of the Cur-

rency; and comes within the provision in this section as to making false reports. *Weitzel v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 101.

Vol. VIII, p. 956, sec. 6. [First ed., 1914 Supp., p. 317.]

Reduction of salaries of letter carriers.—Under the Act of March 2, 1907, 34 Stat., 1206 [8 Fed. Stat. Ann. (2d ed.), 71], providing that the Post Office Department may reduce clerks and carriers from higher to lower grades for inefficiency, and this section, the Postmaster General has no authority to arbitrarily change the rating of carriers collecting the mails so as to bring them within the charge of inefficiency and to reduce the pay granted to them by Congress without any tests of their efficiency. *Spanhake v. U. S.*, (1920) 55 Ct. Cl. 70.

Conclusiveness of action of departmental officer in removing letter carrier from office.—Under R. S. sec. 161 [3 Fed. Stat. Ann. (2d ed.) 250] authority may be properly delegated to the First Assistant Postmaster General by section 17 of the Postal Laws and Regulations issued by the Postmaster General to dismiss letter carriers from the government service, and when the First Assistant Postmaster General complies with all the requirements of this section, his dismissal of

a letter carrier and the approval of his action by the Postmaster General is final, and the Court of Claims has no jurisdiction to review his action. *Kellom v. U. S.*, (1920) 55 Ct. Cl. 174.

Effect of illegal removal—laches.—The provisions of this section give to the appointing officer directions which must be followed when the removal of a person in the classified civil service is sought. But if the appointing officer does not observe such directions in removing a person from office, his action does not thereby create an obligation upon the government to pay a salary to the person so removed for an indefinite time, especially where the latter does not appeal from the illegal order within a reasonable time after his removal. Thus, where an employee of the customs service is dismissed

by proper authority, whether legally or illegally, and does not appeal promptly to the Secretary of the Treasury for reinstatement, but submits to the order of removal without objection for an unreasonable length of time, he will be held guilty of laches in asserting his rights and to have thereby abandoned all title and claim to the emoluments of the office. *Nicholas v. U. S.*, (1920) 55 Ct. Cl. 188. See also *Arant v. U. S.*, (1920) 55 Ct. Cl. 327.

1918 Supp., p. 721, sec. 6.

Railroad employees are not disqualified for jury service since they are not regarded as employees of the United States under this act. *Lee v. Ong v. U. S.*, (C. C. A. 9th Cir. 1920) 264 Fed. 315.

PUBLIC PARKS

Vol. VIII, p. 985, sec. 3.

Withdrawal of lands by state from selection.—The mere filing by the state of Idaho, under the Act of August 18, 1894 [8 Fed. Stat. Ann. (2d ed.) 779], of an application for a survey, did not so far withdraw the lands from the public domain as to make ineffective a selection by a railway company under this act, in lieu of lands relinquished to the United States,—especially where, if valid for any purpose, the application merely gave an option to select which was never exerted. *Edward Rutledge Timber Co. v. Farrell*, (1921) 255 U. S. 268, 41 S. Ct. 328, 65 U. S.

(L. ed.) —, *reversing* (C. C. A. 9th Cir. 1919) 258 Fed. 161, 169 C. C. A. 229.

Sufficiency of designation of lieu land.—The designation by section number, township, and range, of a section of unsurveyed public land selected by a railway company under this act, in lieu of land to be relinquished to the United States, describes the land with reasonable certainty, although it is 7½ miles from any known survey, if it may readily be located from such survey. *Edward Rutledge Timber Co. v. Farrell*, (1921) 255 U. S. 268, 41 S. Ct. 328, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1919) 258 Fed. 161, 169 C. C. A. 229.

RAILROADS

Vol. VIII, p. 1151, sec. 1. [First ed., vol. VI, p. 745.]

Applicability to effects of army officer.—The personal effects of an army officer are not the property of the United States, and therefore, when transported for the government over land-grant railroads, are not entitled to land-grant deductions, but are subject to commercial or regular tariff rates. *Oregon-Washington R., etc., Co. v. U. S.*, (1921) 255 U. S. 339, 41 S. Ct. 339, 65 U. S. (L. ed.) —, *affirming* (1919) 54 Ct. Cl. 131. But reduced rates may be granted by a carrier for the transportation of the personal effects of Army officers changing stations under orders, in view of the provision of the Interstate Commerce Act of February 4, 1887, § 22 [4 Fed. Stat. Ann. (2d ed.) 539], permitting reduced rates to the United States, and of a conference ruling of the In-

terstate Commerce Commission, making such section applicable to property transported for the United States. *Western Pac. R. Co. v. U. S.*, (1921) 255 U. S. 349, 41 S. Ct. 349, 65 U. S. (L. ed.) —, *affirming* (1919) 54 Ct. Cl. 215.

Acquiescence in rates.—The right of a land-grant railroad to recover from the United States the difference between its commercial or general tariff rates and the land-grant rates charged and accepted by it for the transportation for the government of the personal effects of army officers is lost by the carrier's long acquiescence in the government's explicit assertion that the land-grant rates were the proper ones for such service. *Oregon-Washington R., etc., Co. v. U. S.*, (1921) 255 U. S. 339, 41 S. Ct. 329, 65 U. S. (L. ed.) —, *affirming* (1919) 54 Ct. Cl. 131. See to the same effect *Western Pac. R. Co. v. U. S.*, (1921) 255 U. S. 349,

41 S. Ct. 332, 65 U. S. (L. ed.) —, *affirming* (1919) 54 Ct. Cl. 215.

Vol. VIII, p. 1155, sec. 1. [*Driving-wheel brakes.*] [First ed., vol. VI, p. 752.]

I. Introductory.

4. State laws.

IV. "Train."

2. Switching operations.

VIII. Action by injured employee.

I. INTRODUCTORY

State Laws (p. 1157)

Workmen's Compensation Act.—A recovery in an action based on the Safety Appliance Act is not prevented by the Workmen's Compensation Act of the state where the accident occurred, though in terms applicable, and though the train movement was intrastate. *Kraemer v. Chicago, etc., R. Co.*, (Minn. 1921) 181 N. W. 847.

IV. "TRAIN"

2. *Switching Operations* (p. 1158)

What constitutes "train movement."—The Safety Appliance Act applies to an intrastate train movement on an interstate railroad; and the plaintiff's intestate, in taking 17 cars from a yard on a spur track to a yard on the main line, a distance of 3 miles, using a switch engine, having no cabooses, and operating without train orders, was engaged in a "train movement," as distinguished from a "switching movement," and was within the protection of the Safety Appliance Act. *Kraemer v. Chicago, etc., R. Co.*, (Minn. 1921) 181 N. W. 847.

VIII. ACTION BY INJURED EMPLOYEE
(p. 1160)

Proximate cause.—The failure to have the air brakes coupled so as to be under engine control, as required by the Safety Appliance Act, was a proximate cause of the death of the plaintiff's intestate who was killed in a derailment by the cars not under air control crowding the tender into the engine cab and crushing him against the boiler head. *Kraemer v. Chicago, etc., R. Co.*, (Minn. 1921) 181 N. W. 847.

Right of action for death.—There is implied in the Safety Appliance Act a right of recovery for death, though the act does not in express terms provide for a survival of the cause of action; and the personal representative of an employee killed on an interstate road because of a violation by the road of the Safety Appliance Act can recover in an action based on the statute, though the train movement in which the deceased was engaged was intrastate. *Kraemer v. Chicago, etc., R. Co.*, (Minn. 1921) 181 N. W. 847.

Pleading.—A person suing under this Act must show by his pleading that he was either

an employee or a traveller at the time of the injury, the Act being limited by its title to those classes. *Ecclesive v. Great Northern R. Co.*, (1920) 58 Mont. 470, 194 Pac. 143.

Vol. VIII, p. 1161, sec. 2. [First ed., vol. VI, p. 753.]

VII. Automatic coupling and uncoupling apparatus.

VIII. Duty to "equip" and maintain equipment as absolute.

IX. To whom duty to equip owed.

XI. Civil action arising out of violation of section.

VII. AUTOMATIC COUPLING AND UNCOUPLING APPARATUS (p. 1164)

Movement of train due to breaking of coupler.—The movement down grade of a detached portion of a train made possible by the breaking of a defective coupler has been held to be the necessary and natural effect of a failure to comply with the Safety Appliance Act. *Erie R. Co. v. Caldwell*, (C. C. A. 6th Cir. 1920) 264 Fed. 947.

Car without drawhead.—In a case where it appeared that a brakeman was injured while attempting to fasten two cars together with chains because the drawhead of one of the cars was gone, it was held that the case was as a matter of law within the Act. *Wight v. Callicut*, (Tex. 1920) 225 S. W. 389.

VIII. DUTY TO "EQUIP" AND MAINTAIN EQUIPMENT AS ABSOLUTE (p. 1166)

In general.—To same effect as original annotation, see *Davis v. Michigan Cent. R. Co.*, (1920) 204 Ill. 355, 128 N. E. 539, wherein it was said: "The duty and liability to provide couplers automatically coupling by impact and which can be uncoupled without the necessity of going between the cars is an absolute duty imposed on railroads engaged in interstate commerce, under the Federal Safety Appliance Act. Assumed risk is not a defense under this statute. Neither can the action of the employee be defeated by the carrier showing that it has exercised care in providing and keeping in repair such appliances, nor by showing contributory negligence on the part of the employee when he is injured by reason of a violation of the act."

IX. TO WHOM DUTY TO EQUIP OWED (p. 1169)

A carrier's failure to have the end of a loaded freight car standing on a siding equipped with the coupler and drawbar prescribed by the Federal Safety Appliance Acts, the purpose of which is to obviate the necessity for men to go between the ends of the cars, was not an actionable breach of duty towards a brakeman who was injured in a collision between such car, of whose de-

facts he was aware, and another car on which he was riding, which the engine had kicked on the same siding, although had these appliances been present there would have been sufficient room between the ends of the two cars to prevent the injury, where there was no present intention to disturb, couple, or move the defective car, since the collision was not the proximate result of the defect, but of the brakeman's failure to perform his duty to stop the moving car in time to avoid the collision. *Lang v. New York Cent. R. Co.*, (1921) 255 U. S. 455, 41 S. Ct. 381, 65 U. S. (L. ed.) (affirming (1920) 227 N. Y. 507, 125 N. E. 681), where in the court said: "The court's [New York Court of Appeals] conclusion that the requirement of the Safety Appliance Act 'was intended to provide against the risk of coupling cars' is the explicit declaration of the Conarty Case. [See original annotation under this heading.] There, after considering the act and the cases in exposition of it, we said, nothing in its provisions 'gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.'"

"The case was concerned with a collision between a switch engine and a defective freight car, resulting in injuries from which death ensued. The freight car was about to be placed on (we quote from the opinion) 'an isolated track for repairs, and was left near the switch leading to that track while other cars were being moved out of the way, — a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued.' The deceased was on the switch engine, and it was on its way 'to do some switching at a point some distance beyond the car, and was not intended and did not attempt to couple it to the engine or to handle it in any way. Its movement was in the hands of others.'"

IX. CIVIL ACTION ARISING OUT OF VIOLATION OF SECTION (p. 1170)

Contributory negligence.—To same effect as original annotation, see *Flanigan v. Hines*, (1920) 108 Kan. 133, 193 Pac. 1077.

Proximate cause of injury.—Where a switchman standing near a switch was injured by the switch lever being thrown from the impact against the switch points of a car which broke loose, the defective coupling which permitted the car to break loose was the proximate cause of the injury. *Stewart v. Wabash R. Co.*, (Neb. 1921) 182 N. W. 496.

Joinder of causes of action.—An action to recover damages resulting from death of an employee may be predicated on both the Employers' Liability Act and the Safety

Appliance Acts, and the plaintiff may go to the jury on as many grounds of recovery as the evidence tends to establish, under proper instructions as to each, without electing between the acts mentioned. *Flanigan v. Hines*, (1920) 108 Kan. 133, 193 Pac. 1077.

Evidence of defect.—The fact that a car became uncoupled on the stopping of the train is sufficient evidence that the coupling was defective. *Stewart v. Wabash R. Co.*, (Neb. 1921) 182 N. W. 496.

Vol. VIII, p. 1174, sec. 4. [First ed., vol. VI, p. 755.]

I. Cars affected.

V. Duty imposed as absolute.

I. CARS AFFECTED (p. 1174)

Foreign car.—"Nor is defendant's liability under the act affected by the fact that the Grand Trunk Pacific car from which plaintiff fell did not belong to it, and was not being used by it at the time for the purpose of transporting a shipment therein, but was picked up by this switching crew and utilized temporarily for the purpose of enabling the crew to reach and remove the Frisco car." *Lyon v. Wabash R. Co.*, (Mo. App. 1921) 232 S. W. 786.

V. DUTY IMPOSED AS ABSOLUTE (p. 1176)

Rule stated.—To same effect as original annotation, see *Lyon v. Wabash R. Co.*, (Mo. App. 1921) 232 S. W. 786.

Necessity of injury while coupling or uncoupling cars.—It is not necessary that the employee should be injured because of a defective grabiron while coupling or uncoupling cars. If the grabiron can be used in getting to the point where the cars are to be coupled or uncoupled, it is within this section. *Director General of Railroads v. Ronald*, (C. C. A. 2d Cir. 1920) 265 Fed. 138.

Vol. VIII, p. 1182, sec. 8. [First ed., vol. VI, p. 756.]

Effect of section.—In *Ward v. Erie R. Co.*, (1921) 230 N. Y. 230, 129 N. E. 886, in passing upon the question as to whether a state by legislation could impair the remedy given by the Safety Appliance Acts to an employee, the court said, regarding the effect of this section:

"Here there are two provisions that unmistakably reveal the purpose to give to the right of action for damages then attaching at common law a statutory confirmation and a statutory sanction. The act provides (27 Stat. 532, Act March 2, 1893, ch. 196, § 8) that any employee injured by any locomotive, car, or train in use contrary to the statute 'shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowl-

edge.' This provision assumes the existence of a remedy and limits the available defenses. The regulation of the remedy is equivalent to a declaration that a remedy there shall be. The states were without power, with that statute on the books, to make assumption of risk through continuance in employment an answer to a suit. Congress did not mean that they should have the power to destroy the right of action which they were powerless to impair. The supplementary act of 1910 (36 Stat. L. 299) reinforces this conclusion. It provides that the penalty of \$100 for each violation of its provisions shall not be construed to relieve such carrier from liability in any remedial action for the death or injury of any railway employee." The Supreme Court, referring to these two provisions in *Texas & Pac. Ry. Co. v. Rigsby*, supra, at page 40 of 241 U. S., at page 484 of 36 Sup. Ct. (60 L. ed. 874), said of them that 'the inference of a private right of action' was thereby 'rendered irresistible.'

"We build the right of action on the statute. We look to the common law in determining the implications of the statute, the things assumed and held for granted. *Murray v. Chicago & N. W. Ry. Co.* (C. C.) 62 Fed. 24, 31. That is the background in which its language finds a setting. Congress knew the ancient rule which gives a remedy in these circumstances for violation of a duty. With that knowledge, it left to allusion and suggestion the things that allusion and suggestion were sufficient to supply. The only question is whether it left the gaps so wide that in the process of filling them interpretation fades into conjecture. We think our reading of the act is not subject to that reproach. The statute in scheme and framework is instinct with plan and purpose to maintain a remedy and fortify it. The will of Congress is expressed in abbreviated signs and symbols, but none the less it is expressed. Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the states. It is written there in substance: Any one for whose benefit this statute is enacted shall have, in case of violation, a right of action for his damages, and it shall no longer be a defense that there was service with knowledge of the risk."

Vol. VIII, p. 1183, sec. 1. [First ed., vol. X, p. 375.]

III. "Engaged in interstate commerce."

VI. Intrastate cars.

III. "ENGAGED IN INTERSTATE COMMERCE"
(p. 1184)

Application to employee not engaged in interstate commerce.—To same effect as

original annotation, see *Ward v. Erie R. Co.*, (1921) 230 N. Y. 230, 129 N. E. 886.

VI. INTRASTATE CARS (p. 1186)

To same effect as original annotation, see *Reap v. Hines*, (C. C. A. 2d Cir. 1921) 273 Fed. 88.

Question of compliance with statute held to be for jury.—See *Reap v. Hines*, (C. C. A. 2d Cir. 1921) 273 Fed. 88.

Vol. VIII, p. 1188, sec. 2. [First ed., vol. X, p. 375.]

Cars affected.—A railroad moving four cuts of cars without having the air brakes coupled and under control from the engine, is guilty of a violation of this act. *Galveston, etc., R. Co. v. U. S.*, (C. C. A. 5th Cir. 1920) 265 Fed. 266, wherein the court said:

"Under the undisputed facts, as interpreted by this court in its former opinion, the movements of cars, for which the United States sought to collect the penalties, were train movements, and covered by the Safety Appliance Act."

Transfer trains.—Transfer trains operated by an interstate railway carrier under the yardmaster's orders, and under the single operating rule which requires all trains to move at such speed that they can be stopped at vision, over a terminal railway a part of which is single track, and on which are several grade highway and railway crossings, are subject to the requirement of the Safety Appliance Acts of March 2, 1893, and March 2, 1903, as to the coupling of train brakes so as to be under engine control, since, even under the inadmissible suggestion that the use of the road as part of the main line is essential to the application of this provision, such requirement would be satisfied in a case like the one at bar, where two independent railway companies use the road for freight trains under air control, and the passenger trains of another company cross it. *U. S. v. Northern Pac. R. Co.*, (1920) 254 U. S. 251, 41 S. Ct. 101, 65 U. S. (L. ed.) —, (reversing *C. C. A. 8th Cir. 1919*) 255 Fed. 665, 167 C. C. A. 31), wherein the court said:

"The company contends that the rule applied in *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621; *United States v. Chicago, B. & Q. R. Co.*, 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634; and *Louisville & J. Bridge Co. v. United States*, 249 U. S. 534, 63 L. ed. 757, 39 Sup. Ct. Rep. 355, is not applicable, because here, unlike those cases, no part of the trains' journey was performed on a track used as part of the main line of the Northern Pacific system. If use of the road as part of a main line were essential in order that operations on it be controlled by the Safety Appliance Act, the requirement would

be satisfied in this case by the fact that two independent companies use the road for freight trains under air control, and that the passenger trains of another company cross it. 'Not only were these [the defendant's] trains exposed to the hazards which that provision was intended to avoid or minimize, but, unless their engineers were able readily and quickly to check or control their movements, they were a serious menace to the safety of other trains which the statute was equally designed to protect.' *United States v. Chicago, B. & Q. R. Co.*, supra. But there is nothing in the act which limits the application of the provision here in question to operations on main-line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. at L. 943, chap. 976, 8 Fed. Stat. Anno. 2d ed. p. 1188) applicable to 'all trains . . . used on any railroad engaged in interstate commerce.' It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are 'trains' within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is not a train; as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains. Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented."

Vol. VIII, p. 1190, sec. 2. [First ed., 1912 Supp., p. 336.]

Duty absolute.—The duty of a carrier to equip and maintain its cars with sufficient and adequate brakes is an absolute one. *Payne v. Connor*, (C. C. A. 1st Cir. 1921) 274 Fed. 497.

Employees within act.—Whether the employee injured by a violation of this act was at the time engaged in interstate commerce is immaterial. *Tyon v. Wabash R. Co.*, (Mo. App. 1921) 232 S. W. 786.

Secure running boards—act of trespasser creating defect.—The federal Safety Appliance Act, April 14, 1910, which requires cars operated in interstate commerce to be equipped with secure running boards, is not violated where it appears that a trespasser, without the knowledge of the railroad or its servants, displaced an ice bunker cover so that it projected upon the running board, causing plaintiff, a brakeman, to trip over it; the running board itself remaining all the time mechanically perfect and secure. *Slater v. Chicago, etc., R. Co.*, (1920) 146 Minn. 390, 178 N. W. 813.

Coal on engine step does not constitute a violation of this act. *Reeves v. Chicago, etc., R. Co.*, (1920) 147 Minn. 114, 179 N. W. 689.

Question for jury.—Where plaintiff was hit by cars which had been standing and which were moved by cars kicked back as he was crossing the track, the question whether failure to have the standing cars properly equipped with brakes contributed to the injury has been held to be one for the jury. *Payne v. Connor*, (C. C. A. 1st Cir. 1921) 274 Fed. 497.

Vol. VIII, p. 1191, sec. 3. [First ed., 1912 Supp., p. 336.]

Extension of time for compliance.—This section gives to the Commission no power to extend the time for compliance with the provisions of section 2 of this act. *Tyon v. Wabash R. Co.*, (Mo. App. 1921) 232 S. W. 786.

Vol. VIII, p. 1192, sec. 4. [First ed., 1912 Supp., p. 336.]

I. Introductory.

VI. "Nearest available point."

VIII. "Remedial action."

I. INTRODUCTORY (p. 1192)

The word "permitting" was evidently inserted in this section to meet the case of one interstate carrier receiving cars from another line, not thus equipped and hauling them on its own line. *McCalmont v. Pennsylvania Co.*, (N. D. Ohio 1921) 273 Fed. 231.

VI. "NEAREST AVAILABLE POINT" (p. 1196)

Scope of permission to haul defective cars.— "The permission to haul from the place where the want of repair is discovered is a permission to haul it only to the nearest available repair place, and only in case it is necessary to do such hauling in order to make repairs, and when they cannot be made except at that repair place. Even this permission to haul to the nearest available repair place does not permit the hauling of defective cars by chains instead of drawbars in association with other cars commercially used, unless such defective car contains live stock or perishable freight. Obviously this means that crippled cars must be hauled in trains made up exclusively of crippled cars. The association of the word 'used' with the words 'hauled or permitted to be hauled on its line' clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place, or of the car from the place where found to be defective or insecure to the place of repair. It does not mean such use of the car else-

where or in other relations than such hauling or movement." *McCalmont v. Pennsylvania Co.*, (N. D. Ohio 1921) 273 Fed. 231.

VIII. "REMEDIAL ACTION" (p. 1197)

A causal relation between the violation of the Safety Appliance Act and the employee's injuries must always exist. *McCalmont v. Pennsylvania Co.*, (N. D. Ohio 1921) 273 Fed. 231, holding in this case that the carrier was not liable.

Vol. VIII, p. 1199, sec. 1. [*Locomotive ash pan, etc.*] [First ed., 1909 Supp., p. 588.]

Proximate cause of injury.—In *Ft. Worth, etc., R. Co. v. Smithers*, (Tex. 1921) 228 S. W. 637, it appeared that the ash pan of a locomotive was so out of order that the cover could not be closed by the use of the lever. A round house employer, failing to close the pan by the lever, started to leave the locomotive cab to go under the locomotive to close it, and in so doing fell by reason of the slippery condition of the floor of the cab. It was held that the violation of the Ash Pan Act was the proximate cause of the injury.

Vol. VIII, p. 1201, sec. 2. [First ed., 1912 Supp., p. 339.]

Boiler undergoing repair.—A boiler on a locomotive which is in the shop for purpose of repair is not being used in interstate commerce within this section. *Flack v. Atchison, etc., R. Co.*, (Mo. 1920) 224 S. W. 415, wherein it was said: "At the time of the accident here in suit, the engine in question was not being used in 'moving interstate or foreign traffic,' nor was it 'in the active service of such carrier in moving traffic' within the intent and purpose of that act, as we construe it. The engine was undeniably being prepared for use in interstate traffic, and the deceased met his death while engaged in that preparation. The work then being done was necessary in order to avoid a violation of the provisions of the act whose penalties respondent now invokes."

Action for injuries.—In an action under the federal Employers' Liability Act, the plaintiff may recover for injuries caused by the violation of this section. *Cochran v. Atchison, etc., R. Co.*, (Kan. 1921) 198 Pac. 686.

Vol. VIII, p. 1205, sec. 1. [First ed., 1916 Supp., p. 215.]

Engine steps.—The presence of a lump of coal on an engine step does not constitute a violation of this section. *Reeves v. Chicago,*

etc., R. Co., (1920) 147 Minn. 114, 179 N. W. 689.

Piston rod.—A broken piston rod resulting in the escape of large quantities of steam into the cab of the locomotive is within this act. *Kilburn v. Chicago, etc., R. Co.*, (Mo. 1921) 232 S. W. 1017.

Presumption of safety mechanism.—When it comes to a question of proper condition and safety under this act, that mechanism which has been in constant use for years without causing injury must be considered proper and safe until some notice or occasion indicates its danger and insufficiency. *Ford v. McAdoo*, (1921) 231 N. Y. 155, 131 N. E. 874, wherein it was held that the evidence was insufficient to show that the locomotive was defective.

Vol. VIII, p. 1208, sec. 1. [First ed., 1909 Supp., p. 584.]

I. Introductory.

2. Construction and operation.

a. In general.

d. Construction controlled by federal decisions.

3. "Common carrier by railroad.

a. In general.

b. Electric railway.

c. Vessel owned by railroad.

f. Express company.

4. Paramount to state laws.

a. In general.

c. State statutes, in general.

d. State Workmen's Compensation Acts.

II. Employer engaged in interstate commerce.

1. In general.

4. Hauling empty cars.

6. Movements in terminal yard.

8. Transportation of mail.

III. Employee engaged in interstate commerce.

1. Relation of employer and employee.

g. Independent contractor.

h. Express agent.

2. Employed in interstate commerce.

a. General rule and tests.

b. Employee operating train.

c. Employees coupling, uncoupling or switching cars.

d. Employee engaged in construction or repairs.

e. Employee supplying fuel or water.

f. Employee guarding or inspecting property.

g. Employee going to or returning from work or temporarily diverted therefrom.

h. Employee working on watercraft.

i. Other employees.

IV. Injuries to employees.

1. Negligence generally.
 - a. Basis of liability.
 - d. Defects in cars, engines, appliances, etc.
 - (1) In general.
 - (2) Duty of carrier as to place to work.
 - (5) Particular acts or conditions as negligence.
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 - f. Effect of section on particular doctrines or maxims.
 - (1) In general
 - (2) Fellow servant doctrine.
2. Persons entitled to sue.
 - b. Personal representatives.
3. Pleadings.
 - a. In general.
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4. Practice and procedure.
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6. Damages.
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 - (1) In general.
 - (2) Action by widow.
 - (3) Actions by children.
 - d. Actions for death of son.
7. Questions for court and jury.
8. Appeal and error.

I. INTRODUCTORY

2. Construction and Operation
 - a. In General (p. 1213)

The Safety Appliance Act and the Employers' Liability Act.—"The federal Employers' Liability Act, exclusively regulating the relation of common carriers and their employees while engaged in interstate commerce, was enacted long after the Safety Appliance Act, viz. April 22, 1908 (35 Stat. 65), and this absolute duty of the railroad company under the Safety Appliance Act to its employees, injured when engaged in interstate commerce, must be considered as incorporated in it. Whenever a violation of that act is the proximate cause of the injury, the negligence of the railroad company is ipso facto established. The exemption in favor of such employees is greater in the Employers' Liability Act than that conferred by section 8 of the Safety Appliance Act; sections 3 and 4 providing that no such employees shall be held to have been guilty of contributory negligence, or to have assumed the risks of the employment in any case, where the violation by the common carrier

of any statute enacted for the safety of employees contributed to the injury or death of such employee. *Director General of Railroads v. Ronald*, (C. C. A. 2d Cir. 1920) 265 Fed. 138.

Exclusiveness of remedy.—The remedy given by this act, in so far as it fixes the liability of the employer, is exclusive as to him, but does not modify the employee's common law right to sue any third party who is jointly liable for the injury. *Cott v. Erie R. Co.*, (1921) 231 N. Y. 67, 131 N. E. 737.

- d. Construction Controlled by Federal Decisions (p. 1214)

The opinion of the Supreme Court of the United States.—To same effect as original annotation, see *Hines v. Industrial Accident Commission*, (Cal. 1920) 192 Pac. 859; *Wright v. Interurban R. Co.*, (Ia. 1920) 179 N. W. 877; *Seaboard Air Line R. Co. v. Brooks*, (Ga. 1921) 107 S. E. 878. In the last case, the court said:

"The law which we are called upon to construe, being an act of the United States Congress, presents a federal question. On all such questions the Supreme Court of the United States is the highest authority, and its decisions are final. Because there is an absence of direct adjudication on the precise point by the Supreme Court of the United States, it becomes the duty of this court to 'determine the question by the exercise of its own judgment, enlightened by the best available authorities.'"

A federal court's interpretation of the act prevails over any state law or rule of interpretation of a state court. *Bennett v. Atchison, etc., R. Co.*, (Ia. 1921) 183 N. W. 424.

3. "Common Carrier by Railroad"

- a. In General (p. 1215)

Railroad under federal control.—A railroad under federal control under the act of March 21, 1918, (1918 Supp. Fed. Stat. Ann. p. 757 et seq.) is an employer within this section. *Hite v. St. Joseph, etc., R. Co.*, (Mo. 1920) 225 S. W. 916.

- b. Electric Railway (p. 1215)

State corporation.—"Ordinary street cars (and not interurban or suburban cars) operated on streets of cities for the carriage of passengers do not come under the Federal Employers' Liability Act." *Peters v. Kansas City Rys. Co.*, (Mo. 1920) 204 Mo. App. 197, 224 S. W. 26.

- c. Vessel Owned by Railroad (p. 1216)

Vessel not owned by railroad.—Since this act applies only to common carriers by railroad, the fact that an employee is injured while assisting in the unloading of a vessel used in interstate commerce, is immaterial, especially where the vessel is not owned by the defendant railroad and forms no part of

its system. *Foley v. Hines*, (1920) 119 Me. 425, 111 Atl. 715.

f. Express Company (p. 1217)

To the same effect as the original annotation, *Wells Fargo & Co. v. Taylor*, (1920) 254 U. S. 175, 41 S. Ct. 93, 65 U. S. (L. ed.) —, reversing (C. C. A. 5th Cir. 1918) 249 Fed. 109, 161 C. C. A. 161; *State v. American Express Co.* (Utah 1921) 195 Pac. 312. In the former case, the court said:

"The question is presented whether the act embraces a common carrier by express, which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown. The District Court answered the question in the negative and the Circuit Court of Appeals in the affirmative. A negative answer also has been given in a like situation by the Court of Errors and Appeals of New Jersey (*Higgins v. Erie R. Co.*, 89 N. J. L. 629, 99 Atl. 98); and a recent decision by the supreme court of Minnesota makes persuasively for that view (*State ex rel. Great Northern Exp. Co. v. District Ct.*, 142 Minn. 410, 172 N. W. 310).

In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptance of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad (see *Southern P. Co. v. Jensen*, 244 U. S. 205, 212, 213, 61 L. ed. 1086, 1096, 1097, L. R. A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597); by the obvious reference in the latter part of §§ 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars, and other appliances intended to promote the safety of railroad employees (see *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 484, 60 L. ed. 1110, 1117, 36 Sup. Ct. Rep. 626); by the use of similar words in closely related acts which apply only to carriers operating railroads (March 2, 1893, 27 Stat. at L. 531, chap. 196, 8 Fed. Stat. Anno. 2d ed. p. 1155; May 30, 1908, 35 Stat. at L. 476, chap. 225, 8 Fed. Stat. Anno. 2d ed. p. 1199; May 6, 1910, 36 Stat. at L. 350, chap. 208, 8 Fed. Stat. Anno. 2d ed. p. 1420); and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads, but not express companies doing business as here shown (1 Inters. Com. Rep. 677, I. I. C. C. Rep. 349; *United States v. Morsman*, 3 Inters. Com. Rep. 112, 42 Fed. 448; *Southern Indiana Exp. Co. v. United States Exp. Co.*, 88 Fed. 659, 662, s. c. 35 C. C. A. 172, 92 Fed. 1022. And see *American Exp. Co. v. United States*, 212 U. S. 522, 531, 534, 53 L. ed. 635, 639, 640, 29 Sup. Ct. Rep. 315).

4. Paramount to State Laws

a. In General (p. 1217)

State laws superseded.—To same effect as original annotation, see *Illinois Cent. R. Co. v. Johnston*, (Ala. 1920) 87 So. 866; *Charlotte Harbor, etc., R. Co. v. Truette*, (Fla. 1921) 87 So. 427; *Hines v. Burns*, (1920) 189 Ky. 761, 226 S. W. 109; *Myers v. Payne*, (Mo. App. 1921) 227 S. W. 633; *Wintermute v. Oregon-Washington R., etc., Co.*, (1921) 98 Ore. 431, 194 Pac. 420; *Atchison, etc., R. Co. v. Francis*, (Tex. 1921) 227 S. W. 342.

Applicability to Porto Rico.—It is held that this act and the Workmen's Compensation Act of Porto Rico are inconsistent and that so far as inconsistent this Act is inapplicable to railroads in Porto Rico. *Camunas v. Porto Rico R., etc., Co.*, (C. C. A. 1st Cir. 1921) 272 Fed. 924.

c. State Statutes, in General (p. 1219)

The federal law is exclusive within the scope of its operation.—To same effect as original annotation, see *Hines v. Industrial Commission*, (1920) 295 Ill. 231, 129 N. E. 175.

d. State Workmen's Compensation Acts (p. 1220)

A state Workmen's Compensation Law has no application to an injury received by a railroad employee while engaged in interstate commerce. *Hines v. Industrial Acc. Commission*, (Cal. 1920) 192 Pac. 859, 14 A. L. R. 720.

II. EMPLOYER ENGAGED IN INTERSTATE COMMERCE

1. In General (p. 1223)

A terminal road which switches indiscriminately for foreign and domestic cars is an instrumentality of interstate or foreign commerce, regardless of whether it knows them to be such in each instance. *Cott v. Erie R. Co.*, (1921) 231 N. Y. 67, 131 N. E. 737.

A crane used in unloading coal to be held in reserve in view of a threatened coal strike is not an instrumentality of interstate commerce so as to permit a recovery under this Act; nor does the coal acquire the character of such commerce by reason of its contemplated use in the operation of the railroad at a future date. *Kozimko v. Hines*, (C. C. A. 3d Cir. 1920) 268 Fed. 507.

4. Hauling Empty Cars (p. 1227)

The hauling of empty freight cars from one state to another.—To same effect as original annotation, see *Koons v. Philadelphia, etc., R. Co.*, (Pa. 1921) 114 Atl. 262.

6. Movements in Terminal Yard (p. 1227)

In case of an interstate train.—To same effect as original annotation, see *Payne v.*

Rearden, (C. C. A. 8th Cir. 1920) 266 Fed. 879.

8. *Transportation of Mail* (p. 1227)

To same effect as original annotation, see *Cleveland, etc., R. Co. v. Industrial Commission*, (1920) 294 Ill. 374, 128 N. E. 516; *Baker v. Southern Pac. R. Co.*, (1920) 193 Pac. 765.

III. EMPLOYEE ENGAGED IN INTERSTATE COMMERCE

1. *Relation of Employer and Employee* g. *Independent Contractor* (p. 1234)

Servant of independent contractor.—The act does not embrace the servant of an independent contractor holding a contract with an interstate carrier. *Polluck v. Minneapolis, etc., R. Co.*, (S. D. 1921) 183 N. W. 859, following decision on former appeal 40 S. D. 186, 166 N. W. 641, *affirmed* 248 U. S. 558, 39 S. Ct. 6, 63 U. S. (L. ed.) 421.

h. *Express Agent* (p. 1235)

An express messenger in charge of express matter which a railway company was transporting for the express company in an express car furnished by the railway company under a contract which gave the express company the exclusive privilege of conducting an express business, the railway company to provide the motive power and the train operatives, was on the train as an employee not of the railway company, but of the express company, by which he was employed, directed, and paid, and at whose will he was to continue in service or be discharged. *Wells Fargo & Co. v. Taylor*, (1920) 254 U. S. 175, 41 S. Ct. 93, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 5th Cir. 1918) 249 Fed. 109, 161 C. C. A. 161.

2. *Employed in Interstate Commerce*

a. *General Rule and Tests* (p. 1236)

It is essential to a case under the statutes.—To same effect as original annotation, see *Ward v. Erie R. Co.*, (1921) 230 N. Y. 230, 129 N. E. 886; *Rockford City Traction Co. v. Industrial Commission*, (1920) 295 Ill. 358, 129 N. E. 135; *Swank v. Pennsylvania R. Co.*, (N. J. 1920) 111 Atl. 44; *Foley v. Hines*, (1920) 119 Me. 425, 111 Atl. 715; *Gruszewsky v. Director General of Railroads*, (Com. 1921) 113 Atl. 160.

The true test as to whether one is engaged in interstate commerce.—To same effect as original annotation, see *Hines v. Baechtel*, (1921) 137 Md. 513, 113 Atl. 126; *Gruszewsky v. Director General*, (1921) 113 Atl. 160; *Koons v. Philadelphia, etc., R. Co.*, (Pa. 1921) 114 Atl. 262.

That violation of the Safety Appliance Act caused the injury does not dispense with proof that the employer was at the time thereof engaged in interstate commerce. *Flanigan v. Hines*, (1920) 108 Kan. 133, 193 Pac. 1077.

b. *Employee Operating Train* (p. 1244)

Employees within the statute — *Trainmen*.—A railway employee who is injured by being caught between two cars while employed upon a freight train made up of both interstate cars and freight and intrastate cars and freight was employed in interstate commerce, within the meaning of this act, so as to exclude the operation of a state workmen's compensation act. *Philadelphia, etc., R. Co. v. Polk*, (1921) 256 U. S. —, 41 S. Ct. 518, 65 U. S. (L. ed.) —, *reversing* (1920) 266 Pa. St. 335, 109 Atl. 627.

Engineer.—Where an engineer employed in the shifting service of a railroad, engaged in both interstate and intrastate commerce, had hauled a train of interstate cars to its destination in the railroad yard and was injured while taking the engine to the round-house either to receive further orders or to house the engine for the night, it was held that he was engaged in interstate commerce within the meaning of this act. *Director Gen. of Railroads v. Bennett*, (C. C. A. 3d Cir. 1920) 268 Fed. 767.

c. *Employees Coupling, Uncoupling or Switching Cars* (p. 1248)

Employees within the statute — *Switching*.—A switchman was held to be engaged in interstate commerce where at the time of the injury he was assisting in the removal of an intrastate car from a track so as to facilitate the movement of an interstate train. *Keap v. Hines*, (C. C. A. 2d Cir. 1921) 273 Fed. 88.

Where the parties stipulated that the "decendent was assisting another man at work at or near a switch, which switch was connected with tracks used for both interstate and intrastate commerce" it was declared:

"This stipulation, construed most favorably to the plaintiff on the defendant's concession, placed the decendent at the switch and made the switch a part of the tracks. The switch thus became an instrumentality as permanently devoted to commerce as the tracks themselves (*Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. ed. 358, Ann. Cas. 1918B, 54; *Pederson v. L. & W. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, Ann. Cas. 1914C, 53), and determined the character of the employment of both employee and carrier as interstate." *Smith v. Payne*, (C. C. A. 3d Cir. 1920) 269 Fed. 1.

In *Stewart v. Wabash R. Co.*, (Neb. 1921) 182 N. W. 496, a switch foreman was held to be within the act on facts noted by the court as follows:

"The proof shows that defendant is an interstate carrier with lines extending through Missouri, Iowa, and other states, and running passenger trains into Omaha. Plaintiff had worked as a switchman for defendant for seven years at Council Bluffs. He was acting as switch foreman and was working at

the main freight yards on the day of the accident, in yards in which both interstate and intrastate traffic was handled. The three cars were taken from track seven in the yard, and were brought down the main line and pushed upon the Y. One of the cars belonged to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and another to the New York Central Railroad Company. The engineer testified that, after he coupled on to eight or nine other cars, he was given a signal to clear the main line. The main line was used for both interstate and intrastate commerce."

Employees not within the statute.—An engineer switching on to a siding a string of empty cars which have no destination and are to be held there to await orders, and which might in their next use "go anywhere" is not engaged in interstate commerce. *Kraemer v. Chicago, etc., R. Co.*, (Minn. 1921) 181 N. W. 847.

A switchman is not within the act where the cars being switched neither carried interstate commerce nor were they to be used immediately in interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose. *Hines, v. Green*, (1921) 125 Miss. 476, 87 So. 649.

d. Employee Engaged in Construction or Repairs (p. 1254)

Employees within the statute.—*Roadbed and tracks.*—A section hand who is killed while removing the stone ballast from between the ties under tracks used in interstate commerce, is engaged in interstate commerce within the meaning of this section. *Swank v. Pennsylvania R. Co.*, (N. J. 1920) 111 Atl. 44.

So a brakeman hauling ballast for use on a main track over which interstate trains are operated is within the act. *Kansas City Southern R. Co. v. Leinen*, (144 Ark. 454) 223 S. W. 1.

In *Crecelius v. Chicago, etc., R. Co.*, (1920) 284 Mo. 26, 223 S. W. 413, the evidence in behalf of plaintiff tends to show that decedent was timekeeper for a group of workmen in the employ of appellant; that he was employed by the month; that his duties required him to keep a record of the men employed; to check them up at least twice daily; to make two daily reports to his superiors, one by telegraph, and one by mail; that these duties usually consumed his time until about 7 or 8 o'clock in the evening; that he was killed at about 6.30 p. m.; that he was, at the moment when death overtook him, on his way to make his daily telegraphic report; that during the day upon which he died the men under his observation were employed in part in constructing a temporary track and in part in work upon the main track; and that this main track was used by appellant in interstate com-

merce. The train which killed decedent was an intrastate train. It was held that the plaintiff was within the act.

Bridges.—An employee of a railroad company who is killed while hauling stringers for the repair of a bridge used by the company in interstate commerce, is engaged in interstate commerce within the meaning of this act. *Hines v. Industrial Commission*, (1920) 295 Ill. 231, 129 N. E. 175.

Engine or car.—A laborer in the car shops of a railroad who is injured while unloading for repairs a car wrecked in interstate commerce, is within the scope of this act. *Koons v. Philadelphia, etc., R. Co.*, (Pa. 1921) 114 Atl. 262.

Repairing engine.—In *Payne v. Industrial Acc. Commission*, (Col. App. 1921) 195 Pac. 81, a workman was held to be within the act while engaged in a repair shop repairing an engine the past and future use of which was stated as follows:

"This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad. On the 19th of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of 'breaking in' after a locomotive had undergone extensive repairs. After this run to San Pedro, the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, Cal., and Caliente, Nev., on the main line of the railroad, where it has ever since been used."

Employees not within statute.—A car repairer who is injured while repairing a car which is out of use for the purpose of having the repairs made, is not injured "while engaged in interstate commerce" within the meaning of this section. *Herzog v. Hines*, (N. J. 1920) 112 Atl. 315, wherein the court said:

"In *Erie Railroad Co. v. Welsh*, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. ed. 319, the true test to be applied in determining whether

or not a given case was within the federal statute was declared to be the nature of the work being done at the time of the injury; and it was held that the fact that the plaintiff, who was a yard conductor in the company's employ, had shortly before the accident been engaged in superintending the shifting of an interstate car, and that he was returning to the yardmaster's office after he had completed this task, for instructions as to what work he should next engage in, when the accident occurred, and the further fact, had he reached the yardmaster's office safely, he would then have been directed to assist in making up an interstate train, were not sufficient to bring the case within the act.

"Although the facts of the cited case are quite unlike those which are presented in that now before us, the test laid down is applicable; that is, was the work being done by the plaintiff at the time of the injury a task in interstate commerce? We think it plain that it was not. The repair work was being done to an instrument of commerce, it is true, but at that time the car was entirely out of commission, and was not being used for any purpose whatever. In this respect the case radically differs from that of *Pederson v. D. L. & W. R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, Ann. Cas. 1914C, 163, where the repair was being made upon an instrument of interstate commerce then in use in such transportation.

"There are other and later decisions of the federal tribunal where the test declared in the *Welsh Case* was applied in cases quite similar in their facts to that now before us. In *Minneapolis, etc., R. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, the injury occurred while the plaintiff was repairing a locomotive engine. The engine had been used in interstate commerce before the accident happened, and was so used afterward. There was nothing, however, to show that it was permanently devoted to such commerce. It was held that the facts did not present a case within the federal act, the court saying: 'This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time not upon remote probabilities or upon accidental later events.'

"In *Baltimore & Ohio R. R. Co. v. Bran-*

son, 242 U. S. 623, 37 Sup. Ct. 244, 61 L. Ed. 534, the plaintiff was injured while engaged in painting an engine in the defendant company's roundhouse, the work which he was doing being that for which he was employed. It was held that the case was not within the statute. So, too, in the case of *Chicago, etc., R. R. Co. v. Kindlesparker*, 246 U. S. 657, 38 Sup. Ct. 425, 62 L. Ed. 925, the court again applied the test declared in the *Welsh Case*, holding that a plaintiff who was injured while repairing an engine which, when in use, was devoted indiscriminately to the movement of interstate and intrastate traffic, was not engaged at the time of the accident in interstate commerce, within the meaning of the federal statute."

Boiler maker.—In *Payne v. Demott*, (Ga. App. 1921) 106 S. E. 9, the court held that a boiler maker was not engaged in interstate commerce while working on a locomotive which was used chiefly in intrastate traffic and which at the time of the injury had been withdrawn from service for the purpose of being repaired and was in the repair shop.

An employee of an intrastate traction company who is injured while welding rails in tracks used by his employer and also by an interstate company, is not engaged in interstate commerce within the meaning of this act. *Rockford City Traction Co. v. Industrial Commission*, (1920) 295 Ill. 358, 129 N. E. 136, wherein it was said:

"The point urged in the brief of plaintiff in error for a reversal of this judgment is that defendant in error was engaged in interstate commerce at the time of his injury and that recovery must be had, if at all, under the federal Employers' Liability Act. This contention is made on the theory that at the time of the injury he was engaged in repairing an instrumentality used in interstate commerce. Plaintiff in error, the Rockford City Traction Company, operates a street railway in the city of Rockford, and an associated company, the Rockford & Interurban Railway Company, operates four interurban lines out of Rockford—one each to Belvidere, Freeport, and Camp Grant, Ill., and a fourth line to Beloit and Janesville, Wis. These companies are in law two corporations, but they are operated from the same office by the same officers and agents, and their connection is so close that it is almost impossible for any one to know what are the activities of the one and what of the other. Defendant in error was injured in the city of Rockford, near the east end of the East State street bridge across Rock river. Over the point where he was injured the Rockford City Traction Company runs practically all its lines of cars, and the Rockford & Interurban Railway Company used the same tracks for its cars that run to Beloit and Janesville, Wis. Defendant in error testified that he was employed by the Rockford City Traction Com-

pany and was paid by that company and not by the interurban company. This was sufficient to establish the relation of employer and employee between defendant in error and plaintiff in error. *Chicago Traction Co. v. Industrial Board*, 232 Ill. 230, 118 N. E. 464. Where the employer seeks to avoid liability under the Workmen's Compensation Act on the ground that the employee was engaged in interstate commerce at the time of his injury, the burden is on the employer to show that the employee at the time of his injury was engaged in interstate commerce. *Atchison, Topeka & Santa Fe Railway Co. v. Industrial Com.*, 290 Ill. 590, 125 N. E. 380; *Chicago & Alton Railroad Co. v. Industrial Com.*, 290 Ill. 599, 125 N. E. 378. Before the federal Employers' Liability Act controls, it must be shown that the employee was at the time of his injury engaged in the interstate commerce of his employer; that is, both the employee and the employer must at the time be engaged in interstate commerce within the meaning of the act. *Chicago & Alton Railroad Co. v. Industrial Com.*, 288 Ill. 603, 124 N. E. 344. None of the business of plaintiff in error was interstate business, and the circuit court properly held that the Industrial Commission had jurisdiction of the cause."

A carpenter repairing a depot building is not within the act. *Boles v. Hines*, (Mo. App. 1920) 226 S. W. 272.

A machinist's helper, engaged in making repairs upon a switch engine which had been temporarily withdrawn from service therefor and which when in service was used in both interstate and intrastate traffic, is not engaged in interstate commerce. *Hines v. Industrial Acc. Commission*, (Cal. 1920) 192 Pac. 859, 14 Atl. 720.

Employee removing tires from engine wheels.—In *Cleveland, etc., R. Co. v. Ropp*, (Ind. 1921) 129 N. E. 475, the evidence showed that the employee was engaged in taking old tires off wheels; that these tires were taken to the blacksmith's shop and used to make piston keys; that the keys were used to keep crossheads and pistons together on various locomotives. There was nothing in the evidence to show that the employee was doing anything immediately connected with interstate commerce, but it was contended that the pins and key made from the old tires might be used at some future time in engines in interstate commerce. In overruling this contention, the court said:

"The true test of employment in such commerce in the sense intended is: Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it? *Chicago, Burlington & Q. R. R. v. Harrington*, 241 U. S. 177, 180, 36 Sup. Ct. 517, 518 (60 L. ed. 941); *Shanks v. Del., Lack. & West. R. R.*, 239 U. S. 556, 558, 36 Sup. Ct. 186, 60 L. ed. 436, L. R. A. 1916C, 797; *Del., Lack. & West. R. R. v.*

Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. ed. 1397.

"Measured by this test, appellee was not engaged in 'interstate transportation,' nor 'in work so closely related to it as to be practically a part of it.'"

Employee at disused power station.—Where an electric power plant which had been used in interstate commerce was entirely disused during the making of repairs, a temporary substation being substituted, an employee at the disused plant is not within the act. *Wright v. Interurban R. Co.*, (Ia. 1920) 179 N. W. 877.

e. Employee Supplying Fuel or Water (p. 1267)

Employees within the act—Supplying water.—Where the foreman of a wrecking train after having adjusted a shipment of goods on certain interstate cars, is injured while supplying one of the cars of his train with water, which was a part of his day's work, he must be deemed to have been employed in interstate commerce at the time of his injury. *Director General of Railroads, v. Ronalds*, (C. C. A. 2d Cir. 1920) 265 Fed. 138.

f. Employee Guarding or Inspecting Property (p. 1269)

Employee within the statute—Flagman.—A person employed as a railway flagman at a public crossing, to signal both intrastate and interstate trains, was, without regard to the character—intrastate or interstate—of the particular train which he was flagging when killed, engaged in interstate commerce, within the meaning of this act, so as to exclude the operation of a state workmen's compensation law. *Philadelphia, etc., R. Co. v. Di Donato*, (1921) 256 U. S. —, 41 S. Ct. 516, 65 U. S. (L. ed.) —, *reversing* (1920) 266 Pa. St. 412, 109 Atl. 627.

Car inspector.—An employee inspecting, and, wherever necessary, repairing cars which were being made ready for departure to several states, was none the less engaged in interstate commerce, although it was also his duty to inspect and repair cars which were being used wholly within the state. *Hines v. Logan*, (C. C. A. 5th Cir. 1920) 269 Fed. 105.

g. Employee Going to or Returning from Work or Temporarily Diverted Therefrom (p. 1271)

Employees within statute.—A section hand returning on a hand car from his work in the repair of a track used in interstate commerce is within the act. *Wagner v. Chicago, etc., R. Co.*, (Mo. App. 1921) 232 S. W. 771.

An engineer of an interstate train going to the oil house "to get oil to run his engine" or returning from such a trip, is within the act. *Hines v. Burns*, (1920) 189 Ky. 761, 226 S. W. 109.

Employees not within the statute.—Where a section hand on the order of his foreman but in violation of a rule known to him leaves his work and goes to a nearby town to get provisions for the crew he is not while so doing within the act. *Adams v. Hines*, (Wash. 1921) 196 Pac. 19.

"Plaintiff testified that prior to his injury he had been switching cars loaded with interstate freight and empty cars destined to points beyond the state. But these movements had all been completed, and he had stopped his engine in the side track to let No. 48 pass. He said that, if he had not been hurt, his next movement would have been to place an empty for the express people; but that was not enough to bring the case within the act, even if it had appeared that the empty was to be loaded with interstate freight." *Patterson v. Director General of Railroads*, (1921) 115 S. C. 390, 105 S. E. 746.

Where an employee on leaving railroad yards where he was employed in interstate commerce selects a dangerous means of exit instead of the safe one provided by the employer, it is held that in so doing he ends his employment and loses his status of an employee in interstate commerce. *Krysiak v. Pennsylvania R. Co.*, (C. C. A. 3d Cir. 1921) 270 Fed. 758.

h. Employee Working on Watercraft (p. 1274)

To same effect as original annotation, see *Foley v. Hines*, (1920) 119 Me. 425, 111 Atl. 715, wherein it appeared that the vessel was not owned by the railroad and the coal unloaded was not intended to be presently used in interstate commerce.

i. Other Employees (p. 1275)

Employees within the statute.—Where a roadmaster at the time of his injury was engaged in taking an inventory of materials lying on the property of the road, it was held that his work as roadmaster, in supervising the keeping in repair of said track of said railway engaged in interstate commerce, constituted an employment by such carrier in interstate commerce, and that he was such an employee when injured. *Louisiana R. etc., Co. v. Williams*, (C. C. A. 5th Cir. 1921) 272 Fed. 439.

Where a railroad company maintains in its yard adjoining its tracks a heating plant in which steam is generated and transmitted through pipes to cars standing on its tracks, with which connection is made by means of steam plugs, and the steam so generated is used in interstate and intrastate commerce, an employee who operates a boiler in such heating plant is engaged in interstate commerce. *Gruszewsky v. Director General of Railroads*, (Com. 1921) 113 Atl. 160.

An employee who is injured while returning to his employer's depot after delivering interstate mail to a train, is engaged in in-

terstate commerce within the meaning of this act. *Cleveland, etc., R. Co. v. Industrial Commission*, (1920) 294 Ill. 374, 128 N. E. 516.

In *Lindstrom v. New York Cent. R. Co.*, (1919) 186 App. Div. 429, *affirmed* without opinion, (1920) 230 N. Y. 551, it appeared that the plaintiff was employed in cleaning fires on locomotives. On the night of the accident the ash pit at Geneva, where he was usually employed, was out of order and he was directed to go with the engines to Thompsons, a near-by station, and clean them there. On the way a collision occurred and plaintiff was injured. It was conceded that the engines were used in interstate commerce. The question was whether plaintiff while cleaning them was so engaged. It was held that the plaintiff, at the time he was injured, while on his way to his work on an engine provided by the defendant, was in the service of the defendant; that he was engaged when doing his regular work in both interstate and intrastate commerce; that his trip on the engine from Geneva to Thompsons to his work was a necessary incident of his service and of the nature of his work as a whole; and that he was, therefore, at the time engaged in interstate commerce within the meaning of the act. *Lindstrom v. New York Cent. R. Co.*, (1919) 186 App. Div. 429, *affirmed* without opinion, (1920) 230 N. Y. 551.

Employees not within the statute.—A member of a crew of an interstate freight train who is killed while asleep in the caboose of the train and while off duty after the completion of the run, is not engaged in interstate commerce. *Bishop v. Delano*, (C. C. A. 7th Cir. 1920) 265 Fed. 263. The court said:

"In connection with the first writ a bill of exceptions was presented, which consisted of a condensed statement of the evidence. The facts in that bill are fully stated in our former opinion. With the present writ appears a new bill of exceptions which contains a somewhat fuller recital of the testimony. The difference, which is urged as material, is that Myers, conductor of the crew of which Bordner was a member, is now shown to have testified that the crew's 'run was from Montpelier to Chicago and return,' and it is sought from this to have us hold that Bordner was engaged in interstate commerce while he was asleep in the caboose which was being transferred from one point to another in the Chicago yards. But other parts of Myers's testimony agree with all the rest that the 'run from Montpelier to Chicago and return' was not an unbroken period of service; that the crew operated one freight train from Montpelier into Chicago, and an entirely different train on the return part of the run; and that the members of the crew were entitled to have and in fact always did have a period between the sepa-

rate parts of the round trip of at least eight hours' rest, during which they were the masters of their own time and actions.

"Though the defendant knew that Bordner, if he chose, might stay in the caboose during his free period, his doing so was not a requirement of his service. We see no larger ground of liability than if the defendant had permitted Bordner during his time of nonservice to sleep in a station building, and he had there been killed through the negligence of defendant's servants.

"Plaintiff in error calls our attention particularly to *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. ed. 1057, Ann. Cas. 1918B, 662 and Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. ed. 969, decided since we gave our former opinion; but we find in them nothing to militate against our decision.

"Indeed, even if Bordner, having been discharged from his interstate run between Montpelier and Chicago, had been engaged in moving the caboose from one point to another in the Chicago yards, so that the caboose might the following day be attached to an outgoing interstate train on which he was expecting to be called into service, he would not have been engaged in interstate service. *Chicago, B. & O. R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. ed. 941, also decided since our former decision."

A clerk who is killed while acting as a messenger in carrying a coal report from the company's engine house to its telegraph office, is not engaged in interstate commerce within the meaning of this section. *Hines v. Baechtel*, (1921) 137 Md. 513, 113 Atl. 126.

IV. INJURIES TO EMPLOYEES

1. Negligence Generally

a. Basis of Liability (p. 1277)

Negligence of employer as basis.—To same effect as original annotation, see *Cleveland, etc., R. Co. v. Ropp*, (Ind. 1921) 129 N. E. 475.

Necessity of violation of statute for safety of employees.—In *Baltimore, etc., R. Co. v. Wheeler*, (Ind. App. 1920) 129 N. E. 40, it was contended that negligence by the employer could be shown only by proof that it had violated a statute enacted for the safety of its employees. In overruling this contention, the court said:

"The eighth instruction, tendered by appellant and refused, was to the effect that if the appellee's decedent was struck and killed by reason of his negligence, and that appellant had not violated any statute enacted by Congress for the protection and safety of employees engaged in interstate commerce, there could be no recovery. Section 1 of the federal act creates a liability for 'injury or death when such injury or death results from the negligence of any

officer, agent, or employee.' Section 4 provides that—

"'In any action . . . under . . . the provisions of this act . . . such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'

"It is appellant's contention that these two sections must be construed in pari materia, and, when so construed, the negligence of the officer, agent, or employee which gives the right of action must grow out of some violation of a statute enacted for the safety of the employee, by such officer, agent, or employee, which contributed to the injury or death for which suit is brought. This contention cannot be upheld. Section 1 of the act creates a liability in favor of the employee, and abrogates the fellow-servant rule, subject, however, to the doctrine of assumption of risk by the employee. *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441, 38 Sup. Ct. 139, 62 L. ed. 385. Where the carrier violates any statute enacted by Congress for the safety of employees, and thus contributes to the injury or death of such employee, section 4 provides that in such cases the employee shall not be held to have assumed the risk of his employment. Where the injury or death of the employee is brought about by any reason other than the violation of any such statute the doctrine of 'assumption of risk' applies. There was no error in refusing to give the instruction."

d. Defects in Cars, Engines, Appliances, etc.

(1) In General (p. 1280)

Inspection of foreign car.—A carrier sending a foreign car to its car repairers because a draw bar has pulled out is not bound to inspect the car for further latent defects, and is not liable for an injury to a car repairer resulting from the presence of decayed timbers or corroded bolts in the structure of the car. *Berry v. Director General of Railroads*, (Wis. 1921) 180 N. W. 824.

(2) Duty of Carrier as to Place to Work (p. 1280)

Place not under carrier's control.—A carrier is not negligent because of the existence of an open vat of hot water on the premises of a packing company near its tracks, where its workmen going from track to track in the course of the route had a safe path which they could have followed without passing near the vat. *In re Emerson Estate*, (Ia. 1921) 182 N. W. 376.

(5) Particular Acts or Conditions as Negligence (p. 1282)

Placing granite block in insecure position on platform.—In *Corbett v. Hines*, (N. H.

1921) 112 Atl. 796, the plaintiff, a freight handler, was injured while loading granite blocks in a car by one of the blocks falling on him. In holding the railroad company liable because the block was placed in an insecure position on the platform, the court said:

"The argument that the stone fell because of some undisclosed cause, and that therefore there is no evidence of the defendant's fault, ignores the fact that if the stone had been placed in a secure position it would not have fallen. This is shown by the fact that numerous other stones of like size and shape still stood when and after this one fell. The reasonable inference from the situation and what happened is that this stone was not made secure in its position, as it should have been. There was no unusual jar, such as might overcome the equilibrium of a stone that stood firmly. Of course there must have been a sufficient disturbance of some sort to upset the equilibrium that had been maintained since the stone was placed upon the platform. The fact that the disturbance was not noticed is evidence that it was but slight, and the fact that the stone fell because of slight disturbance warrants a finding that it was not securely placed.

"The plaintiff knew that if the block of stone stood insecurely enough it would fall, and that it might be left in that condition. What he did not know, and was not in fault for not knowing, was that this block was in that situation. There was nothing in its appearance to indicate the fact, and he might well assume that the care necessary to insure the safety of those working about it had been taken in placing the stone. It would be a slight matter to determine whether the stone was placed securely or insecurely; but the duty of such ascertainment rested upon the defendant, who placed it there, and not upon the plaintiff, who could rightfully assume that the defendant's duty had been performed. *Tierney v. Granite Works*, 79 N. H. 166, 106 Atl. 481.

"The plaintiff also knew that the ends of the stones were more or less uneven, and that this might cause them to stand insecurely, but it did not appear that it was the practice to trust to the conformation of the stone to insure their stability. The only evidence upon this question was that the truckman who delivered these stones at the freight depot called the attention of the defendant's employee Marston to the fact that one was not standing securely, and Marston trigged it up with a small piece of wood.

"The essential point in the defendant's argument upon the plaintiff's assumption of risk is the claim, as stated in the brief, that the plaintiff 'knew or ought to have known that these stones standing on end must in some instances at least be more or less un-

stable, and that slight pressure would cause them to fall.' It is true that this state of facts might have been found from the evidence, but it is also true that the evidence was not conclusive that the plaintiff did not reasonably believe that the stones had been safely placed, and that the danger which he encountered did not exist."

Duties with respect to track walker.—No duty as to signals, lookout, speed or the like for the benefit of a track walker is ordinarily owed in the operation of a train. *Bennett v. Atchison, etc., R. Co.*, (Ia. 1921) 183 N. W. 424.

e. Violation of Safety Appliance Act as Negligence (p. 1283)

Effect of noncompliance.—Violation of the safety appliance act is negligence per se. *Steward v. Webash R. Co.*, (Neb. 1921) 182 N. W. 496. See also *Flanagan v. Hines*, (1920) 108 Kan. 133, 193 Pac. 1077.

Boiler Inspection Act.—In an action under this act the plaintiff may recover for injuries caused by the violation of the federal Boiler Inspection Act, § 2 [8 Fed. Stat. Ann. (2d ed.) 1200.] *Cochran v. Atchison, etc., R. Co.*, (Kan. 1921) 198 Pac. 685.

Ash Pan Act.—In *Ft. Worth, etc., R. Co. v. Smithers*, (Tex. 1921) 228 S. W. 637, it appeared that the ash pan of a locomotive was so out of order that the cover could not be closed by the use of the lever. A round house employer, failing to close the pan by the lever, started to leave the locomotive cab to go under the locomotive to close it, and in so doing fell by reason of the slippery condition of the floor of the cab. It was held that the violation of the Ash Pan Act [8th Fed. Stat. Ann. (2d ed.) 1199] was the proximate cause of the injury.

f. Effect of Section on Particular Doctrines or Maxims

(1) In General (p. 1283)

The res ipsa loquitur doctrine.—To same effect as original annotation, see *Lamb v. Atlantic Coast Line R. Co.*, (1920) 179 N. C. 619, 103 S. E. 440, wherein the court said:

"It is urged for the defendant that the court in its charge erroneously recognized the doctrine of res ipsa loquitur as applying to the case, and we were referred to numerous decisions of the federal court to the effect that the position in question has no application to cases between employer and employee. These decisions, however, arose prior to the enactment of the Employers' Liability Act or in cases which did not come under its provisions. The position withdrawing cases of employee and employer was due chiefly to the prevalence also of the fellow-servant doctrine by which an employer was relieved from liability for injuries due solely to the negligence of the fellow servant and from the uncertainties as to the cause of

the injury thereby created; the facts in nearly all of the cases indicating the negligence by some fellow servant as the more probable cause of the injury. The statute having, as we have seen, abolished the fellow-servant doctrine, there is doubt if the federal courts will adhere to the distinction adverted to in cases controlled by its provisions. The contrary has been held in *So. Ry. v. Derr*, 240 Fed. 73, 153 C. C. A. 109, and this would seem to be the correct deduction from the premises."

(2) Fellow Servant Doctrine (p. 1284)

In general.—To same effect as second paragraph of original annotation, see *DeBlaur v. Lehigh Valley R. Co.*, (C. C. A. 2d Cir. 1920) 269 Fed. 984; *Cott v. Erie R. Co.*, (1921) 231 N. Y. 67, 131 N. E. 737; *Myers v. Payne*, (Mo. App. 1921) 227 S. W. 633; *Corbett v. Hines*, (N. H. 1921) 112 Atl. 796; *Fields v. Director General of Railroads*, (1920) 86 W. Va. 707, 104 S. E. 767.

Fellow servant need not be engaged in interstate commerce.—To same effect as original annotation, see *Hines v. Keyser*, (C. C. A. 3d Cir. 1920) 268 Fed. 772.

Particular instances—Operating locomotive without lookout.—Where the backing of a locomotive without the fireman acting as a lookout results in a section hand being run over and killed, the case is one of the negligence of a fellow servant and within the purview of this act. *Cervona v. Delaware, etc., R. Co.*, (N. J. 1920) 114 Atl. 14.

Moving train without warning to employee.—Where a train standing in a depot is moved backward without any notice to an employee engaged in removing lamps from the rear of the train with the result that he is killed, such act constitutes negligence under this act. *Grijnuik v. McAdoo*, (N. J. 1920) 113 Atl. 920.

Handling hand car.—The act of a fellow servant in letting go his corner of a hand car, whereby another engaged with him suffers a rupture from the sudden added strain, gives rise to a cause of action under the act. *Karagas v. Union Pac. R. Co.*, (Mo. App. 1921) 232 S. W. 1100.

2. Persons Entitled to Sue

b. Personal Representatives (p. 1287)

Personal representative must sue.—To same effect as original annotation, see *Swank v. Pennsylvania R. Co.*, (N. J. 1920) 111 Atl. 44.

Ancillary administrator—Appointment and powers.—"While ordinarily primary administration should be granted in the state of the intestate's domicile, it cannot be said that the courts of another state, having jurisdiction, must necessarily wait for proceedings to be brought in the domiciliary state,—especially where the only assets in either

state are a right of action for death under the federal act." Thus where a railroad employee, a resident of Massachusetts, is killed in the course of his employment in New York, an administrator appointed in the latter state, prior to any administration of the estate in Massachusetts, has a legal right to bring an action in New York under this act and may compromise the claim. *McCarron v. New York Cent. R. Co.*, (Mass. 1921) 131 N. E. 478.

3. Pleadings

a. In General (p. 1295)

State laws govern in matters of pleading where the suit is brought in a state court. *Ecclesive v. Great Northern R. Co.*, (1920) 58 Mont. 470, 194 Pac. 143.

Joinder of counts.—The plaintiff may join a count under the statute with one at common law, and abandon at the trial that which is unproved. *Miller v. Schaff*, (Mo. 1921) 228 S. W. 488.

Reference to other federal acts.—Though a complaint states specifically that the action is under the Employers' Liability Act and makes no reference to any other act, the Safety Appliance Act, Boiler Inspection Act and the like, are thereby drawn into the case. *Kilburn v. Chicago, etc., R. Co.*, (Mo. 1921) 232 S. W. 1017.

Sufficiency of complaint generally.—See *Cincinnati, etc., R. Co. v. Little*, (Ind. 1921) 131 N. E. 762.

b. Particular Allegations (p. 1301)

That the plaintiff was engaged in interstate commerce must be shown by appropriate allegations of the complaint. *Ecclesive v. Great Northern R. Co.*, (1920) 58 Mont. 470, 194 Pac. 143.

c. Amendments to Pleadings (p. 1302)

In general.—To same effect as original annotation, see *Swank v. Pennsylvania R. Co.*, (N. J. 1920) 111 Atl. 44, wherein it appeared that at the close of the case, but before the court's charge, plaintiff was permitted, over the defendant's objection, to amend the complaint by adding as one who would suffer pecuniary loss, besides the widow, a child, who at the death of plaintiff's intestate was in ventre sa mere, but who was born in the interim between the filing of the complaint and the trial, and also to amend by adding, in addition to the charge in the complaint that "the defendant by its servants and agents failed and neglected to give any warning of the approach of said train," a further allegation setting forth distinctly as an act of negligence that the foreman or person charged with giving notice of the approach of the train failed to give notice. Defendant insisted that these amendments so materially altered the complaint as

to practically charge a different cause of action, and for that reason came within the prohibition of the statute limiting such actions to two years after the cause of action arose. Answering this contention, the court said:

"The power to amend is defined in sections 23 and 24 of the supplement to our Practice Act (P. L. 1912, p. 381), which confers upon the court the power to permit 'before or at the trial the statement of a new or different cause of action in the complaint or counterclaim.' Whether this would permit the statement of a new or different cause of action after the limitation prescribed by statute in which to bring the action had matured, we find it unnecessary to determine, for we do not consider that the amendments amounted to the statement of a new or different cause of action, but merely expanded or amplified what was already alleged in support of the action, and therefore related back to the commencement of the action and were not affected by the intervening lapse of time. *Seaboard Air Line v. Renn*, 241 U. S. 290, 36 Supp. Ct. 567, 60 L. ed. 1006; *Texas & Pacific Ry. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; and *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134. The first amendment did not add a new party to the suit, for the general administratrix remained the sole plaintiff, and all it did was to set forth the child as another dependent of decedent, and the second amendment merely amplified the acts of negligence already complained of, and neither could in any sense be said to state a new or different cause of action."

4. Practice and Procedure

a. In General (p. 1306)

Rules of practice and procedure generally.—To same effect as original annotation, see *Baltimore, etc., R. Co. v. Wheeler*, (Ind. App. 1920) 129 N. E. 40.

Defense as affected by state rule of practice.—In an action under this act a substantive federal defense duly asserted cannot be lessened or destroyed by a state rule of practice. *Brant v. Chicago, etc., R. Co.*, (1920) 294 Ill. 606, 128 N. E. 732.

b. Election (p. 1311)

Between Employers' Liability Act and Safety Appliance Act.—An action to recover damages resulting from death of an employee may be predicated on both the Employers' Liability Act and the Safety Appliance Acts and the plaintiff may go to the jury on as many grounds of recovery as the evidence tends to establish, under proper instructions as to each, without electing between the acts mentioned. *Flanagan v. Hines*, (1920) 108 Kan. 133, 193 Pac. 1077.

e. Form of Verdict (p. 1317)

Special finding as to assumed risk.—A special finding that the plaintiff's intestate "should have known the danger of the act which resulted in his death" does not require the setting aside of a general verdict for the plaintiff. *Schantz v. Northern Pac. R. Co.*, (N. D. 1920) 180 N. W. 517.

5. Evidence

d. Presumptions (p. 1320)

Proof of injury alone creates no presumption of negligence.—To same effect as original annotation, see *Payne v. Bucher*, (C. C. A. 3d Cir. 1921) 270 Fed. 38. See also *Harness v. Baltimore, etc., R. Co.*, (1920) 86 W. Va. 284, 103 S. E. 866; *Southern R. Co. v. Adams*, (Va. 1921) 105 S. E. 566 (finding of body of section hand beside track).

Employee engaged in interstate commerce.—There is no presumption that the duties performed by a railway employee on a train constituted of both interstate and intrastate commerce, were performed in the latter commerce. *Philadelphia, etc., R. Co. v. Polk*, (1921) 256 U. S. —, 41 S. Ct. 518, 65 U. S. (L. ed.) —, reversing (1920) 266 Pa. St. 335, 109 Atl. 627.

e. Burden of Proof (p. 1321)

Employee engaged in interstate commerce.—One asserting a claim or remedy against a railway company under a state workmen's compensation law, growing out of an occurrence in which there are constituents of interstate commerce, is charged with the burden of proving that the employee was, at the time of the injury, actually engaged in interstate commerce, so as to avoid the application of the Federal Employers' Liability Act. *Philadelphia, etc., R. Co. v. Polk*, (1921) 256 U. S. —, 41 S. Ct. 518, 65 U. S. (L. ed.) —, reversing (1920) 266 Pa. St. 335, 109 Atl. 627.

Employer engaged in interstate commerce.— "As for the evidence, it was that plaintiff was moving freight as we have indicated, but neither the origin nor destination of the freight was shown. The burden as to this question was on defendant, since it must be held to knowledge of the actual movement of freight committed to its care. *Osborne v. Gray*, 241 U. S. 16, 36 Sup. Ct. 486, 60 L. ed. 865. It was open, therefore, to the jury to find that the freight which plaintiff was handling was moving in intrastate commerce." *American R. Express Co. v. Compton*, (Ala. 1921) 87 So. 810.

6. Damages

b. Actions for Death

(1) In General (p. 1323)

Recovery against carrier is no bar to an action against a joint tortfeasor. *Moore v. Omaha Warehouse Co.*, (Neb. 1921) 182 N. W. 597.

(2) Pecuniary Loss (p. 1325)

In general.—The measure of damages for death in an action under the federal Employers' Liability Act is the amount which deceased, if he had lived, would have contributed to his beneficiaries, and not the fair cash equivalent of his full yearly earning capacity payable in annual installments until his death. *Fallulah Falls R. Co. v. Davis*, (Ga. App. 1921) 105 S. E. 712.

The essentials to recovery are dependency and pecuniary loss. *Bennett v. Atchison, etc., R. Co.*, (Ia. 1921) 189 N. W. 424, wherein it was said: "We are at a loss to know how the quantum of damages in this case can be ascertained without proof of her life expectancy and without proof of contributions. The federal act limits the recovery to those relatives for whose benefit the administrator sues as are shown to have sustained actual pecuniary loss."

c. Recovery by Widow and Children

(1) In General (p. 1327)

Effect of separation without support.—In *Southern R. Co. v. Miller*, (C. C. A. 4th Cir. 1920) 267 Fed. 376, it was contended that only nominal damages be recovered by an employee's wife in an action for his death, because she and her husband had separated soon after their marriage and he had not contributed to her support. Answering this contention, the court said: "There had been no divorce, and nothing appears to show that she might not at any time have enforced her conjugal rights under the laws of Virginia. This being so, she was entitled to substantial damages, if the jury found in her favor, as seems to be plainly held by the Supreme Court in *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 372, 38 Sup. Ct. 535, 62 L. ed. 1167."

(2) Action by Widow (p. 1330)

Proof of wages paid to other employees in similar positions.—In an action under this act by a widow to recover damages for the death of her husband, it is competent for her to prove what the employer is paying at the time of the trial to employees engaged in exactly the same line of work as that in which the decedent was engaged. *Swank v. Pennsylvania R. Co.*, (N. J. 1920) 111 Atl. 44.

(3) Actions by Children (p. 1330)

Adult children are not, in the absence of proof of actual dependency, entitled to recover for the death of their father. *Hines v. Walker*, (Tex. 1920) 225 S. W. 837.

d. Actions for Death of Son (p. 1331)

Evidence of existence and dependency of parents.—It has been held that there was sufficient evidence to show that the parents as beneficiaries of the action had been injured and had sustained pecuniary loss by the death of their son, where although there

was no direct proof that the decedent's father and mother were living at the time he was killed, there was evidence that the decedent's parents lived in Poland, and that for several years before going into the army the decedent had sent them money monthly and that after leaving the army he had sent them money at different periods, the last being on a date so shortly before his death that the return card of the remittance was not received until after his death. *Smith v. Payne*, (C. C. A. 3d Cir. 1920) 269 Fed. 1.

7. Questions for Court and Jury (p. 1334)

Negligence of carrier.—To the same effect as the original annotation, see *Hines v. Logan*, (C. C. A. 5th Cir. 1920) 269 Fed. 105 (providing safe place to work); *Hines v. Keyser*, (C. C. A. 3d Cir. 1920) 268 Fed. 772; *Director Gen. of Railroads v. Bennett*, (C. C. A. 3d Cir. 1920) 268 Fed. 767 (defective car on track at point of narrow clearance); *Southern R. Co. v. Miller*, (C. C. A. 4th Cir. 1920) 267 Fed. 376 (failure to provide employee with equipment).

Negligence of fellow servants.—In an action under this act the question of the negligence of the fellow servants of the plaintiff's testate is one for the jury to determine. *Reed v. Director General of Railroads*, (N. J. 1921) 113 Atl. 146; *Cervona v. Delaware, etc., R. Co.*, (N. J. 1920) 114 Atl. 14.

Proximate cause of employee's death.—Where there is evidence that the railroad company was negligent in maintaining tall-tales near one of its bridges, the question of the proximate cause of the death of a brakeman who was struck by the bridge and killed, is one for the jury. *Brant v. Chicago, etc., R. Co.*, (1920) 294 Ill. 606, 128 N. E. 732.

8. Appeal and Error (p. 1336)

Power to reduce verdict.—A state appellate court may reduce a verdict and need not reverse and remand in case of an excessive recovery at least in a case where there is no finding of contributory negligence so that the question of comparative negligence does not enter. *Kansas City Southern R. Co. v. Leinen*, (1920) 144 Ark. 454, 223 S. W. 1. And see *Crecelius v. Chicago, etc., R. Co.*, (1920) 284 Mo. 26, 223 S. W. 413, wherein a verdict was reduced though the comparative negligence doctrine had been applied by the jury.

Vol. VIII, p. 1339, sec. 3. [First ed., 1909 Supp., p. 585.]

I. Construction of section.

II. Contributory negligence.

1. In general.

2. Effect on amount of damages.

3. Effect of violation of Safety Appliance Acts.

4. Evidence.

5. Instructions to jury.

6. Questions for jury.

I. CONSTRUCTION OF SECTION (p. 1340)

The distinction between assumed risk and contributory negligence.—To the same effect as the original annotation see *Pryor v. Williams*, (1920) 254 U. S. 43, 41 S. Ct. 36, 65 U. S. (L. ed.) —, reversing (1917) 272 Mo. 613, 200 S. W. 53.

II. CONTRIBUTORY NEGLIGENCE

1. In General (p. 1342)

Negligence of employee as sole proximate cause of injury.—To the same effect as the first paragraph of the original annotation, see *Dahlen v. Hines*, (E. D. Wis. 1920) 267 Fed. 926; *Pittsburgh, etc., R. Co. v. Edwards*, (Ind. 1921) 129 N. E. 310; *Olson v. Chicago, etc., R. Co.* (S. D. 1921) 182 N. W. 454. No degree of contributory negligence, however great, will bar a recovery of any damages. It is only when the plaintiff's act is the sole cause—where the defendant's act is no part of the causation—that defendant is free from liability under the act. *Fitzpatrick v. Hines*, (Neb. 1920) 179 N. W. 410.

In an action for the death of a bridge carpenter it appeared that becoming frightened at the approach of a train he left a place of safety on the pilings of the bridge beside track, attempted to run along the track ahead of the train and was run over and killed. There was no negligence in the management of the train. It was held that his negligence was the sole cause of his death. *Olson v. Chicago, etc., R. Co.*, (S. D. 1921) 182 N. W. 454. And where a brakeman is charged with the sole responsibility of placing cars on a siding, and he leaves them so near another track that there is not clearance, by reason of which fact he is injured while riding on the step of the engine, the situation of the cars being plainly visible to him and the engine being controlled by his signals, his negligence is the sole cause of the injury, though there was no "derailer" at the switch. *Ingram v. Atlantic Coast Line R. Co.*, (1921) 181 N. C. 491, 106 S. E. 565. But where the brakeman who had cut out a car called the attention of the conductor to the fact that it was too close to the main track and was ordered to leave it where it was, the negligence, if any, of the brakeman was not the sole cause of a subsequent injury to him caused by the dangerous proximity of the car to the main track. *Authement v. Louisiana Western R. Co.*, (1920) 147 La. 816, 86 So. 215. And contributory negligence of the employee is not sufficient in itself to defeat an action under this Act if the employer was also guilty of negligence that operated to cause the injury. *Cincinnati, etc., R. Co. v. Little*, (Int. 1921) 131 N. E. 762.

2. Effect on Amount of Damages (p. 1344)

Doctrine as to effect of contributory negligence in general.—To same effect as original annotation, see *Brant v. Chicago, etc., R. Co.*,

(1920) 294 Ill. 606, 128 N. E. 732; *Pittsburgh, etc., R. Co. v. Edwards*, (Ind. 1921) 129 N. E. 310; *Bennett v. Atchison, etc., R. Co.*, (Ia. 1921) 183 N. W. 424; *Howard v. New York, etc., R. Co.*, (1920) 236 Mass. 370, 128 N. E. 422; *Crecelius v. Chicago, etc., R. Co.*, (1920) 284 Mo. 26, 223 S. W. 413; *Greenwell v. Chicago, etc., R. Co.* (Mo. 1920) 224 S. W. 404; *Wagner v. Chicago, etc., R. Co.*, (Mo. App. 1921) 232 S. W. 771; *Stricklin v. Chicago, etc., R. Co.*, (1921) 59 Mont. 367, 197 Pac. 839; *Kansas City, etc., R. Co. v. Estes*, (Tex. 1921) 228 S. W. 1087.

3. Effect of Violation of Safety Appliance Acts (p. 1340)

General principles.—To same effect as original annotation, see *Foley v. Hines*, (1920), 119 Me. 425, 111 Atl. 715.

The question of contributory negligence is immaterial where a violation of the Safety Appliance Acts is shown. *Payne v. Connor*, (C. C. A. 1st Cir. 1921) 274 Fed. 497; *Flanagan v. Hines*, (1920) 108 Kan. 133, 193 Pac. 1077.

Violation of Boiler Inspection Act.—Where the injured employee was not engaged in interstate commerce, the fact that the injury arose from a violation of the Boiler Inspection Act will not prevent the defense of contributory negligence. *Patterson v. Director General of Railroads*, (1921) 115 S. C. 390, 105 S. E. 746.

4. Evidence (p. 1348)

Burden of proof.—Where under a state statute contributory negligence is a matter of defense and the burden of proving it is placed upon the defendant, such statute applies in an action under this Act. *Baltimore, etc., R. Co. v. Wheeler*, (Ind. App. 1920) 129 N. E. 40, wherein it was said: "It is next contended that the court erred in refusing to give instruction No. 1, tendered by appellant, and reading as follows:

"The court instructs the jury that the rights of the plaintiff and the liabilities of the defendant in this case are governed exclusively by the law enacted by the Congress of the United States known as the federal Employers' Liability Law, and no laws of the state of Indiana can have any effect in determining the rights of the plaintiff or the liability of the defendant."

"In order to show that this instruction is not a correct statement of the law, and that there was no error in refusing to give the same, it is only necessary to call attention to the question of contributory negligence, and the burden of proof upon that subject. The right of appellee to recovery is materially affected by section 362, Burns 1914, which provides that in an action for damages brought on account of the alleged negligence of a defendant causing personal injuries or death, it shall not be necessary for the plaintiff to allege or prove the want of contribu-

tory negligence on the part of the plaintiff, or on the part of the person for whose injuries or death the action is prosecuted. Contributory negligence in such cases, under the law of this state, is a matter of defense, and applies to an action in the courts of this state to recover damages under the federal Employers' Liability Act. Except in so far as the act itself modifies or changes the rules of practice and procedure or substantive law, cases arising under the act shall be heard and determined in the state courts in the same manner as would like cases arising under the laws of this state, and in cases like the one now under consideration. The act not defining negligence, and there being no federal common law, it is the common law of the state which must be looked to in determining whether the acts complained of amount to negligence, or whether the injured party was guilty of contributory negligence. While the question as to the existence of contributory negligence is to be determined according to the law of the state, the effect of such negligence, when established, is controlled by the federal law."

5. Instructions to Jury (p. 1349)

Common law count abandoned.—Where a count under the common law is abandoned at the trial and the only remaining count is under the act, no instruction on contributory negligence need be given. *Miller v. Schaff*, (Mo. 1921) 228 S. W. 488.

6. Questions for Jury (p. 1351)

Question not submitted to jury.—Where the record shows that the question whether the damages should have been reduced by reason of the plaintiff's contributory negligence was not submitted to the jury the court on appeal will not disturb the verdict on that ground. *Dunton v. Hines*, (D. C. Me. 1920) 267 Fed. 452.

Defective boiler.—In *Cochran v. Atchison*, etc., R. Co., (Kan. 1921) 198 Pac. 685, evidence held sufficient to sustain a finding that the dropping of the crown sheet of a locomotive boiler was not due to the failure of the injured engineer to keep water in the boiler, was stated by the court as follows:

"It may be true, as defendant claims, that the great preponderance of the evidence showed that leaky stay bolts would not cause the crown sheet to drop, and showed that the accident could not have occurred except for the failure of the engineer to keep a sufficient supply of water on the crown sheet. On the other hand, there was the testimony of the engineer, the fireman, and the rear brakeman, who rode on the engine, that just before the explosion the ejectors were working properly, and that there was a half glassful of water over the crown sheet. The fireman testified that it had not been more than a minute before the explosion that he looked at the water glass, and that it

showed a half glass of water, indicating that the crown sheet was covered to a depth of about four inches; that he looked at the water glass on this trip every five minutes or oftener, and opened the gauge cocks when between stations. This witness also testified that when he received the engine in the morning at the round house he noticed that two or three of the stay bolts were leaking, and that when the engineer sent the telegram two-thirds of the bolts were leaking badly. The jury might have discredited all of the testimony showing that sufficient water was kept upon the crown sheet up to the time it dropped; but the jury did just the contrary, and it must be said that there was sufficient evidence to sustain the finding."

Vol. VIII, p. 1352, sec. 4. [First ed., 1909 Supp., p. 585.]

I. In general.

II. Principles generally as to assumption of risk.

1. In general.

2. Knowledge as affecting.

3. Acts of master or superior as affecting.

4. Negligence of employer.

5. Negligence of fellow servant.

III. Particular employees.

IV. Burden of proof.

V. Questions for court and jury.

I. IN GENERAL (p. 1352)

Construction generally.—To the same effect as the original annotation, see *Payne v. Connor*, (C. C. A. 1st Cir. 1921) 274 Fed. 497; *Foley v. Hines*, (1920) 119 Me. 425, 111 Atl. 715; *Ft. Worth, etc., R. Co. v. Smithers*, (Tex. 1921) 228 S. W. 637 (violation of Ash Pan Act).

Effect limited to terms of act.—To same effect as original annotation, see *De Baur v. Lehigh Valley R. Co.*, (C. C. A. 2d Cir. 1920) 269 Fed. 964; *Smith v. Hines*, (1920) 119 Ms. 442, 111 Atl. 761; *Nagle v. Hines*, (N. J. 1920) 112 Atl. 195; *Wintermute v. Oregon-Washington R., etc., Co.*, (1921) 98 Ore. 431, 194 Pac. 420; *Southern Pac. R. Co. v. De la Cruz*, (Tex. 1921) 228 S. W. 108; *Harness v. Baltimore, etc., R. Co.*, (1920) 86 W. Va. 284, 103 S. E. 866.

Decision of federal court as controlling.—To the same effect as the original annotation, see *Pryor v. Williams*, (1920) 254 U. S. 43, 41 S. Ct. 36, 65 U. S. (L. ed.) —, *reversing* (1917) 272 Mo. 613, 200 S. W. 53.

A violation of Boiler Inspection Act precludes the defense of assumption of risk. *Kilburn v. Chicago, etc., R. Co.*, (Mo. 1921) 232 S. W. 1017.

Pleading.—Though the complaint states specifically that it is founded on the Employers' Liability Act and makes no reference to any other act, the Safety Appliance Act, Boiler Inspection Act and the like are

available to preclude the defense of assumption of risk. *Kilburn v. Chicago, etc., R. Co.*, (Mo. 1921) 232 S. W. 1017.

Instructions.—In *Brant v. Chicago, etc., R. Co.*, (1920) 294 Ill. 606, 128 N. E. 732, it was held that in view of the provisions of this section there was no error in the court giving an instruction to the jury which in substance directed it that public policy does not permit an employer, by contract or written application, to relieve itself from liability for injuries occasioned by its negligence or to impose upon its employees a risk that the law imposes upon the employer.

II. PRINCIPLES GENERALLY AS TO ASSUMPTION OF RISK

1. In General (p. 1355)

Unusual or extraordinary risks.—To same effect as original annotation, see *Director-Gen. of Railroads v. Templin*, (C. C. A. 3d Cir. 1920) 268 Fed. 483.

Although an employee has general knowledge of an extraordinary danger to which he is exposed and has been given some warning, he will not be held to have assumed the risk where the testimony is uncertain as to the time when the warning was given, and as to whether it was calculated to impress him with a real and abiding sense of the peril he was about to encounter. *Southern R. Co. v. Miller*, (C. C. A. 4th Cir. 1920) 267 Fed. 376.

Distinction between assumed risk and contributory negligence.—Assumption of risk and contributory negligence are separate and distinct defenses, and where the evidence raises a question of fact as to assumption of risk it is error to refuse to instruct thereon and to give instructions on contributory negligence. *McAdoo v. Anzellotti* (C. C. A. 2d Cir. 1921) 271 Fed. 268.

Contributory negligence and assumption of risk are distinct although they may rest largely on the same facts. The principle established by the cases is that assumption of risk is an implied condition of the contract between the employer and the employee, while negligence of the employee contributing to his hurt arises from his own tort. *Wintermute v. Oregon-Washington R., etc., Co.*, (1921) 98 Ore. 431, 194 Pac. 420.

2. Knowledge as Affecting (p. 1356)

Actual knowledge or obvious risk.—To the same effect as original annotation, see *McAdoo v. Angellotti*, (C. C. A. 2d Cir. 1921) 271 Fed. 268; See *v. Chicago, etc., R. Co.*, (Mo. App. 1921) 228 S. W. 518.

An employee assumes those risks and dangers which are ordinarily incident to the employment in which he voluntarily engages, but he does not assume extraordinary risks incident thereto, or risks due to the negligence of his employer or of those for whose conduct the employer is responsible, until he becomes aware of such negligent act, de-

fect, or disrepair and of the risk arising therefrom, or unless the danger is so obvious that an ordinarily prudent person, under similar circumstances, would have observed and appreciated it.

Where an employee is without knowledge of such unusual risks, and not chargeable with notice thereof because of their obvious nature, he is under no duty to anticipate and take precautions to discover them, but has the right to assume that the employer has exercised proper care in providing a reasonably safe place and a reasonably safe system or method in and under which to work. *Harness v. Baltimore, etc., R. Co.*, (1920) 86 W. Va. 284, 103 S. E. 866. To same effect, see *McMullen v. Atchison, etc., R. Co.*, (1920) 107 Kan. 274, 191 Pac. 306; *McIntyre v. St. Louis, etc., R. Co.*, (Mo. 1921) 227 S. W. 1047.

No recovery can be had under the federal Employers' Liability Act, by an employee who was injured as the result of defects in a claw bar he was using, where such defects were so obvious that an ordinarily prudent employee would not have used it. *Pryor v. Williams*, (1920) 254 U. S. 43, 41 S. Ct. 43, 65 U. S. (L. ed.) —, *reversing* (1917) 272 Mo. 613, 200 S. W. 53.

Effect of want of knowledge.—To the same effect as the original annotation, see *Hines v. Logan*, (C. C. A. 5th Cir. 1920) 269 Fed. 106; *Fagan v. Central R. Co.*, (N. J. 1920) 111 Atl. 32.

Unsafe place to work.—A railroad telegrapher who, knowing that a box car fitted up as a telegraph office was cold and wet and that the roof leaked, nevertheless consented to work therein, assumed the risk of injury. *Newberry v. Central of Georgia R. Co.*, (M. D. Ala. 1921) 271 Fed. 117.

"Simple tool" doctrine.—A scaffold erected under the direction of a gang boss is not a "simple tool" which the workman using is presumed to understand as well as the employer, and the risk is not assumed in the absence of knowledge of a defect. *Smith v. Hines*, (1920) 108 Kan. 151, 194 Pac. 318.

3. Acts of Master or Superior as Affecting (p. 1357)

No promise to remedy defect.—In *Nickas v. Hines*, (Wis. 1921) 183 N. W. 151, it appeared that a section hand engaged in taking up old ties complained to his foreman that his pick was dull. The foreman said that no others could be had until the tool car came, which it was known would not arrive until several weeks later. The section hand was thereafter injured by reason of the dull pick pulling loose from a tie. It was held that (a) the complaint did not show an apprehension of danger and (b) there was no promise to remedy the defect, so that the risk of continuing work with the dull pick was assumed.

4. *Negligence of Employer* (p. 1359)

Rule stated.—To same effect as original annotation, see *Fagan v. Central R. Co.*, (N. J. 1920) 111 Atl. 32, wherein the court said: "While an employé assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or those for whose conduct the employer is responsible, the employé has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, reasonably safe appliances, and a reasonably safe system or method of work, and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known it."

Order to do dangerous act.—Where the master orders and commands the servant to do an act involving extraordinary danger, the servant is justified in obeying the command, and by so doing does not assume the risk. In such case the risk is taken by the master. *Schantz v. Northern Pac. Co.*, (N. D. 1920) 180 N. W. 517.

5. *Negligence of Fellow Servant* (p. 1361)

Rule stated.—To same effect as original annotation, see *Howard v. New York, etc., R. Co.*, (1920) 236 Mass. 370, 128 N. E. 422; *Reed v. Director General*, (N. J. 1921) 113 Atl. 146.

III. PARTICULAR EMPLOYEES (p. 1362)

Brakeman.—To same effect as first paragraph of original annotation, see *Director Gen. of Railroads v. Templin*, (C. C. A. 3d Cir. 1920) 268 Fed. 483.

A brakeman who is injured by being caught between a car and a fence while standing on the side step of the car when it is being switched into a commercial yard, situated on a spur track from the defendant's main line, must be held to have assumed the risk, where it is shown that he had assisted in switching cars into the yard many times prior to the accident and knew of the proximity of the fence to the track. *Nagle v. Hines*, (N. J. 1920) 112 Atl. 195.

But it cannot be said as a matter of law that a brakeman assumed the risk of injury from being struck by cars kicked at an unusual rate of speed in the yards. *Payne v. Connor*, (C. C. A. 1st Cir. 1921) 274 Fed. 497. Nor does a rear brakeman on a string of cars which is making a gravity switch assume the risk that other brakeman will negligently allow the cars to collide with standing cars so as to throw him off by the shock of the collision. *Louisville, etc., R. Co. v. Porter*, (Ala. 1920) 87 So. 288. So, a trainman does not assume the risk of injury from the negligent act of the engineer in stopping the train with a sudden jar. *Lamb v. Atlantic Coast Line R. Co.*, (1920) 179

N. C. 619, 103 S. E. 440. And an employee lawfully boarding a freight train at a proper place has the right to assume that he will not be subjected to jerks of extraordinary violence, where they are so sudden, unexpected, and unusual as not to be obvious; and whether a particular jerk is one ordinarily accompanying the movement of freight trains, or extraordinary and unusual, generally is a question for the jury to determine. *Harness v. Baltimore, etc., R. Co.*, (1920) 86 W. Va. 284, 103 S. E. 866.

While it was a frequent thing to make up trains by kicking and shoving cars, the switching crew in this instance knew that some member of the train crew would be required to attend to coupling the air hose on the train being made up, and the deceased is not held to have assumed the risk of the sudden and violent propulsion of the cars against him without warning, under the circumstances shown by the record, and which the jury found was done in a negligent manner. *McMullen v. Atchison, etc., R. Co.*, (1920) 107 Kan. 274, 191 Pac. 306.

Engineers.—An experienced railway engineer assumes the risk, under the federal Employers' Liability Act, of any injury that he may receive when leaning outside the cab window by reason of the fact that the end of the arm of a mail crane—a device adopted with the conditions imposed by the Post Office Department—is, when in use, as near to the train as 14 inches, the farthest point at which a bag can be picked up from a crane being 29 inches, and a less distance than that being essential to insure getting the bag. *Southern Pac. Co. v. Berkshire*, (1921) 254 U. S. 415, 41 S. Ct. 162, 65 U. S. (L. ed.) —, *reversing* (Tex. 1919) 207 S. W. 323.

Section men, trackwalkers and repairmen.—In order to safeguard himself from the ordinary dangers of his employment, as the law requires him to do, a track employee is not called upon to seek out and discover extraordinary dangers imposed on him by his employer, but may assume that his employer and his agents have exercised for his safety such care as the circumstances reasonably admit. *Smith v. Payne*, (C. C. A. 3d Cir. 1920) 269 Fed. 1. In this case there was testimony that the engine of the train which struck the decedent was operated by the defendant without a headlight, under conditions of darkness and storm which made it difficult or impossible for the decedent, though on watch for a train, to see it, and for his companion to know of its approach until it had come abreast of him and had struck the decedent. The court said: "If lack of evidence of negligence on the part of defendant was the ground on which the learned trial judge entered judgment of nonsuit, we think he fell into error, for he could not have held as a matter of law, that the operation of a train in a forward movement, at night, without a headlight on the engine,

was an ordinary danger of the trackworker's employment, the risk of which he had assumed."

A section hand does not assume the risk arising from the negligent acts of his foreman. *Swank v. Pennsylvania R. Co.*, (N. J. 1920) 111 Atl. 44.

An employee working under a car on a siding without having a blue flag displayed does not as a matter of law assume the risk of a car being negligently kicked on to the siding and against that under which he is working. *Pendergrass v. Southern R. Co.*, (1920) 114 S. C. 78, 103 S. E. 150.

A trackwalker assumes the ordinary risks of injury from the operation of trains over the tracks which he is required to inspect. *Bennett v. Atchison, etc., R. Co.*, (Ia. 1921) 183 N. W. 424.

An employee entering a round house with which he is familiar and passing between the pits instead of taking a safe path, when the round house was full of steam, assumes the risk. *Wintermute v. Oregon-Washington R., etc.*, (1921) 98 Oregon 431, 194 Pac. 420.

A boiler maker who in violation of a rule attempts to tighten a plug in a locomotive boiler without blowing off the steam assumes the risk. *Flack v. Atchison, etc., R. Co.*, (Mo. 1920) 224 S. W. 415.

A blacksmith's helper using his hands instead of tongs provided for that purpose to place a mold in position under the hammer assumes the risk of injury from the sudden falling of the hammer. *Southern Pac. R. Co. v. De la Cruz*, (Tex. 1921) 228 S. W. 108.

Workman in ditch.—A workman in a ditch was held to have assumed the risk of the bank caving, in *See v. Chicago, etc., R. Co.*, (Mo. App. 1921) 228 S. W. 518, the facts being stated as follows: "The ditch was eight feet deep six feet wide and was across and under defendant's track. Plaintiff had helped dig the ditch. At the point where the dirt fell a place on the side of the ditch had been smoothed for a brace. At the time the dirt fell there was one set of timbers in the ditch and another place prepared to receive the timbers. A huge tile was to be pulled into and along the ditch by means of a rope and plaintiff, together with another man and defendant's foreman, were in the ditch, the plaintiff engaged in getting the rope untangled. Preparations were also being made to put in a set of timbers close to the point where the dirt fell, and this shoring was being done at the time. Plaintiff was an experienced workman, having been engaged therein for five or six years. The wall or side of the ditch was perpendicular, and, while there were no manifestations that the dirt was about to cave off, yet there was nothing to prevent plaintiff from seeing and knowing of the danger or likelihood of a cave-in if such existed. The dirt which fell from the side of the bank fell from the top to the bottom in a cup shape and came to a

feather edge. There was evidence on plaintiff's side that at the time the dirt fell plaintiff had an adz in his hand and was engaged in shoring on that side at the moment the dirt fell."

IV. BURDEN OF PROOF (p. 1363)

General rule—Assumption of risk.—To same effect as first paragraph of original annotation, see *Brant v. Chicago, etc., R. Co.*, (1920) 294 Ill. 606, 128 N. E. 732; *Howard v. New York, etc., R. Co.*, (1920) 236 Mass. 370, 128 N. E. 422; *Corbett v. Hines*, (N. H. 1921) 112 Atl. 796.

Knowledge of danger.—In order to show assumption of risk, it must be established by a preponderance of the evidence that the servant had knowledge of and appreciated the danger incident to the act in the course of his employment about to be performed from which the injury resulted. *Schantz v. Northern Pac. R. Co.*, (N. D. 1920) 180 N. W. 517.

V. QUESTIONS FOR COURT AND JURY (p. 1363)

General rule.—To the same effect as the original annotation, see *Director Gen. of Railroads v. Templin*, (C. C. A. 3d Cir. 1920) 268 Fed. 483; *Brant v. Chicago, etc., R. Co.*, (1920) 294 Ill. 606, 128 N. E. 732; *Cervona v. Delaware, etc., R. Co.*, (N. J. 1920) 114 Atl. 14; *Fagan v. Central R. Co.*, (N. J. 1920) 111 Atl. 32.

Brakeman.—Whether a brakeman assumes the risk of being thrown from a car by the jar resulting from its passing over a defective joint in the track is for the jury. *Miller v. Schaff*, (Mo. 1921) 228 S. W. 488. The court said: "The evidence pertaining to the severity of the usual jolts and impacts in handling trains on a reasonably sound track, and of respondent's knowledge thereof, has nothing to do with the inquiry in this case. Had respondent's foot been thrown from the stirrup by the car he was getting upon striking another in the process of coupling, or had it resulted simply from a stopping of the train reasonably necessary and to be expected, that evidence would have been more relevant. The negligence charged here is that the track was negligently permitted to remain in a highly defective and dangerous condition and that respondent's injury resulted therefrom. We are not prepared to say that a main line track with broken ties, spikes out, little or no ballast, and joints which sink as much as six inches under passing cars, is shown to be a track in usual and ordinary condition for tracks of the kind, and that the jars and jolts resulting from such a condition were assumed by appellant as a matter of law. Respondent was under no duty to inspect appellant's track for defects of the kind which the evidence tends to prove injured him. He was a brakeman and in a department of the service distinct from that of maintenance of

way. He testified he did not know of the low joint at the place of injury until the car struck it. There was evidence tending to show an absence of broken ties or any patent condition of disrepair at this point. In such circumstances, it cannot be said the evidence conclusively proved assumption of risk."

Engineer.—Whether an engineer assumed the risk as an incident to his employment of injury from the carrier's negligence in placing a defective car at a place of admittedly great danger has been held to be a question for the jury. *Director Gen. of Railroads v. Bennett*, (C. C. A. 3d Cir. 1920) 268 Fed. 767.

Round house employee.—Whether a round house employee assumed the risk of falling by reason of the wet and greasy condition of the floor of the locomotive cab in which he was working was, in *Ft. Worth, etc., R. Co. v. Smithers*, (Tex. 1921) 228 S. W. 637, held to be for the jury. The assumption of the risk from the absence of lights in the round house was also held to present a jury question.

Vol. VIII, p. 1364, sec. 5. [First ed., 1909 Supp., p. 585.]

II. APPLICABILITY OF SECTION GENERALLY (p. 1365)

Contract with express messenger.—A common carrier by express which neither owns nor operates a railway, but which, under contract with a railway company, conducts an express business over such railway, the railway company furnishing the express car, the motive power, and the train operatives, and the express company paying for this service, is not a "common carrier by rail road," and, therefore, not affected by the provision of this section, invalidating any contract whereby a carrier subject to that act exempts itself from any liability under it. Thus, an express messenger in charge of express matter which a railway is transporting under a contract with the express company may validly stipulate, as a condition of his employment by the express company, that neither that company nor the railway company shall, under any circumstances or in any case, be liable for any injury which he may receive while on the railway company's trains as such messenger, whether caused by the negligence of the railway company or otherwise, and that he will assume all and every risk incident to such employment, from whatever cause arising, thereby assenting to the contractual arrangement between the two companies exempting the railway company from liability for such injuries, and obligating himself to the express company to refrain from asserting any liability against it or the railway company on account of any such injuries. *Wells Fargo & Co. v. Taylor*, (1920) 254 U. S. 175, 41 S. Ct. 93, 65 U. S. (L. ed.) —, reversing

(C. C. A. 5th Cir. 1919) 249 Fed. 109, 161 C. C. A. 161.

Vol. VIII, p. 1369, sec. 6. [First ed., 1912 Supp., p. 335.]

- I. Limitation of action.
- II. Jurisdiction and venue.
- III. Removal to federal court.

I. LIMITATION OF ACTION (p. 1370)

Time of accrual of cause of action.—Where a suit to recover damages for the homicide of an employee of a railway company is brought under this section, by the administratrix of the deceased employee, the action is barred by the statute of limitations, where it was commenced more than two years after the date of the homicide sued for, but within two years from the date of the appointment of the administratrix. *Seaboard Air Line Ry v. Brooks*, (Ga. 1921) 107 S. E. 878.

Application of Each-Cummins Act.—The provision of the Act of Feb. 28, 1920, ch. 91, sec. 206 (f) [1920 Supp. Fed. Stat. Anno. 79] that "the period of federal control shall not be computed as a part of the periods of limitation in actions against carriers, or in claims for reparation to the commission for causes of action arising prior to federal control," does not apply to actions under this Act. *Jones v. Delaware, etc., R. Co.*, (N. J. 1921) 114 Atl. 331.

Introducing barred cause by amendment.—Where after the removal of an action for negligence it is sought by amendment to bring the cause within the Federal Employers' Liability Act, the limitation prescribed by this section will apply if the time stipulated has elapsed. *Newberry v. Central of Georgia R. Co.*, (M. D. Ala. 1921) 271 Fed. 117, wherein it was said: "While ordinarily a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduces new matter or a different cause of action not within the *lis pendens* as to which the statute of limitations has operated a bar at the time of making the amendment, the statute of limitations is as available as if the amendment were a new and independent suit. * * *

"Section 6 of the federal Employers' Liability Act provides that:

"'No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.'

"More than two years had elapsed before the rejected amendment to the complaint was offered. Manifestly this limitation of two years applies here, where the complaint made in the state court alleged no facts to bring the case within the purview of the federal Employers' Liability Act, and more than two years had elapsed after the cause

of action arose and before the amendment was offered."

II. JURISDICTION AND VENUE (p. 1372)

Concurrent jurisdiction of state and federal courts.—To same effect as first paragraph of original annotation see *Miner v. Chicago, etc., R. Co.*, (1920) 147 Minn. 21, 179 N. W. 483.

Effect of failure of cause of action under statute.—Where a cause of action under the federal statute fails in an action in a state court, judgment may be rendered under the state law despite the fact that the defendant is a nonresident corporation and was deprived of the right of removal by the joinder of the cause of action under the federal act, provided the joinder was in good faith and not merely to defeat removal. *Polluck v. Minneapolis, etc., R. Co.*, (S. D. 1921) 183 N. W. 859.

Requiring dismissal of suit in another state.—In view of the concurrent jurisdiction given by this section, the probate court of a state may require an administratrix appointed by it to dismiss a suit brought by her under the act in another state, on the ground that the public policy of the appointing state, declared in a statute, forbids the solicitation of personal injury suits to be prosecuted outside the state, where the defendant resides therein. *In re Spoo's Estate*, (Ia. 1921) 183 N. W. 580.

III. REMOVAL TO FEDERAL COURT (p. 1374)

Removal prohibited for any cause.—To the same effect as original annotation, see *Newberry v. Central of Georgia R. Co.*, (M. D. Ala. 1921) 271 Fed. 117.

Diverse citizenship.—To same effect as first paragraph of original annotation, see *Miner v. Chicago, etc., R. Co.*, (1920) 147 Minn. 21, 179 N. W. 483.

Vol. VIII, p. 1378, sec. 9. [First ed., 1912 Supp., p. 335.]

Venue of action.—An action for death under this section may be brought in the state where the workman resided though the fatal injury was received in another state. *St. Louis Southwestern R. Co. v. Smitha*, (Tex. 1921) 232 S. W. 494.

Vol. VIII, p. 1383, sec. 1. [First ed., 1909 Supp., p. 581.]

Construction.—This statute provides penalties, and therefore is, perhaps, within the rule as to strict construction in respect to its interpretation; yet, it being one based upon public policy and in the interest of greater public safety, its provisions will not be so technically and narrowly defined as to destroy the leading and manifest purpose of Congress. *U. S. v. Boston, etc., R. Co.*, (O. C. A. 1st Cir. 1920) 269 Fed. 89 (*reversing* *D. C. Mass. 1920*) 265 Fed. 800).

The phrase "movement of any train," as used in this section, applies to movements of trains in railroad yards for the purpose of switching cars as well as to movements of trains over main-line tracks. Hence, a brakeman engaged in connection with an engine in moving cars in and about a railroad yard for the purpose of making up trains, comes within the scope of the Act. *Pennsylvania R. Co. v. U. S.*, (C. C. A. 3d Cir. 1920) 265 Fed. 609. The court said: "The railroad company's sole insistment is that the act applies only to movements of trains over main-line tracks, and not to mere yard movements, such as were made in this case. In construing the act, it must be borne in mind that its purpose, as expressed in its title, was to promote the safety of employees, as well as travelers, upon railroads. Of course, in carrying out this purpose, the mischief sought to be avoided was the mental and physical exhaustion of employees liable to result from permitting or requiring them to remain on duty for excessive lengths of time. The act provides that the term 'railroad,' as used in the act, shall include 'all the road in use by any common carrier operating a railroad.'

"As is well pointed out in the opinion of the learned judge of the court below, no train is excluded from the provisions of the act, except wrecking or relief trains, and there is no limitation as respects the kind of movement or the place in which it shall be made. In this situation, bearing in mind the purpose of the legislation and appreciating that men may as easily become exhausted by overwork in the movement of trains in and about yards as they may in so-called main-line movements, and thus imperil their own, as well as the safety and lives of others, we would have no hesitation, even if we considered this a case of first impression, in holding that Lathero, while at work in the Altoona yards, was engaged in or connected with the movement of a train, and hence that the railroad company is subject to the penalty prescribed in the act for a violation thereof. As was said by Mr. Justice Lurton in *Chicago, Ind. & L. Ry Co. v. Hackett*, 226 U. S. 559, 564, 33 Sup. Ct. 581, 584 (57 L. Ed. 906), in construing a statute of Indiana, to hold that yard movements such as were made in the Altoona yard were not movements of a train 'would be to make the act meaningless as to the most dangerous class of work which falls to the lot of railroad employees.'

"But we are also of the opinion that the question has been set at rest by the decision of the Supreme Court in *United States v. Brooklyn Terminal*, 249 U. S. 296, 307, 39 Sup. Ct. 283, 63 L. Ed. 613, where it was held that crews engaged in moving a locomotive with 7 or 8 cars between docks of the Brooklyn Eastern District Terminal and its warehouses or team tracks, a distance of over a mile, were engaged in the movement of a train within the act in question, al-

though there was no main-line movement, in the sense that the train was made up and moved over the main-line tracks as distinguished from yard tracks. It is sought to distinguish that case from the case at bar upon the ground that in the former the crews were not engaged in yard work, but in a part of main-line transportation. We are unable, however, to see any such distinction; if there is any, it is in theory rather than fact. In our judgment, the employees in that case were engaged in yard movements quite as much as was the employé in the case at bar.

"Although a distinction has been drawn in the cases as to one of the sections of the federal Safety Appliance Acts (27 Stat. 531; 29 Stat. 85; 32 Stat. 943; 36 Stat. 298,) between a train consisting of an engine and cars which have been assembled and coupled together for a run or trip along the road, and movements in railroad yards, whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains, which have completed their run, are broken up, and the latter held not to be within the provisions of those acts (U. S. v. Erie R. R. Co., 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019), yet, as pointed out by the Supreme Court in the Brooklyn Terminal Case, and by the Circuit Court of Appeals of the Second Circuit, when that case was before it (Brooklyn Eastern District Terminal v. U. S., 239 Fed. 297, 290, 152 C. C. A. 275), those decisions are not applicable to cases arising under the Hours of Service Act."

Vol. VIII, p. 1387, sec. 2. [First ed., 1909 Supp., p. 582.]

- I. Purpose and scope.
- II. Constitutionality and construction.
- V. Employees within act.
- VI. "On duty."
- VII. Night and day offices.

I. PURPOSE AND SCOPE (p. 1388)

Purpose.—"The controlling purpose of Congress in the enactment of this statute was the protection of the lives of the traveling public, by preventing the employment of men charged with responsible duties as to movements of trains by telegraph or telephone for so long a time as to render them incapable of performing their duties efficiently." U. S. v. New York, etc., R. Co., (C. C. A. 1st Cir. 1921) 274 Fed. 321.

"The statute was intended to promote the safety of employees and the traveling public by affording sufficient time for recreation and rest, so that small periods during their hours of duty for meals would not offer any opportunity for rest as contemplated." U. S. v. Cornwall, etc., R. Co., (M. D. Pa. 1920) 268 Fed. 680.

While the leading idea of the statute is the limitation of hours, Congress sought to

make its purpose operative by a classification based upon night and day service. U. S. v. Boston, etc., R. Co., (C. C. A. 1st Cir. 1920) 269 Fed. 89 (*reversing* (D. C. Mass. 1920) 265 Fed. 800).

Circumstances of each case control.—Each case must be decided on its own peculiar conditions, since what might under some circumstances be such a period of release as would break the continuity of service and afford such an opportunity for rest and release from responsibility from mental tension as it is the purpose of the act to secure, might be insufficient under other circumstances. U. S. v. New York, etc., R. Co., (C. C. A. 1st Cir. 1921) 274 Fed. 321. In this case the court held that the operator was not employed more than nine hours in a twenty-four hour period where the following facts were shown: Upon the days in question this operator went on duty at 4 p. m. and remained until from 7:20 to 7:27 p. m., when he was released from duty by the train dispatcher to return at periods varying on the different days from 8:35 p. m. to 9:20 p. m., during which time he was not subject to any call, nor required to remain upon the railroad premises, and could do what he chose with his time, which he employed, as he testified, sometimes in sleeping, sometimes in reading, and sometimes attending the theater. After this definite release he returned to his post and remained to an hour varying from 10 p. m. to 10:14 p. m., when he was again definitely released, under the same conditions, by the train dispatcher from service on 1 day until 12:15 a. m., and upon the other 4 days until 12:30 a. m., and after his return to duty at the end of the second period of release he remained on duty until 12:52 a. m. upon 2 of the days in question, 12:55 a. m. upon 2 others, and 12:58 upon the fifth, when he received a third release from duty until 3 o'clock a. m. upon two days, 3:05 a. m. upon the third day, 3:20 a. m. upon the fourth day, and 2:45 a. m. on the fifth day, and after his return to duty at the expiration of this release he remained at his post until 3:35 a. m. on one day, 3:58 a. m. upon the second day, 3:41 a. m. the third day, 4:10 a. m. the fourth day, and 3:55 a. m. the fifth day. Upon these days the aggregate of his actual service varied from 5 hours 13 minutes upon one day to 6 hours 9 minutes upon another, and his periods of release aggregated from 5 hours 46 minutes to 6 hours 41 minutes.

II. CONSTITUTIONALITY AND CONSTRUCTION (p. 1389)

Construction.—In interpreting this provision it must be given such reasonable, sensible construction as will promote its beneficial purpose and effect the intention of the Congress that enacted it. U. S. v. Cornwall, etc., R. Co., (M. D. Pa. 1920) 268 Fed. 680.

V. EMPLOYEES WITHIN ACT (p. 1391)

Bridge tender.—A person who is employed by an interstate railroad as a bridge tender and who is injured while instructing a co-employee in his duties, is within the scope of this act. *Desmond v. Boston, etc., R. Co.*, (Mass. 1921) 129 N. E. 596.

VI. "ON DUTY" (p. 1396)

Dividing hours of service.—In *U. S. v. Boston, etc., R. Co.*, (C. C. A. 1st Cir. 1920) 269 Fed. 89, it was said: "We think the significant idea and the real purpose of Congress was to declare that telegraph and telephone operators should not be kept at the post of duty more than 9 hours out of the 24 in night and day service, and, that being the public policy sought to be enforced, that the purpose should become operative, unless the terms of the statute are so indefinite and uncertain as to defeat it."

"According to the agreed statement in the case before us, the operators were relieved from duty for certain periods. But still the hours of service during the 24 exceeded 9 hours, and we think the reliefs under a description so general as that of the agreed facts should be viewed as negligible intermissions (*United States v. Grand Rapids & I. R. Co.*, 224 Fed. 667, 140 C. C. A. 177) or as said in *United States v. Atchison, T. & S. F. R. Co.*, 220 U. S. 37, 44, 31 Sup. Ct. 362, 55 L. 361, 'trifling interruptions,' not to be considered, and not as such rest from the strain of excessive hours of duty as to defeat the operation of the statute, which declares that no operator shall be permitted to remain on duty for a longer period than 9 hours in any 24."

Continuity of service—Period allowed for meals.—To same effect as original annotation, see *U. S. v. Cornwall, etc., R. Co.*, (M. D. Pa. 1920) 268 Fed. 680.

Relieved train crew riding on train.—The members of a relieved train crew are not "on duty" within the meaning of this act when they are riding on one of their employer's trains from the point where they were relieved to a nearby town. *Payne v. Industrial Commission*, (1921) 296 Ill. 223, 129 N. E. 830.

VII. NIGHT AND DAY OFFICES (p. 1400)

In general.—Regarding what constitutes night offices and day offices within the meaning of this section, the court in *U. S. v. Boston, etc., R. Co.*, (D. C. Mass. 1920) 265 Fed. 800, said: "The meaning of the statute, as has been pointed out (*U. S. v. Atchison, T. & S. F. R. Co.*, 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361; *U. S. v. Atlantic Coast Line R. R. Co.*, 211 Fed. 897, 123 C. C. A. 275), is far from clear. It divides stations or places into those that are 'continuously operated night and day' and those 'operated only during the daytime.' Giving the language its ordinary meaning, it is evident that there might be, and in fact there are,

places operated longer than 'during the daytime,' but which are not 'continuously operated night and day.' As everybody knows, many stations in country districts are kept open for the public convenience during the early hours of the evening as well as during the daytime, observing roughly the same hours of opening and closing as stores in their vicinity. The railroad agent at these places not infrequently does such telegraphic work as the business of the railroad requires, in addition to his other duties.

"It is settled that the expression 'continuously operated night and day' is to be understood as including stations which are closed part of the night, if they are operated during the daytime and a substantial portion of the night. *U. S. v. Atchison, etc.*, supra. The same decision makes it clear that the mere keeping open of a station after 6 p. m. does not bring it within the 9-hour class. As applied to the case before me, the most significant word in the act is 'night.' Unless an office be operated in the night, as well as during the day, the 9-hour limitation does not apply."

"What constitutes night operation is a question of fact. The division into day and night which the statute contemplates apparently refers to the business day; e. g., 'a day watchman' and 'night watchman,' 'day shift' and 'night shift.' It would hardly be contended that a station kept open in the early evening primarily as an accommodation to the public was 'operated' during the night. On the other hand, if kept open after hours when the public which it served would be likely to do business with it, and for purposes connected with the running of trains, it would be a night office."

"Nine o'clock in the evening is evidently on the border line. In such cases it seems to me that the purpose for which the station was kept open is the decisive factor. If it be primarily for the accommodation to the public, the station would not, I think, be operated at night within the statute. This seems to me to be what Congress intended. 'Operated,' in the statute, signifies more than 'kept open.' The very looseness of the language was perhaps not unintentional. It is to be remembered that too severe limitation on hours of service at small stations will result in their being closed, thereby inconveniencing the public, without any corresponding advantage."

"The agreed statement throws no light on the purpose for which the stations in question were kept open during the evening, nor on the sort of work then done at them. It devolves on the plaintiff to establish the facts essential to recovery."

"Stations continuously operated night and day."—This phrase should not be taken in its strict sense as meaning every moment of the time either of the day or of the night. *U. S. v. Boston, etc., R. Co.*, (C. C. A. 1st Cir. 1920) 269 Fed. 89.

"It appears that, where an office is open such a length of time as to require more than one operator with a 13-hour period, then, there being two or more operators require to complete such period, 9-hour periods would become practicable. And such, indeed, was the view of the Interstate Commerce Commission, the administrative body charged with the enforcement of the act, who, on March 8, 1908, made a ruling—287(g):

"The commission interprets the phrase 'continuously operated night and day' as applying to all offices, places, and stations operated a portion of the day and a portion of the night, a total of more than 13 hours. The phrase 'operated only during the daytime' refers to stations which are operated not to exceed 13 hours in a 24-hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime."

"It has been repeatedly decided that the ruling of an administrative body charged with the enforcing of a law is not lightly to be disregarded, but is entitled to great weight." *U. S. v. Cornwall, etc., R. Co.*, (M. D. Pa. 1920) 268 Fed. 680.

The words "night" and "day" were apparently used in a general sense, and not in the sense that, in and of themselves, the words were to be accepted as arbitrarily decisive of a classification based strictly upon a division between night and day. This seems obvious, because the word "night," in its common acceptance, means the dark half of the day; that part of the complete day during which the sun is below the horizon; the time from sunset to sunrise; while "day" means the period during which the sun is above the horizon; the interval of light, in contradistinction to that of darkness, or to night. And the division between day and night which the statute contemplates does not refer to the business day established by the railroads, based upon shifts in respect to day watchman and night watchman, and similar rules and regulations of railroads. *U. S. v. Boston, etc., R. Co.*, (C. C. A. 1st Cir. 1920) 269 Fed. 89.

Offices "operated only during the daytime."—An office open fifteen hours a day in winter and sixteen and a half hours in summer is not such an office as was contemplated by Congress in the term "operated only during the daytime." But an office may be operated a portion of the night and a portion of the day and yet fall beneath the class which is called "daytime" offices. *U. S. v. Cornwall, etc., R. Co.*, (M. D. Pa. 1920) 268 Fed. 680, wherein the court said:

"It is reasonable to suppose that Congress intended in general to include in the 'daytime' class such offices as had the lighter business, which could be readily handled by one operator, and to include in the 'night and day' class those offices which had such amount of business as would require several operators, in which case only would it be

practical to have a 9-hour limit. Therefore in the former class the 13-hour period was allowed; in the latter, only a 9-hour period."

Vol. VIII, p. 1406, sec. 3. [First ed., 1918 Supp., p. 756.]

V. Excuses for excess of service.

3. "Casualty or unavoidable accident."

VII. Evidence.

V. EXCUSES FOR EXCESS OF SERVICE

3. "*Casualty or Unavoidable Accident*" (p. 1411)

In general.—A delay to a train by an unavoidable accident is not a license to a carrier for any officer or agent to keep the crew of such train on duty over 16 hours. To excuse such service it must be shown that the officer or agent made at least some effort to avoid excess service. *U. S. v. Geer*, (W. D. Pa. 1920) 268 Fed. 385.

Unavoidable accident.—In an action under this act for the recovery of penalties it has been held that a judgment for the defendant is proper where among the facts found by the court below and set down in its special findings were these: That the delays of the three trains on account of which the employees were detained in service more than 16 consecutive hours were caused by unavoidable accidents, which were the results of causes not known to the carrier or its officers or agents in charge of the employees at the times they respectively left the terminals; that these causes and accidents could not have been foreseen; that the detention of these employees on these trains on duty more than 16 hours was caused wholly by these accidents; and not that the keeping of them on duty for more than 16 consecutive hours could not have been avoided by the defendant by the exercise of reasonable diligence after the respective accidents. *U. S. v. Atchison, etc., R. Co.*, (C. C. A. 8th Cir. 1921) 270 Fed. 1.

Adding time of delay to statutory period.

—A railroad company does not have the right to add the time the respective trains were delayed by accident or casualty to the sixteen hours that the employees might be held in service. *Denver, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 63.

VII. EVIDENCE (p. 1416)

Burden of proof.—Where the original delay of a train was caused by unavoidable accidents or casualties the burden of proof was on the railroad company to show that it exercised the required diligence to relieve the crews and to prevent the excess service of its employees. *Denver, etc., R. Co. v. U. S.*, (C. C. A. 8th Cir. 1920) 270 Fed. 63.

"Excess service may be justified under the facts, but the excuses embodied in the proviso are separate and affirmative defenses which must be specially pleaded and estab-

lished." *U. S. v. Geer*, (W. D. Pa. 1920) 268 Fed. 385.

Admissibility on cross-examination.—An objection to a question on cross-examination of the superintendent of the defendant as to a delay on another date than that specified in the action is properly sustained where no evidence in regard thereto had been brought out on his direct examination. *U. S. v. Atchison, etc., R. Co.*, (C. C. A. 8th Cir. 1921) 270 Fed. 1.

Vol. VIII, p. 1418, sec. 4. [First ed., 1909 Supp., p. 584,]

Interpretations and regulations of Interstate Commerce Commission.—While the act in question provides for suits by the United States for recovery of the penalties provided, its enforcement is largely committed to the Interstate Commerce Commission, because it is expressly provided that such commission shall execute and enforce its provisions, and all powers are extended to such commission, together with the power to extend the period within which common carriers shall comply with its provisions, and therefore, while interpretations and regulations of the Interstate Commerce Commission are not conclusive upon courts, in view of the concurrent power and responsibility contemplated by the statute, due weight should be given to the interpretations of its terms by that tribunal. *U. S. v. Boston, etc., R. Co.*, (C. C. A. 1st Cir. 1920) 269 Fed. 89.

1918 Supp., p. 754, sec. 1. [*Eight-hour day.*]

Contract rate for ten hours held recoverable for eight hours, see *Arizona, etc., R. Co. v. Foley*, (C. C. A. 9th Cir. 1921) 274 Fed. 516.

1918 Supp., p. 757, sec. 1.

Purpose of act.—See *Wilson v. Central Vermont R. Co.*, (Mass. 1921) 131 N. E. 169.

Order of Director General to cancel ratings on silk held to present judicial question and preliminary injunction was granted. *Cheney v. Hines*, (C. C. A. 2d Cir. 1920) 266 Fed. 310.

Regulation limiting recovery for loss of baggage.—"The authority of the Director General of Railroads to promulgate a baggage regulation limiting the amount of recovery to \$100, where no value is declared on intrastate as well as interstate transportation, the sufficiency of the notice of the regulation, and every objection raised to the application of the Federal Control Act have been settled by decisions of the Supreme Court adversely to the plaintiff's claim. . . . *Northern Pacific Railway Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. 897; *Hines v. Burnett*, (Va. 1921) 107 S. E. 657."

"Railroads and systems of transportation."—In *Hines v. Dahn*, (C. C. A. 8th Cir.

1920) 267 Fed. 105, the court, in discussing the meaning of the words "railroads and systems of transportation," as used in this and other sections of the Federal Control Acts, said:

"We do not think there can be any doubt about the meaning of the words 'railroads and systems of transportation' as used in the several acts of Congress and the proclamation of the President. In our judgment they refer only to the physical properties which constituted the system or systems. The system is composed of the roadbed, tracks, engines, cars, and other appurtenances which are used in the transportation of passengers and freight from one place to another. The system is entirely distinct from the corporate entity which may own or manage the system. The President had no authority, nor did he pretend by the language of his proclamation, to take over the railroad corporation or corporations, which owned the several systems. The whole Federal Control Act is opposed to any such interpretation, because it provides for the payment to the different corporations of a compensation for the use of the several systems and elaborate provisions are made for the protection of the rights of both parties. The United States owned no railroad stock and did not seek to obtain control of the railroad corporations. The fundamental idea underlying the decision of the United States to take control of the systems was that it was necessary so to do in order that the great task of transporting troops, munitions, and supplies might be carried on by the different systems to the exclusion of all other traffic if necessary. Any further control than to accomplish this object was not needed, sought, or obtained."

Effect of federal control.—"The railroad properties within the continental United States, while federal control lasted, were organized into a unified national system of transportation under a single head, the Director General of Railroads." *Globe, etc., F. Ins. Co. v. Hines*, (C. C. A. 2d Cir. 1921) 273 Fed. 774.

Legislation and the powers conferred on the President, and through him upon the Director General, the government in no sense became a common carrier, but exercised control over the carriers to the end that said systems of transportation be utilized for the transportation of troops, war material, and equipment to the exclusion, so far as may be necessary, of all other traffic thereon. *U. S. v. Geer*, (W. D. Pa. 1920) 268 Fed. 385.

Act as suspending Safety Appliance Acts, etc.—"Keeping in view the purpose, and only purpose, of the legislation, it would be very anomalous if the existing acts of Congress, such as the safety appliance acts, the hours of service acts, and others passed solely for the purpose of protecting the public, should be held to be suspended or

repealed, and that the nation could not thus exercise the extraordinary powers of government for national preservation without temporarily invalidating the existing legislation passed for the protection of the traveling public." *U. S. v. Geer*, (W. D. Pa. 1920) 268 Fed. 385.

Act as suspending state control over intrastate rates.—See *Public Service Commission v. New York Cent. R. Co.*, (1920) 230 N. Y. 149, 129 N. E. 455, 14 A. L. R. 449.

Suits for money due from government under act.—See *Wilson v. Central Vermont R. Co.*, (Mass. 1921) 131 N. E. 189.

Right of action against railroad.—Where at the time the cause of action arose for injuries caused by a collision the railroad was being operated by the Director General of Railroads, the liability if any for such injuries was held to be on the Director General and a demurrer to an action against the railroad company was sustained. *Galehouse v. Baltimore, etc., R. Co.*, (N. D. Ohio 1921) 274 Fed. 370.

In *Morgan's Louisiana, etc., R., etc., Co. v. Johnson*, (C. C. A. 5th Cir. 1921) 274 Fed. 207 it was declared: "The alleged cause of action arose while the government was operating the lines of railroad of the defendants, and the suit was brought after the promulgation of General Order No. 50 of the United States Railroad Administration, which required such a suit to be brought against the Director General. The question of the right of the plaintiff to maintain the suit against the defendants, or either of them, was duly raised, and the action of the court in allowing the recovery complained of is duly presented for review. The court erred in overruling the objections of the defendants to the maintenance of the suit against them."

In *Erie R. Co. v. Caldwell*, (C. C. A. 6th Cir. 1920) 264 Fed. 947, it was said: "The Director General of Railroads having lawfully taken full possession and control of this company's property, the company itself could not be liable for negligence resulting in injury to employees or others during the time its property was being operated by governmental agencies over which it had no control."

But no liability exists and no action can be maintained against the Director General of Railroads on a cause of action arising prior to the period of federal control. An action for such a cause must be brought against the railroad. *Standley v. U. S. Railroad Administration*, (N. D. Ohio 1920) 271 Fed. 794.

Jurisdiction of prosecution for larceny.—A state court has jurisdiction of a prosecution for larceny of goods en route on a railroad under federal control. *State v. Ferree*, (W. Va. 1921) 107 S. E. 126.

1918 Supp., p. 760, sec. 3.

Termination of power of board.—The power of a board organized under this sec-

tion terminates with the end of federal control, though the dispute before it is one with employees and provision is made in the Transportation Act of 1920 [1920 Supp. Fed. Stat. Ann. 72 et seq.] for the board to try such disputes. *Gregg v. Stark*, (1920) 188 Ky. 834, 224 S. W. 459.

1918 Supp., p. 762, sec. 10.

Repeal of section.—While this section expressly provides that actions might be brought by and against carriers, and judgments rendered "as now provided by law," that provision was subsequently nullified by General Order No. 50, which directed that actions should be brought against the Director General. *Globe, etc., F. Ins. Co. v. Hines*, (C. C. A. 2d Cir. 1921) 273 Fed. 774; *Blevins v. Hines*, (W. D. Va. 1920) 264 Fed. 1005.

Effect of act on state laws as to rates.—Where a railroad was required by the state law to carry passengers between certain points within the state at a rate not exceeding two cents per mile, it was held that an order of the Director General of Railroads issued under this section increasing the rate of carriage of passengers both interstate and intrastate to three cents per mile was a constitutional exercise of the war power of Congress. *New York Cent. R. Co. v. Public Service Commission*, (N. D. N. Y. 1920) 268 Fed. 558, wherein it was further held that this Act did not repeal, but merely suspended, a state statute regulating intrastate passenger rates and that on the termination of federal control the state continued to control the rates *ex proprio rigore*.

General orders 18 and 18a are invalid. *St. Louis Southwestern R. Co. v. Turner*, (Tex. 1920) 225 S. W. 383; *Young v. Hines*, (Mo. App. 1921) 229 S. W. 417; *Hill v. Seaboard Air Line R. Co.*, (1920) 180 N. E. 428, 105 S. E. 19.

General order 50 is invalid. *American R. Express Co. v. Compton*, (Ala. 1921) 87 So. 810; *Hines v. Mauldin*, 146 Ark. 170, 225 S. W. 639; *Kansas City Southern R. Co. v. Rogers*, (1920) 146 Ark. 232, 225 S. W. 640; *Parkinson v. Chicago, etc., R. Co.*, (1920) 43 S. D. 161, 178 N. W. 293; *Pullman Co. v. Uribe*, (Tex. 1920) 225 S. W. 189; *Beebe v. Minneapolis, etc., R. Co.*, (Wis. 1921) 182 N. W. 743.

"General Order No. 50, promulgated by the Director General, October 28, 1918, directing that actions at law, suits in equity and other proceedings thereafter brought in any court based on contract binding upon the Director General, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917, growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against

William G. McAdoo, Director General, and not otherwise, is an interpretation of the laws regulating Federal Control of Railroads by that department of the government charged with the duty of executing the same, and such interpretation has always been regarded by the courts with great respect." *Hines v. Dahn*, (C. C. A. 8th Cir. 1920) 267 Fed. 105.

Proceedings in admiralty not excluded by this section, see *Hines v. Sangstad Steamship Co.*, (C. C. A. 1st Cir. 1920) 266 Fed. 502.

Right to sue in name of Director General.—The act and the rules promulgated by federal authority in pursuance thereof, did not intend either to extinguish or impair, but, on the contrary, expressly preserved, the rights of parties to prosecute to judgment, in the name of the Director General of Railroads any cause of action against the railroad companies to which they as parties were entitled under the federal, state, or common law. *Rose v. Hines*, (1920) 25 Ga. App. 791, 104 S. E. 794.

When the carrier in question was at the time of the shipment operated by the United States government through an officer called "Director General of Railroads," suits for the freight were properly brought in the name of that official against the party or parties, whether consignor or consignee, or both, who procured the transportation to be made. *Clemons v. Payne*, (Ga. App. 1921) 105 S. E. 623.

Suits against Director General—Liability for fire damage.—The Director General is liable for personal injury to one burned while attempting to put out a fire started by a locomotive not equipped with a proper spark arrester. *Hines v. Bellah*, (Ga. App. 1921) 106 S. E. 559.

The liability of the Director General of Railroads is not limited to actions brought solely to enforce common carrier liabilities by virtue of the provisions of section 10 of the Federal Control Act. He may be joined with a railroad company as defendant in an action brought to recover damages caused by a railroad fire. *Anderson v. Minneapolis, etc., R. Co.*, (1920) 146 Minn. 430, 179 N. W. 45.

Liability for injury at crossing.—The liability of the Director General is not limited to claims growing out of a breach of a contract to transport passengers or freight but extends to an accident at a highway crossing. *Hines v. Zellner*, (1920) 25 Ga. App. 272, 103 S. E. 97.

Action for conversion.—An action against the Director General and the carrier for conversion is not an action against the government and special authority from the United States to one is not necessary. *Chambers v. Hines*, (Tex. 1920) 225 S. W. 200.

Double damages for killing stock imposed by a state statute, may be recovered, despite federal control. *Chilton v. Hines*, (1920) 205 Mo. App. 130, 224 S. W. 18.

Suit by soldier.—A soldier in active serv-

ice has no right of action against the Director General for injuries due to the negligent management of the train in which he is being transported. *Moon v. Hines*, (Ala. 1921) 87 So. 603, 13 A. L. R. 1020.

Liability of railroad to suit—In general.—Federal control does not change the status of a railroad company as to liability to suit. It may be sued after being taken over by the government the same as before. *Hines v. Henaghan*, (C. C. A. 4th Cir. 1920) 265 Fed. 831. To same effect, see *Hines v. Atlantic Refining Co.*, (C. C. A. 4th Cir. 1920) 265 Fed. 839; *Louisville, etc., R. Co. v. Johnson*, (1920) 204 Ala. 150, 85 So. 372. See also *Ellis v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 270 Fed. 279.

Liability of railroad for acts or omissions of Director General.—The owner companies were not made liable for acts or omissions of the Director General in operating the railroads by the provision of this section, that carriers, while under federal control, should remain subject to all existing laws and liabilities, and may sue and be sued as heretofore. *Missouri Pac. R. Co. v. Ault*, (1921) 256 U. S. —, 41 S. Ct. 593, 65 U. S. (L. ed.) —, reversing (1919) 140 Ark. 572, 216 S. W. 3. To the same effect, see *Norfolk-Southern R. Co. v. Owens*, (1921) 256 U. S. —, 41 S. Ct. 587, 65 U. S. (L. ed.) —, reversing (1919) 178 N. C. 325, 100 S. E. 617.

Cause of action arising prior to federal control.—Where the cause of action arose prior to federal control the suit is properly brought against the carrier rather than the Director General. *Louisville, etc., R. Co. v. Spears*, (Ky. 1921) 232 S. W. 60.

Cause of action not arising against railroad as common carrier.—This section did not exclude an action against a carrier under federal control on a cause of action not arising against it as a common carrier. *Hines v. Sangstad Steamship Co.*, (C. C. A. 1st Cir. 1920) 266 Fed. 502.

A criminal prosecution for failure to comply with a state statute relating to the maintenance of waiting rooms will not lie where the railroad was under federal control at the time of the acts complained of. *Com. v. Louisville, etc., R. Co.*, (1920) 189 Ky. 309, 224 S. W. 847, 11 A. L. R. 1448.

An action against Pullman Company for negligence was held to be improperly brought while railroads were under federal control, in *Pullman Co. v. Sweeney*, (C. C. A. 2d Cir. 1920) 269 Fed. 764.

Employees within Employers' Liability Act.—A railroad employee injured while the railroad was under federal control is within the terms of the Employers' Liability Act. (8 Fed. St. Ann. (2d ed.) 1208); *Hite v. St. Joseph, etc., R. Co.*, (Mo. 1920) 225 S. W. 916.

Award under state workmen's compensation act against corporation under federal control.—See *Pullman Car Lines v. Riley*, (Del. 1921) 114 Atl. 920.

Action as one arising under law of United States.—An action against the Director General of Railroads for the alleged negligence

of railroad employees is one arising under a law of the United States. *Blevins v. Hines*, (W. D. Va. 1920) 264 Fed. 1006.

Statutory presumption of negligence applicable.—The statutory presumption of negligence as set forth in state statute, is applicable in a suit against the Director General of Railroads, where the damage sued for was caused by the running of the locomotives or cars of any of the railroads under his control as Director General. *Hines v. McCook*, (1920) 25 Ga. App. 396, 103 S. E. 690.

Venue of action against Director General, see *Ellis v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 270 Fed. 279.

Service of process on the agents of the Director General who were formerly the agents of the carrier is insufficient to bring him into court. *Lanier v. Pullman Co.*, (1920) 180 N. C. 406, 105 S. E. 21.

Form of designating Director General in complaint.—In *Hines v. Wimbish*, (1920) 204 Ala. 350, 85 So. 765, the Director General was held to be sued as an official and not as an individual, the caption of the complaint being as follows: "Walter D. Hines as Director General of Railroads of the United States, and the Director General of Railroads of the United States, defendants."

Parties defendant in action under Employers' Liability Act against railroad under federal control.—See *Atkinson v. Philadelphia, etc., R. Co.*, (1921) 137 Md. 632, 113 Atl. 110.

The substitution of the Director General by consent obviates all question as to the validity of general order 50 and neither the plaintiff nor the Director General can object to the substitution. *Kersten v. Hines*, (1920) 283 Mo. 623, 223 S. W. 586.

Though it is improper to join the carrier as a party to a suit for a cause arising under federal control, the Director General is not prejudiced thereby, and an appellate court may dismiss as to the carrier and affirm as to the Director General. *Morrell v. Northern Pac. R. Co.*, (N. D. 1920) 179 N. W. 922. See also *Adams v. Quincy, etc., R. Co.*, (Mo. 1921) 229 S. W. 790.

The joinder of the carrier in an action against the Director General, while proper, is a useless formality whose mission may be ignored. *Hines v. Collins*, (Tex. 1921) 227 S. W. 332; *Hines v. Parry*, (Tex. 1921) 227 S. W. 339.

Under general order No. 50 a suit for personal injuries against a railroad while it is under federal control, should be brought against the Director General rather than against the railroad. *Mardis v. Hines*, (C. C. A. 8th Cir. 1920) 267 Fed. 171.

Defenses available to Director General.—The Director General of Railroads, so far as the suit was concerned, was merely a substitute for the railroad company, and, under the law, assumed all of its burdens;

and we think it quite clear that under the act of Congress of March 21, 1918 (40 Stat. 456, c. 25, § 10,) the Director General of Railroads was precluded from making any defense in this case that the railroad company itself could not have made. *Hines v. McCook*, (1920) 25 Ga. App. 396, 103 S. E. 690.

Punitive damages may be recovered against the Director General for a willful violation of duty by train employees producing a crossing accident. *Davis v. Elzey*, (Miss. 1921) 88 So. 630.

A provision on judgment for execution while erroneous is harmless and does not affect its validity. *Hines v. Robey*, (Tex. 1920) 225 S. W. 201.

Garnishment.—The Director General is not put to garnishment, which is in effect, as regards the garnishee, primarily only an action or suit in personam by the defendant, brought in the plaintiff's name against the garnishee, ancillary to the main action at law between the plaintiff and the defendant, and is not in effect a "levy" until the actual payment or delivery to the court or judicial officer of the moneys or properties after judgment against the garnishee. *Hines v. Minor*, (Ga. App. 1921) 105 S. E. 851.

Appeal bond.—So much of general orders 50 and 50a as provides that no appeal bond shall be required of the Director General, is invalid. *Bryson v. Payne*, (Tex. 1921) 232 S. W. 362.

Suits for statutory penalty.—The Director General is not made liable for statutory penalties for violation of state laws by the provisions of this section that carriers, while under federal control, shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, and of § 15, that the lawful police regulations of the several states shall continue unimpaired. *Missouri Pac. R. Co. v. Ault*, (1921) 256 U. S. —, 41 S. Ct. 593, 65 U. S. (L. ed.) —, reversing (1919, 140 Ark. 572, 216 S. W. 3. wherein it was further held that the question whether the liability imposed by state statutes for violations of those statutes should be deemed compensation or penalty, presented a question not of state but of federal law, open to review in the federal supreme court on writ of error to a state court.

To the same effect as the above case, see *Norfolk-Southern R. Co. v. Owens*, (1921) 256 U. S. —, 41 S. Ct. 597, 65 U. S. (L. ed.) —, reversing (1919) 178 N. C. 325, 100 S. E. 617.

The Director General is not liable to a statutory penalty for failure to keep depot grounds lighted. *State v. Hines*, (Tex. 1921) 228 S. W. 667.

A statutory penalty for killing animals may be recovered. *Kansas City Southern R. Co. v. Rogers*, (1920) 146 Ark. 232, 225 S. W. 640.

1918 Supp., p. 763, sec. 11.

Evidence as to possession of goods stolen from others.—Where it was charged that defendant knowingly had and retained railroad tools and materials in his possession without any right or title thereto and without the consent of the United States and that said property was part of the property used in the operation of the railroad, it was held evidence was admissible of the possession of stolen goods other than those which the defendant was accused of stealing even though the goods belonged to another owner. *Vaughn v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 451.

Sufficiency of evidence.—In *Vaughn v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 451, the evidence showed that the plaintiff in error was a switchman for the Southern Pacific Company working in the Brooklyn yards at Portland, Or. It was shown by the evidence of the general foreman of the store department at the yards that there had been a standing shortage of journal bearings. Another witness testified that the railroad had had many complaints on account of articles missing from the Brooklyn yards and the caboose stores, etc., and that boxes in which journal brasses were kept had been broken into and the journals stolen. There was testimony that on February 21, 1919, a special agent of the United States Railroad Administration, accompanied by detectives,

searched the defendant's residence and found in the basement thereof a sack of journal bearing brasses broken into small pieces, marked with the initials "O. W. R. & N." and "So. Pac. Co."; also four large pieces of babbitt metal, paint brushes which had been filed or rasped around the initials "S. P. Co.," so that the initials were scarcely legible, and one cold chisel with "S. P. Co." stamped on it, one hammer with the initials "S. P. Co.," and other articles marked "S. P." Another witness identified certain keys and locks and journal brasses found in the basement of the defendant's house as property of the Southern Pacific Company, and testified that he found in the pocket of defendant's trousers section house keys. There was evidence that the defendant had been seen carrying bundles away from the yards, and had been seen taking away plumbing material. This evidence was held sufficient to establish the corpus delicti. The foregoing considerations also were held to answer the contention that there was complete failure of proof that either the railroad or the government ever owned or used the property described in the indictment.

1918 Supp., p. 765, sec. 15.

"South Dakota Workmen's Compensation Law" was held applicable in suit against Director General of Railroads in *Hines v. Meier*, (C. C. A. 8th Cir. 1921) 273 Fed. 182.

REPLEVIN

Vol. VIII, p. 1425, sec. 934. [First ed., vol. VI, p. 766.]

Bond where property libelled for condemnation and forfeiture.—Under this section it has been held that where an automobile has been seized while being used to transport

intoxicating liquor, an order may be made delivering it to the claimant on his giving a claimant's delivery bond in the sum for which the automobile has been appraised. *U. S. v. One Chevrolet Automobile*, (M. D. Tenn. 1920) 267 Fed. 1021.

RIVERS, HARBORS AND CANALS

Vol. IX, p. 12, sec. 2476. [First ed., vol. VI, p. 787.]

Determination of navigability.—A river having actual navigable capacity in its natural state, and capable of carrying commerce among the states, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. *Economy Light, etc., Co. v. U. S.*, (1921) 256 U. S. 113, 41 S. Ct. 409, 65 U. S. (L. ed.)

—, *affirming* (C. C. A. 7th Cir. 1919) 256 Fed. 792, 168 C. C. A. 138.

Vol. IX, p. 24. [*Condemnation, purchase, etc.*] [First ed., vol. VI, p. 827.]

State law as controlling.—This statute subjects such proceedings to the state laws only in respect to matters of procedure and not to matters of substance. In this connection it is further said: "The right to determine the necessity of the taking of property for public use, under the power of

eminent domain, is necessarily incident to the sovereign power of the United States government to determine for itself whether it needs any particular property for such use. This right and power cannot be limited or affected by the laws of a state unless Congress so provides, and no federal legislation to that effect has been enacted." In *re* Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

Vol. IX, p. 33. [*Condemnation of land for improvements, etc.*]
[First ed., 1909 Supp., p. 608.]

Constitutionality.—This section is not unconstitutional as delegating to private parties the right of eminent domain. In this connection it is said of the act: "It merely provides that when, as here, the government desires to take private land necessary for a public use mentioned in the statute, but wishes to have such land donated by private interests, willing, but unable, to do so, because unable to purchase and acquire a valid title thereto, in that event the United States government, instead of receiving the land itself from such person, company, or corporation, as it would have the right to do (Act April 24, 1868, c. 194, 25 Statutes at Large 94, [9 Fed. St. Ann. (2d ed.) p. 24], may, under the circumstances mentioned, accept, from the private interests concerned, reimbursement of the expense of acquiring such land by condemnation; that is, payment of the just compensation which must be made therefor, when, and as, duly determined in condemnation proceedings properly brought in the name of, and by, the government against the owners of the land so needed. The government, not the private interest, condemns and takes the land. The only connection with the matter which such private interest has is its arrangement with the government to save the latter harmless from the cost of such taking." In *re* Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

Questions as to nature and necessity of use.—"It is well settled that the question whether the use for which property is sought to be taken as a public use is a judicial question." . . . "If the use for which any particular property is sought to be taken is a public use, the question whether such property is necessary for such use is a legislative question, and the determination thereof by the proper legislative body cannot be questioned in condemnation proceedings brought for the taking thereof." In *re* Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

The fact of inability to purchase the land desired is not a jurisdictional question which, like other facts on which the jurisdiction of the court depends is one of the issues in the case. The question whether the local interests have been unable to acquire the lands involved, as well as the necessity for using

such lands really enters into and becomes a part of the broad question of the necessity for instituting condemnation proceedings which the Secretary of War, not the court, must decide. In *re* Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

"The duties and powers of the Secretary of War in connection with proceedings of this kind are confined to determining whether particular lands are needed in connection with any certain work of river and harbor improvement duly authorized by Congress, and, if such lands be so needed, to deciding whether condemnation proceedings are to be instituted in the name of the United States for the acquirement of such lands. In determining whether he will cause such proceedings to be instituted, the Secretary of War, acting within the exercise of 'his discretion,' must necessarily decide some questions, at least to his own satisfaction. When he has requested the Attorney General to institute and conduct such proceedings, it becomes the duty of the latter officer to comply with such request, and when the proceedings have been commenced questions arising thereafter, such as those concerning the nature of the use for which the land is sought, the amount of compensation to be made to the owners of such lands, the practice to be followed, and kindred questions, are to be determined in the condemnation proceedings. With none of these last-mentioned questions has the Secretary of War any official concern or connection. The duties imposed, and the powers conferred, upon him are ultimately to decide whether he will cause condemnation proceedings to be instituted. In making this decision, he must first determine the necessity for the taking. His determination as to the necessity of such taking is final, and not reviewable by the courts." In *re* Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

Delegation to government officials of power to determine necessity.—The power to determine the questions of the necessity of the use may be delegated by Congress to executive officials of the government, and the finding by such officials on this question, made in the exercise of such delegated power, is not subject to review by the courts. In *re* Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

Elements not affecting character of use.—"The mere fact that the taking of property for a public use will result in greater benefit to some persons than to others, or that private individuals contribute to the expense of such taking, does not affect the character of such use, or render it any the less public, within the meaning and scope of the law of eminent domain." In *re* Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

Use of property to improve navigation as public use.—Use of property by the United States, when necessary for the purpose of improving the navigability of navigable

river, within its jurisdiction, is a public use for which it is entitled to take such property by the power of eminent domain." In re Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

A hearing on the question of necessity is not essential to due process of law in the sense of the Fourteenth Amendment. In re Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

Payment of compensation.—"While private property cannot be taken, even under the right of eminent domain, unless necessary for public use, and then only if just compensation be paid therefor, yet it is not necessary, in the absence of express constitutional or statutory requirements to that effect, that such compensation be paid before the actual taking of the property, provided that reasonably certain, prompt, and adequate provision for the payment of just compensation be made, or the public faith and purse be pledged for such payment." In re Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105, wherein it was held that the mere commencement of condemnation proceedings was not the taking of any property, and that the actual payment of compensation, therefore, need not precede or accompany the filing of the petitions. In re Condemnations, etc., (E. D. Mich. 1920) 266 Fed. 105.

Vol. IX, p. 37, sec. 8. [First ed., 1914 Supp., p. 369.]

Validity of contract binding government to pay more than amount appropriated.—The making of a contract binding the government to pay more than the amount appropriated was not within the power of the Secretary of War, under the River and Harbor Act of July 25, 1912, making an appropriation for completing a specified improvement, and providing in this section that whenever the appropriations made or authorized to be made for the completion of any river and harbor work shall prove insufficient therefor, the Secretary of War may, in his discretion, on recommendation of the Chief of Engineers, apply the funds so appropriated or authorized to the prosecution of the work,—especially in view of the provisions of U. S. R. S. § 3733, (see Vol. 8, p. 355) that no contract for any public improvement shall bind the government to pay a larger sum than the amount in the Treasury appropriated for the specific purpose, and of §§ 3722 (see Vol. 8, p. 351) and 5503 (see Vol. 7, p. 651), and of the Act of June 30, 1906, (see Vol. 3, p. 153) that no act shall be construed to authorize the execution of a contract involving the payment of money in excess of appropriations made by law unless such act shall, in specific terms, declare an appropriation to be made, or that a contract may be executed. *Sutton v. U. S.*, (1921) 256 U. S. —, 41 S.

Ct. 563, 65 U. S. (L. ed.) —, *modifying*, and as modified, *affirming* (1920) 55 Ct. Cl. 193.

Vol. IX, p. 42, sec. 1. [First ed., vol. VI, p. 796.]

Purpose.—The purpose of the statute is to prevent discharging or depositing matter into the harbor which will obstruct or injure it. *Warner-Quinlan Co. v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 503.

"Or any other matter of any kind."—"The statute enumerates the specific materials which, in the opinion of Congress, would ordinarily be deposited into the waters and would obstruct and injure the harbor, but made sure that it should not be obstructed or injured because of the failure to mention all the materials that might possibly be placed or deposited in the prescribed limits, and so Congress added the words, 'or any other matter of any kind.' This means, applying the maxim of ejusdem generis, matter of the same general class as before mentioned. The materials mentioned except acid, are mostly solids, and the injury which they would do the harbor would be to obstruct it. While obstruction is the principal injury Congress had in mind, it was not the only one; for 'acid' would not obstruct, but would corrode and be detrimental to boats, wharves, etc., and would thus be injurious to the harbor as such." *Warner-Quinlan Co. v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 503.

Refuse from refining of petroleum.—In *Warner-Quinlan Co. v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 503, it appeared that there came from the plant of the defendant a material described by the witness as "fuel matter," "sludge," "black oil," and "oil and tar." The court declared:

"'Sludge' is specifically mentioned in the act, and is defined by the Standard Dictionary as: 'Refuse, acid, or alkali from the refining of petroleum; muddy or pasty refuse of various kinds; slime of ores; the plate covering an opening in a boiler for removal of sediment; also, the sediment.'"

"This matter which came from the defendant's plant sometimes became solid and settled as a sediment. If it continued to be discharged or placed in the waters of the harbor, without restriction, it would in time obstruct and injure the harbor. Masters of boats would naturally and ordinarily object to entering waters covered with oil and tar. These would surely prove injurious to the harbor, if not actually obstructive. We think the evidence establishes that the matter coming from the defendant's plant would be both obstructive and injurious to the harbor, and included in that general class of matter forbidden to be placed, discharged, or deposited by any process or in any manner in the tidal waters of the harbor of New York."

Evidence required to sustain conviction.—

In order to sustain the conviction, it is necessary that the evidence show, first, that the supervisor, in pursuance of the statute, had prescribed limits in the tidal waters of the harbor of New York or its adjacent or tributary waters; and, second, that the defendant had, at or within the time or times specified in the indictment, placed, discharged or deposited by some process or in some manner some of the forbidden matter within those prescribed limits. *Warner-Quinlan Co. v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 503.

Vol. IX, p. 53, sec. 10. [First ed., vol. VI, p. 813.]

Parties who may complain of obstruction.—The only party who may complain of a dam as being in violation of this section is the United States, unless one is individually injured differently from the general public in degree and kind. *Silvey v. Montgomery County*, (S. D. Ohio 1921) 273 Fed. 202.

Loading crane projecting beyond edge of wharf and over navigable waters has been held an obstruction of such waters rendering the owner liable to a colliding vessel it appearing that it had been erected without making an application to the Secretary of War for his approval and authorization. *F. S. Royster Guano Co. v. Outten*, (C. C. A. 4th Cir. 1920) 266 Fed. 484.

Liability for obstruction.—In case of an obstruction deliberately placed in a navigable channel without giving any warning of it the owners will be responsible to owners of vessels injured thereby while themselves exercising due care. *The Mahanoy*, (C. C. A. 2d Cir. 1921) 273 Fed. 668.

Vol. IX, p. 56, sec. 11. [First ed., vol. VI, p. 815.]

Authority of Congress.—The right of the government to establish harbor lines is not exhausted by one exercise of the power but it may change these lines just as often as it may deem necessary in order to protect navigation from obstruction. *U. S. v. Pennsylvania, etc., Dock Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 839.

Vol. IX, p. 58, sec. 13. [First ed., vol. VI, p. 816.]

Beached barge as "refuse."—Where the line, by which a barge is being towed, parts and the barge drifts ashore, later breaks up during a storm and damages a cottage on the beach, there is no violation of this section since the barge cannot be regarded as refuse thrown from a vessel nor as material deposited on the shore of navigable water. *Longstean v. McCaffrey* (1920) 95 Conn. 486, 111 Atl. 788. The court said: "The statute upon which the court based its charge, Fed. Stat. Ann. (2d Ed.) vol. 9, p.

58 provides in its first part that it shall not be lawful 'to throw, discharge or deposit' from or out of any ship, barge, or floating craft of any kind any refuse matter of any kind other than that flowing in street or sewer in liquid state into any navigable waters of the United States.

"Depositing refuse in any navigable waters of the United States from or out of any floating craft constitutes the offense of the statute, and its violation would furnish, if it occasioned injury and was the proximate cause of the damage, a cause of action for negligence for the damage done. *Myrtle Point Transportation Co. v. Port of Coquille River*, 86 Or. 311, 168 Pac. 625.

"A barge beached upon the shore of navigable water cannot be held to be refuse within the meaning of this act, whether the barge came there through fault of the owner or unavoidable accident, or whether it was abandoned from the time it became beached. And by the terms of this offense the refuse must have been thrown, deposited, or discharged or been permitted to be thrown, discharged, or deposited from or out of the barge. None of the conditions constituting the offense described in the first portion of the statute are present in the situation detailed before us. An even more controlling reason made this part of the statute and all of it inadmissible. The court, as appears from the instruction, relied upon the latter part, which reads:

"It shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise."

"This portion of the statute was intended to secure the prevention of the impeding or obstruction of navigation by depositing or suffering to be deposited any kind of material, refuse or otherwise on the bank or shore of navigable water, or on the bank or shore of its tributary where the same shall be liable to be washed into such navigable water. Protection of navigation was the purpose of the statute. The violation of a statute which forbids the doing of certain acts does not give a cause of actionable negligence in favor of private individuals unless the statute was designed to prevent such injuries as were suffered by the individual claiming damage and unless it imposes upon the one violating the statute a specific duty for the protection or benefit of him who claims damages for the violation. 1 Thompson on Negligence, § 12; 20 Ruling Case Law, § 33.

"The violation of the ordinance could have had no influence in causing the accident, and the trial court properly withdrew its consideration from the jury. It is a well-settled rule that a person cannot recover from another for negligence based upon the viola-

tion of a statute or ordinance which is not intended for his protection.

"The rule which is applicable to actions for negligence based upon the violation of a statutory duty is to all intents and purposes the same as the rule applicable to actions for negligence based upon a violation of a common law duty. Where there is no duty, there can be no negligence. The statutory duty must be owing to the person injured, and not to some one else, in order that a violation thereof shall constitute actionable negligence." *Anthony v. Conn. Co.*, 88 Conn. 700, 707, 92 Atl. 672.

And it must also appear that the violation of the statute was the proximate cause of the injury sustained. *Feehan v. Slater*, 89 Conn. 697, 701, 96 Atl. 159.

"This statute was for the protection of navigation. It was not designed for the protection or benefit of cottagers upon the shore. This is apparent upon the slightest inspection of the statute. Had this been a proper subject upon which to instruct the jury, the instruction would have been erroneous in omitting the essential element that the pieces of the barge so washed upon the shore did, or were apt to impede or obstruct navigation."

Vol. IX, p. 60, sec. 15. [First ed., vol. VI, p. 817.]

Scope and application of section.—"This act imposes an affirmative and positive duty upon vessels coming to anchor in navigable channels to see that they do not under any circumstances, accidents excepted, prevent or obstruct the passage of other vessels; not that they shall not anchor at all in such a channel, but that when they anchor therein they shall so anchor and in such method, as not to close the channel or unduly or unreasonably prevent or obstruct, the passage of other vessels. *The Margaret*, (D. C.) 203 Fed. 331; *Id.*, 213 Fed. 975, 130 C. C. A. 381; *The Hesperos* (C. C. A.) 265 Fed. 921.

"When a vessel intends, not only to stop in a channel in which she is moving, but to anchor and to swing around so that her length obstructs the channel, she is bound to give notice of her movement or intention, or warn others not to approach until she has completed her unusual maneuver. The maneuvers which the *Sosua* executed took up a large part of the channel upon a dark night. She passed the Hainesport without signal about 75 feet off the Walnut street docks, crossed her bow, and directly after passing Market street began to reverse her engines, all without warning signal and without a lookout.

"She violated the statutory prohibition . . . in swinging around to come to anchor without any warning or indication of her intention. If she had had a lookout properly stationed, the close approach of the Hainesport would doubtless have been observed, and the master and pilot, whose at-

tention was directed to bringing her into a proper position to anchor, would not have had to rely upon chance to observe the approach of the Hainesport with her tow. The very maneuver she executed was an obstruction to the channel. She was bound to refrain from maneuvers calculated to embarrass the vessel in her rear in an attempt to pass." *The Sosua*, (E. D. Pa. 1921) 271 Fed. 772.

"The statute was intended as an explicit legislative statement that the dominant use of channels is for passage, and not anchorage, and it does not permit a vessel to anchor voluntarily in a channel, when her presence there imperils other vessels, or requires more than ordinary skill or care in their navigation. Obviously masters of vessels are charged with knowledge that the coming of fogs or storms may make an anchored vessel an obstruction, when it would not be in fair weather." *The City of Norfolk*, (C. C. A. 4th Cir. 1920) 266 Fed. 641.

Duty imposed.—To same effect as original annotation, see *The Hesperos*, (C. C. A. 4th Cir. 1920) 265 Fed. 921, wherein a large steamship was held to be negligent in anchoring near a channel in such a manner as to allow her stern to swing around with the tide and obstruct it thereby causing a collision with an incoming steamship.

Vessel caught in fog.—In this connection it has been said: "The first thought and object of the master and pilot of a vessel caught by a dense fog in a channel in which the vessel at anchor would be an obstruction to another vessel navigated with due care should be to get out of the way of other vessels by moving on with 'moderate speed' to the nearest anchorage grounds or the open sea. In such navigation 'moderate speed' means speed so slow that the vessel can be stopped within the distance at which another vessel can be seen. If the fog is so dense as to justify the master in believing that another vessel going at a moderate speed could not be seen at the distance in which he could stop his vessel, and that the two vessels would be in danger of collision, then the master should anchor and give the statutory signals. Even if he thus obstructs the channel, he is not responsible, because it is done under necessity. Doubt as to this necessity should be solved by weighing all the circumstances and conditions, such as the width of the channel, the flow of the tide, the force of the wind, the probability of meeting other vessels, the size of the ship, and distance and course to the nearest anchorage. If the navigator of the vessel, upon careful consideration of all the circumstances, reasonably concludes that necessity requires anchorage he should not be held in fault, and in case of collision should be held entitled to the presumption in favor of a vessel at rest against a moving vessel. The duty of the master of the approaching vessel

is to stop as soon as he hears the fog signal." The City of Norfolk, (C. C. A. 4th Cir. 1920) 266 Fed. 641.

Effect of provision on local regulations.—A local regulation making an absolute prohibition against anchoring in a channel is supplanted by this section. The City of Norfolk, (C. C. A. 4th Cir. 1920) 266 Fed. 641.

Vol. IX, p. 78, sec. 7. [First ed., 1916 Supp., p. 224.]

Failure of war department to define anchorage grounds.—Where the War Department did not act in pursuance of the statute and the place at which a vessel anchored was a usual and customary anchorage set apart by a city ordinance and authorized by permission from the office of the port warden, the vessel was held to be protected. The Mexico Maru, (W. D. Wash. 1921) 270 Fed. 800.

Vol. IX, p. 80, sec. 5. [First ed., vol. VI, p. 793.]

Liability of city.—In *Conklin v. Norwalk*, (C. C. A. 2d Cir. 1920) 270 Fed. 68, the city of Norwalk was held liable for the failure of the bridge tender to open the draw or in case he could not open it to give the required signal.

Vol. IX, p. 81, sec. 9. [First ed., vol. VI, p. 805.]

What is "navigable river."—The prohibition in this section against the construction of a dam in a navigable river of the United States without the approval of the War Department, applies to a river having actual navigable capacity in its natural state, and capable of carrying commerce among the states, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. *Economy Light, etc., Co. v. U. S.*, (1921) 256 U. S. 113, 41 S. Ct. 409, 65 U. S. (L. ed.) —, [affirming (C. C. A. 7th Cir. 1919) 256 Fed. 792, 168 C. C. A. 138] wherein it was held that the Desplaines river below the city of Joliet, and just above where the Desplaines joins the Kankakee to form the Illinois river, was a navigable river of the United States, within the meaning of the prohibition in this section against the construction of a dam in a navigable river of the United States without the approval of the War Department.

Approval of War Department.—The requirement of this section that the War Department approve the location and plans for any dam in a navigable river of the United States, is not in substance satisfied by the refusal of the Secretary of War to act because, as he was assured that the river was not navigable, he had no jurisdiction. This

cannot be regarded as an equivalent to an approval, either in form or effect, or even as an official inquiry into the navigability of the river. *Economy Light, etc., Co. v. U. S.*, (1921) 256 U. S. 113, 41 S. Ct. 409, 65 U. S. (L. ed.) —, affirming (C. C. A. 7th Cir. 1919) 256 Fed. 792, 168 C. C. A. 138.

Contract to remove collapsed pier.—Even though approval of the secretary of war might have been necessary to alterations in a contract for the construction of a bridge, the failure to obtain it does not affect the rights of the parties in respect to a subsequent contract to remove steel which has fallen into the water when one of the piers collapsed, where it is agreed by the second contract that the question of responsibility for the fall of the pier shall fix the payment to be made under the contract for removing the steel. *Midland Bridge Co. v. Houston, etc., R. Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 931.

Effect of subsequent alterations in mere details.—A mere alteration in detail, which in no way contemplates any change in the size, nature, or relation to the stream of the completed bridge does not have to be approved by the secretary of war as a condition to an existing contract for construction continuing of force between the parties thereto. *Midland Bridge Co. v. Houston, etc., Valley R. Co.*, (C. C. A. 5th Cir. 1920) 268 Fed. 931.

Vol. IX, p. 86, sec. 18. [First ed., vol. VI, p. 818.]

Failure to remove piles.—Where a railroad company, constructing a new bridge across a navigable shifting stream, fails to remove piles which were used to support the former bridge, it is liable for injury to a vessel colliding with such piles. Nor is the question of liability affected by the fact that conditions imposed by the War Department were complied with. *Olympian Dredging Co. v. Southern Pac. Co.*, (C. C. A. 9th Cir. 1921) 270 Fed. 384.

1918 Supp., p. 772, sec. 5.

Sufficiency of petition.—A petition is sufficient under this section where the petitioner prays that "On filing this petition, an order may be entered therein, by this court, providing for the taking of immediate possession of each and all of said lands by petitioner, for such improvement, and fixing the amount and form of certain and adequate security to be given on behalf of the United States, as petitioner herein, for the payment of such just compensation as may be awarded to the party or parties entitled thereto on account of the taking of the rights of way and otherwise hereinbefore mentioned as required for said improvement, which certain and adequate security, petitioner hereby offers to give as may be, by the court, directed." *In re Condemnations*, (E. D. Mich. 1920) 266 Fed. 105.

SALVAGE

Vol. IX, p. 121, sec. 1. [First ed., 1914 Supp., p. 384.]

What constitutes salvage service.—Where a vessel at anchor in a harbor drags its anchor during a gale and collides with another anchored vessel, and the vessels are lashed together to prevent further damage to both, the latter vessel is not entitled to an award for a salvage service in permitting the other vessel to be lashed to her. *The Yaye Maru*, (D. C. Md. 1920) 265 Fed. 850.

Where it appeared that the vessel had not been abandoned and that the services performed by seamen remaining on the vessel entailed no hardship or exhaustion since they were performed only at regular hours except for the overtime, for which they were paid extra, a libel against the vessel for salvage services was dismissed. *The Macona*, (S. D. N. Y. 1920) 269 Fed. 468.

Vessels traveling in company.—While no one may claim a salvage award for doing that which he is legally bound to do, and for which he is actually or constructively remunerated in other ways, a claim for salvage on the part of one vessel for aiding another when she went aground cannot be defeated by evidence of an agreement of the two vessels to travel in company for protection against submarines. *Maru Nav. Co. v. Societa Commerciale, etc.*, (D. C. Md. 1921) 271 Fed. 97.

Element considered in making award.—“It is fair to consider the value of the property in peril, the degree of peril, and the value of the property employed by the salvor, the risk of life or property incurred, the skill and dispatch shown in rendering the services, together with the foresight and skill used in the preparation to render it, the time consumed, and the labor performed by the salvor. *The Blackwall*, 10 Wall. 1, 19 L. Ed. 870. The courts do not desire to award so little as to discourage salvage aid, nor so much as to encourage unnecessary and extravagant statement of service. The No. 92, 252 Fed. 118. All these matters are within the sound discretion of the District Judge, who hears the facts and sees the witnesses. It is for him to correctly find the facts, and it is only if the evidence indicates an abuse of discretion that this court interferes. *The Kanawha*, 254 Fed. 762, 166 C. C. A. 208.” *Jacobson v. Panama R. Co.*, (C. C. A. 2d Cir. 1920) 266 Fed. 344.

In ascertaining the value of salvage services it is fair to consider the difficulty of safely handling the distressed vessel and the risk run of injury to the salving vessel. *The Western Pride*, (C. C. A. 2d Cir. 1921) 274 Fed. 920.

The primary consideration in salvage cases is the amount of benefit conferred. *The Nord Alexis*, (C. C. A. 2d Cir. 1921) 273 Fed. 160.

Amount of award—In general.—In *The Bretanier*, (C. C. A. 4th Cir. 1920) 267 Fed. 178, it was held that a tug worth, with her apparatus, \$175,000, was entitled to a salvage award of \$12,000 for hauling a steamship, valued at \$500,000 off a shoal and towing it a short distance.

Where barges which had been floating with the ebb tide in ice floes became grounded, it was held that a tow boat which pulled them off and turned them to safety performed services in the nature of salvage services for which an award of \$1,500 was proper although it appeared that there was no immediate pending disaster to the barges and that the difficulties encountered by the tow boat were no more than she would have undertaken in towing a schooner up the harbor on the afternoon the services were rendered at ordinary towing rates. *Potter v. Payne*, (E. D. N. Y. 1920) 269 Fed. 470.

In *Bullard v. 230,263 Feet of Lumber*, (S. D. Fla. 1920) 267 Fed. 860, wherein salvage was asked for saving lumber from a wrecked schooner, the court said: “The work of salving the lumber appears to have been onerous in the extreme, the men having to work in water most of the time, and continued over a considerable time, with a number of vessels and their crews engaged. The position of the wrecked schooner was an exposed one, adding to the difficulties of the work of the men engaged in salving the cargo.

“Considering all the circumstances shown by the testimony, I am of opinion that an award of 75 per cent. of the net proceeds of the salvaged property, after paying the costs of the suits, and the costs of the damage suffered by the *Serafina*, the division of salvage to be made according to the wrecking rules, proportioned to the amount of lumber salvaged by each vessel, except when acting in consort.”

“In some foreign countries the amount or proportion to be paid for salvage services is fixed by law. But in England and in this country the rate of salvage compensation is governed by no determinate rules applicable to all cases. The proper rate of compensation is necessarily to some extent in the discretion of the court on a just estimate of all the circumstances of the individual case. Each case of salvage is to be disposed of on its own merits. There are, however, certain general principles which serve to guide courts in the exercise of their discretion. When the risk is inconsiderable and the service slight, the award should be little more than mere remuneration *pro opere et labore*. *The Benjamin A. Van Brunt*, (D. C.) 164 Fed. 775. If the service is attended with unusual danger and difficulty, the award will be proportionately higher. *Luckenbach v. Scows 3 & 16*, (D. C.) 50 Fed. 570. The highest compensation ordinarily allowed in the most

meritorious cases is one moiety, which is rarely given except in the case of a derelict. While seldom more than one-half or less than one-third is given there are many cases in which the award has been under 5 per cent." The High Cliff, (C. C. A. 2d Cir. 1921) 271 Fed. 202. In this case an award of \$5,000 was reduced on appeal to \$2,000 where it appeared that a barge which broke loose during a storm and when drifting up a slip was taken in charge by a tug and carried further into the slip to a place of safety, there being no danger and the time required being about three-quarters of an hour.

Computation of award.—See The Copperfield, (S. D. Fla. 1920) 268 Fed. 77.

"The mere towing to safety a drifting barge or scow is usually regarded as salvage service of a low order of merit, and is compensated by a small award." The High Cliff, (C. C. A. 2d Cir. 1921) 271 Fed. 202.

Salvage in harbor.—"It has long been settled in this circuit that salvage services rendered in harbor cases, where tugs are abundant and on the ground or near by are not services of a high order." The High Cliff, (C. C. A. 2d Cir. 1921) 271 Fed. 202.

Effect of retention by captain of articles taken from wreck.—Where the captain of a salvaging vessel retained certain nautical instruments, books and papers and a small loot taken from the wreck until after answer filed by the claimant the court declared that

while "the evidence is such that I can visit this conduct upon the other salvors, it is necessary that the court should visit it upon the guilty party, and this I do by depriving the master of the tug of all participation in the salvage awarded the crew; the master's share to inure to the benefit of the claimants of the schooner and cargo, in proportion to the value of each as found above." The Copperfield, (S. D. Fla. 1920) 268 Fed. 77.

Interest.—The allowance of interest on a salvage award is within the discretion of the trial court. Maru Nav. Co. v. Societa Commerciale, etc., (D. C. Md. 1921) 271 Fed. 97.

Rights of members of crew.—The members of a crew have an independent right accorded them by law for salvage, are entitled to a maritime lien as protection and may maintain an action in personam to the extent of their lien for salvaging services. Jacobson v. Panama R. Co., (C. C. A. 2d Cir. 1920) 266 Fed. 344.

Vol. IX, p. 122, sec. 5. [First ed., 1914 Supp., p. 385.]

Government owned vessels.—The fact that both vessels were government owned ships and under the control of the Emergency Fleet Corporation has been held not enough to deprive the master and crew of the salvaging vessel of compensation for salvaging services. Jacobson v. Panama R. Co., (C. C. A. 2d Cir. 1920) 266 Fed. 344.

SEAMEN

Vol. IX, p. 139, sec. 4511. [First ed., vol. VI, p. 853.]

Scope of section.—This section and amendments and the form provided in the schedule annexed and R. S. sec. 4530 [9 Fed. Stat. Ann. (2d ed.) 158] and its amendments for the protection of seamen, relate to the voyage and impose duties on the ship and seamen for the voyage. "Neither can renounce those duties during the voyage. These statutes on their face, and the judicial construction given them, leave no doubt of these conclusions: (1) The master cannot discharge the crew, and the crew cannot demand wages in full, until the end of the voyage; (2) the end of the voyage is not a port of distress, but the port of destination; (3) seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular; (4) extension of the time of the voyage by intention or neglect of the master is such breach of the contract as entitles the seamen to demand their release on that ground in any safe port; (5) but extension of the voyage be-

yond the time mentioned in the contract, due to perils of the sea which the master or owner could not be reasonably expected to guard against, is not a breach of the contract as to time, and does not warrant seamen in leaving the vessel or demanding wages in full before reaching the port of destination; (6) on the other hand, seamen are entitled to their wages and discharge when the ship reaches the port of destination before the expiration of the stipulated time of the voyage." Hamilton v. U. S., (C. C. A. 4th Cir. 1920) 268 Fed. 15.

Nature and construction of shipping articles.—"Shipping articles are mercantile documents, and are entitled to a liberal construction in order to accomplish the purpose the parties had in mind. They are not to be scrutinized as if they were legal pleadings." U. S. v. Westwood, (C. C. A. 4th Cir. 1920) 266 Fed. 696.

Requirements of articles.—*Baggage must be specified.*—It is required that the articles a seaman is asked to sign shall tell him in general terms, at least, what kind of a voyage the master is then planning to undertake, reserving on their face, if need be, sufficient latitude for the changes which may

subsequently arise from the exigencies of a successful participation in the world's carrying trade. *U. S. v. Westwood*, (C. C. A. 4th Cir. 1920) 266 Fed. 696.

Duration of voyage—Extension of time.—Seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular.

Extension of the time of the voyage by intention or neglect of the master is such breach of the contract as entitles the seamen to demand their release on that ground in any safe port.

But extension of the voyage beyond the time mentioned in the contract, due to perils of the sea which the master or owner could not be reasonably expected to guard against, is not a breach of the contract as to time, and does not warrant seamen in leaving the vessel or demanding wages in full before reaching the port of destination.

If, however, the voyage cannot be completed, or is ended by mutual agreement, the former articles are of no effect upon the future status of the crew, who are free to make a new agreement with the captain, if he has the authority so to do. *Shanley v. U. S.*, (E. D. N. Y. 1921) 274 Fed. 691.

Employment and discharge of seamen.—The master *virtute officii* employs and discharges seamen. *Hughes v. Southern Pac. Co.*, (S. D. N. Y. 1918) 274 Fed. 876.

Vol. IX, p. 153, sec. 4527. [First ed., vol. VI, p. 864.]

Seamen in coastwise trade.—The master and seamen may voluntarily use shipping articles in the shipping of seamen for the coastwise trade in which case the provisions of this section apply. *Hughes v. Southern Pac. Co.*, (S. D. N. Y. 1918) 274 Fed. 876.

Vol. IX, p. 156, sec. 4529. [First ed., 1916 Supp., p. 227.]

Construction.—The section is penal and the right *stricti juris*. *Petterson v. U. S.*, (S. D. N. Y. 1921) 274 Fed. 1000.

Applicability.—It has been held that this section is not applicable to foreign vessels. *The City of Norwich*, (E. D. N. Y. 1921) 273 Fed. 304.

Seamen as wards of court.—“Seamen are wards of the courts, no doubt, and are protected against their own carelessness. The statutes, especially the revision of 1915, show an increased solicitude for their welfare, which courts have no right to view with jealousy. Still they remain in some measure persons *sui juris*, and there is neither justice nor policy in aiding them to catch at penalties, where they have suffered no wrongs.” *Petterson v. U. S.*, (S. D. N. Y. 1921) 274 Fed. 1000.

“Without sufficient cause.”—Where a mas-

ter refuses to pay seamen their wages “without sufficient cause,” a payment of full wages subsequently made to them should be credited as part payment of the penalty provided for in the statute. *Vincent v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 889.

Where seamen signed shipping articles at the port of San Francisco to Manila for final discharge, it was held on a libel for the penalty that they were entitled to their discharge at Manila and that there was absence of a fair ground of dispute though the insular collector of customs, acting as shipping commissioner, wrote a letter stating: “Whereupon the master thereof rated the said seamen as such deserters, and this office so confirms.” This being construed as meaning that the collector merely confirmed the fact that the master rated the men as deserters. *Vincent v. U. S.*, (C. C. A. 9th Cir. 1921) 272 Fed. 889.

Sufficient cause—Attachment against wages.—An attachment under a state statute is not “sufficient cause” under this section for withholding a seaman's wages. *Burns v. Fred. L. Davis Co.*, (C. C. A. 1st Cir. 1921) 271 Fed. 439.

Evidence insufficient to show discharge.—In *Petterson v. U. S.*, (S. D. N. Y. 1921) 274 Fed. 1000, it was held that an agreement to an extension of the articles and a return to the ship after a demand for pay and a refusal to be responsible for the safety of the ship, followed by payment and a month's bonus together with the giving of a release at the end of the extended voyage, did not show a discharge before the articles for extension were signed.

Vol. IX, p. 158, sec. 4530. [First ed., 1916 Supp., p. 228.]

Duties imposed on ship and seamen.—R. S. sec. 4511 [9 Fed. Stat. Ann. (2d ed.) 139] and amendments and the form provided in the schedule annexed and this section and its amendments for the protection of seamen, relate to the voyage and impose duties on the ship and seamen for the voyage. “Neither can renounce those duties during the voyage. These statutes on their face, and the judicial construction given them, leave no doubt of these conclusions: (1) The master cannot discharge the crew, and the crew cannot demand wages in full, until the end of the voyage; (2) the end of the voyage is not a port of distress, but the port of destination; (3) seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular; (4) extension of the time of the voyage by intention or neglect of the master is such breach of the contract as entitles the seamen to demand their release on that ground in any safe port; (5) but extension of the voyage beyond the time mentioned in the

contract, due to perils of the sea which the master or owner could not be reasonably expected to guard against, is not a breach of the contract as to time, and does not warrant seamen in leaving the vessel or demanding wages in full before reaching the port of destination; (6) on the other hand, seamen are entitled to their wages and discharge when the ship reaches the port of destination before the expiration of the stipulated time of the voyage." *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15.

Right to one-half wages—Generally.—Under this section seamen making a demand of the master are entitled to one-half of the wages earned and still unpaid. *Low Ling Sing v. Standard Transp. Co.*, (S. D. N. Y. 1921) 274 Fed. 1017.

Necessity of demand.—"The statute authorizing this libel presupposes a reasonable demand (*The Pinna*, 265 Fed. 642, 167 C. C. A. 18) plainly made. It must be plainly made, in order that the shipmaster may know exactly what is demanded of him; for by the statute, if he refuses half wages, whole wages instantly become due, together with possible damages. Where such important consequences hinge upon the making of a demand, it is obvious that clearness both in language and in proof is due from those who rely upon it." *The Hougomont*, (C. C. A. 2d Cir. 1921) 272 Fed. 881.

Amount.—To the same effect as the original annotation, see *The Hougomont*, (C. C. A. 2d Cir. 1921) 272 Fed. 881.

Waiver.—In *The Hougomont*, (C. C. A. 2d Cir. 1921) 272 Fed. 881, the rights of seamen as libelants were held to be defeated by waiver arising from the receipt by the seamen of payments after demand for half wages and by remaining on board the ship after like was filed and performing services.

Vol. IX, p. 179, sec. 12. [First ed., 1916 Supp., p. 233.]

Fisherman's wages.—A state statute excluding fishermen from an exemption from garnishment accorded seamen, is invalid as this section expressly states that its provisions shall "apply to fishermen employed on fishing vessels as well as to seamen" and the power of Congress being paramount the state statute must give way. *Burns v. Fred L. Davis Co.*, (C. C. A. 1st Cir. 1921) 271 Fed. 439.

Vol. IX, p. 180, sec. 20. [First ed., 1916 Supp., p. 250.]

"Seamen having command."—A foreman having direct command of the work in hand and of the men is not a fellow servant of a seaman under his authority. *George Leary Constr. Co. v. Matson*, (C. C. A. 4th Cir. 1921) 272 Fed. 461.

Negligence in selection of appliances and appurtenances.—Since under the statute the master of the vessel, or seaman in command,

is not a fellow servant of those under his authority, his selection and supply of the appliance and appurtenances used for the service on the ship under his direction is the selection and supply of the owner, and for injury to a seaman due to negligence in such selection and supply the owner is liable for full indemnity for the injury. *George Leary Constr. Co. v. Matson*, (C. C. A. 4th Cir. 1921) 272 Fed. 461.

Vol. IX, p. 181, sec. 4549. [First ed., vol. VI, p. 884.]

Mode of discharge.—A seaman when discharged must be discharged before a shipping commissioner. Any other discharge is wrongful. *Hughes v. Southern Pac. Co.*, (S. D. N. Y. 1918) 274 Fed. 876.

Vol. IX, p. 182, sec. 4552. [First ed., vol. VI, p. 885.]

Release—Conclusiveness.—Where a dispute as to the rate of wages was taken before the shipping commissioner at the end of the voyage but he apparently did not go into the merits of the claim by the crew but denied it as a matter of course, a release signed under such circumstances cannot be used as a receipt in full. *Shanley v. U. S.*, (E. D. N. Y. 1921) 274 Fed. 691.

Mistake in signing.—In *Pacific Mail Steamship Co. v. Lucas*, (C. C. A. 9th Cir. 1920) 264 Fed. 938, it was held under the evidence that a seaman neither sought nor desired a discharge, that he was only asked to sign for his wages and did not know that he signed a release, and that the alleged discharge could not be sustained because it was not fully explained to him.

Wages where seaman becomes sick.—A seaman who falls sick on a voyage is entitled to recover his full wages for the trip for which he was engaged, and the necessary expense incurred in his cure. *Pacific Mail Steamship Co. v. Lucas*, (C. C. A. 9th Cir. 1920) 264 Fed. 938.

Vol. IX, p. 185, sec. 4556. [First ed., vol. VI, p. 887.]

Duty of seamen as to serving.—The importance of obedience and discipline on a ship, to the end that it may proceed on its voyage, imposes on the crew, after they have commenced the voyage, the duty to use reasonable means to ascertain the actual condition of the vessel, including a resurvey, if that be practicable, before refusal to serve for unseaworthiness. . . . But they are not bound to serve on a vessel which is unseaworthy, and they should be acquitted of the charge of desertion or revolt, or endeavor to revolt, if in apprehension of danger they leave the ship or refuse to serve, asserting and believing on reasonable grounds that the ship is unseaworthy, although it may turn

out on further close investigation that it was in fact seaworthy, for reasonable apprehension of loss of life or limb is set above delay of the vessel. *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15.

Vol. IX, p. 201, sec. 4577. [First ed., vol. VI, p. 901.]

Aliens.—An alien who is employed as a seaman on an American vessel and who has been discharged at a foreign port because of sickness, is entitled under this section to be returned to the United States. *The Santa Elena*, (S. D. N. Y. 1920) 271 Fed. 347.

Vol. IX, p. 203, sec. 4580. [First ed., vol. VI, p. 902.]

Justification for discharge—Generally.—Just grounds for the discharge of a seaman by the master must be shown. *Mattes v. Standard Transp. Co.*, (S. D. N. Y. 1921) 274 Fed. 1019.

What constitutes a discharge.—Where at a port which was not the port of final discharge the men were not requested to continue on the voyage under the articles but were requested to sign new articles for a new voyage, which they refused to do, it was held that the vessel by its own conduct fixed the status of the men with relation to the proceeding before the court, and that they were entitled to their wages and transportation to the port from which they sailed, if they so desired. *Jenkins v. U. S. Emergency Fleet Corp.*, (W. D. Wash. 1920) 268 Fed. 870.

Approval of consul.—“It is hornbook law for masters that discharges must be approved by consuls and the law of the United States is in substance the same.” *Mattes v. Standard Transp. Co.*, (S. D. N. Y. 1921) 274 Fed. 1019.

Vol. IX, p. 205, sec. 4581. [First ed., vol. VI, p. 904; 1916 Supp., p. 251.]

Seaman discharged by consent.—A seaman who is discharged by voluntary consent before a consul is not entitled to a month's bonus. *Petterson v. U. S.*, (S. D. N. Y. 1921) 274 Fed. 1000.

Disease contracted by seaman through his own fault.—“It is well settled that, while the vessel is liable for the cure and maintenance of a sailor who is taken ill while serving the vessel, she is not liable for such maintenance and cure when the disease was contracted from the indulgence by the sailor in case of gross indiscretion, or indulging his own vices.” *The Coniscliff*, (S. D. Ala. 1920) 266 Fed. 959.

Vol. IX, p. 215, sec. 4596. [First ed., 1916 Supp., p. 230.]

Scope of section.—This section relates to mere ordinary disobedience or neglect of duty by one of several seamen. *Hamilton v. U. S.*, (C. C. A. 4th Cir. 1920) 268 Fed. 15.

Desertion—What constitutes.—To constitute “desertion” in the sense of the word used in this section the seaman must quit the ship and her service, not only without leave, but without justifiable cause, and with intent not again to return to duty on the vessel. *The Margaret Spencer*, (S. D. Fla. 1921) 274 Fed. 930, wherein a cook was held to be guilty of desertion where, following what he claimed was an unreasonable delay in the delivery of his mail, he cursed and abused the master, refused to obey orders and, on his discharge from arrest by the harbor police, refused to return to the vessel in accordance with the order of the vice consul.

SHIPPING AND NAVIGATION

Vol. IX, p. 343, sec. 14. [First ed., 1909 Supp., p. 655.]

Suspension of rules by war regulations.—The rules governing the length of hawsers established in pursuance of this section were not suspended as a result of war regulations, particularly where the violation at issue occurred more than a year after the signing of the armistice. *The Berkley*, (E. D. Va. 1921) 271 Fed. 35.

Vol. IX, p. 346, sec. 1. [First ed., 1912 Supp., p. 352.]

I. Introductory.

III. Person entitled to lien.

V. “Repairs, supplies or other necessities.”

VIII. Necessity that credit was given to vessel.

X. Jurisdiction.

I. INTRODUCTORY (p. 347)

Purpose and scope.—In *Piedmont, etc., Coal Co. v. Seaboard Fisheries Co.*, (1920) 254 U. S. 1, 41 S. Ct. 1, 65 U. S. (L. ed.) — (affirming (C. C. A. 1st Cir. 1918) 253 Fed. 20, 165 C. C. A. 40), Mr. Justice Brandeis said that reports of Congress state that the purpose of this act was this: “First, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. *The General Smith*, 4 Wheat. 438, 4 L. ed. 609. Second, to do away with the

doctrine that when the owner of a vessel contracts in person for necessities, or is present in the port when they are ordered, it is presumed that the materialmen did not intend to rely upon the credit of the vessel, and that hence, no lien arises. The *St. Jago de Cuba*, 9 Wheat. 409, 6 L. ed. 122. Third, to substitute a single Federal statute for the state statutes in so far as they confer liens for repairs, supplies, and other necessities. *Pevroux v. Howard*, 7 Pet. 324, 8 L. ed. 700. The reports expressly declare that the bill makes 'no change in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.' The act relieves the libellant of the burden of proving that credit was given to the ship when necessities are furnished to her upon order of the owner, but it in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner, or of someone acting by his authority. The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is therefore *stricti juris*, and will not be extended by construction, analogy, or inference."

This provision is merely a statutory declaration of a principle long recognized in maritime jurisprudence. The *Coaster*, (W. D. Wash. 1921) 273 Fed. 609.

The purpose of this act was to give certainty where uncertainty and conflict of decision had arisen on the question of the liability of a ship for materials and service. The *Portland*, (C. C. A. 9th Cir. 1921) 273 Fed. 401. The court said: "The cases cited show how the courts differed in their construction, depending upon whether supplies were furnished in a foreign or domestic port, or were furnished upon the credit of the representative of the ship, or upon the credit of the ship, and whether they were furnished upon the order of the owner or the master. We shall not take up the discussion further than to say that Congress, presumably knowing of the confusion, endeavored by the act of 1910 to make the law more certain by providing in effect that proof that credit was given the ship is dispensed with in the first instance, in that a presumption shall obtain that certain persons have authority to procure supplies and that the ship's husband or master is one of the persons. No lien accrues if such persons did not have authority to bind the ship, and such lack of authority was known, or ought to have been known, to the furnisher of supplies."

This statute did not enlarge the subject matter of maritime liens, but did grant a lien where labor or materials (which previously could have been the basis of a maritime lien) were furnished to a vessel, even in a home port by the order of the master, or anywhere upon the order of the master or owner, although no proof of credit to the

vessel was offered. The *Harvard*, (E. D. N. Y. 1920) 270 Fed. 668.

This act was intended to furnish a complete system within itself. "The first section gives the right of lien to all who furnish repairs or supplies, without distinction as to whether the vessel is foreign or domestic, and imposing only the condition that they should be necessities and furnished upon the order of the owner or by some person by him authorized, and provides further that this lien shall be enforced by a proceeding in rem, and exempts the claimant from any requirement to aver or prove that the repairs or supplies were furnished on the credit of the vessel. Section 2 of the act lists those who are presumed to possess the required authority, and denies such authority to those who are in physical possession or charge of the vessel, if their possession is tortious or unlawful. The third section somewhat extends the list of those who are thus presumed to have authority, but takes away the right of lien from any claimant who knew, or by the exercise of reasonable diligence might have learned that the person on whose order the repairs or supplies were furnished was without authority to bind the vessel." The *Lord Baltimore*, (E. D. Pa. 1921) 269 Fed. 824, wherein the court further said: "A new statement of the policy of the law has been introduced. Those who make repairs or furnish needed supplies to vessels on the order of any one in apparent control are given the right of lien. There is thus wiped out the old distinction of work done or sales made on personal credit, and those made on the credit of the vessel, unless, of course, the right of lien has been waived. There is also wiped out the other distinction between vessels in a foreign and in a home port. A claimant may now maintain a lien, notwithstanding the fact that the person on whose apparent authority the supplies were furnished did not have authority to bind the vessel, if the claimant did not know, nor could with reasonable diligence have found out, such lack of authority."

"The purpose of this section was to alter the then existing presumption that repairs, supplies, or other necessities ordered by the owner in any port or by the master in the home port were furnished on the credit of the owner, in the absence of proof that credit was given to the vessel. The act gave a maritime lien in such cases on the vessel enforceable in rem for repairs, supplies, and necessities ordered by the master or by a person authorized by him, without the necessity of proving that credit was given to the vessel." The *Susquehanna*, (C. C. A. 2d Cir. 1920) 267 Fed. 811.

Construction.—"A construction must be given to the act which will afford a practical working rule to those dealing with vessels. The act of Congress results in at least the possibility that one person may be called upon to pay the debt of another, and any lien

claimant is charged with notice of this possible result. A consequence is that the act must be strictly construed, and the claimant must do his part to minimize the danger of such a result. At the same time the act must be given such a construction as not to defeat its main purpose, which is to enable those in charge of a vessel to obtain all necessary supplies." The Lord Baltimore, (E. D. Pa. 1921) 269 Fed. 824.

"Order" and "procure."—In *The Portland*, (C. C. A. 9th Cir. 1921) 273 Fed. 401, the court said regarding the meaning of these words: "Appellant puts special stress upon the fact that there was a general contract between libellant and the charterer to buy fuel oil used by the charterer in operating its ships, and that the charterer therein agreed to provide and pay for the fuel oil used by the ship, and says that the oil was in fact 'procured' by the charterer under a personal contract obligating libellant to furnish the same. It is to be noted that section 1 of the act uses the words 'upon the order' of the owner, while section 2 declares what persons shall be presumed to have authority from the owner 'to procure' supplies, and in section 3 we find the words 'person ordering the repairs,' etc. We cannot perceive, however, that the words 'order' and 'procure' were used with different significance. Fuel furnished by a person upon the order of the master is equivalent to fuel which the master has authority to procure. The first section confers the right of lien where the furnishing is done on order; the second defines those who are presumed to have authority to obtain the fuel."

The presumption of the statute may be removed and the right of lien based on it destroyed by proof which overcomes it. *The Coaster*, (W. D. Wash. 1921) 273 Fed. 609.

III. PERSON ENTITLED TO LIEN (p. 348)

In general.—"No one with knowledge that fuel or supplies are ordered by one without authority acquires a lien, and one cognizant of circumstances which suggest inquiry may not close his eyes and avail himself of presumptions of the law. Under these circumstances a lien may not be impressed." *The Coaster*, (W. D. Wash. 1921) 273 Fed. 609.

Duty of person claiming lien.—"Every claimant is bound to know that the supplies are in fact for the vessel and in fact reached it; he is further put on guard to know that the supplies are such as are ordinarily required on board a vessel, and in this sense reasonably necessary, and he must further, at his peril, make sure that the person ordering these supplies is clothed with either the actual or the apparent authority to bind the vessel. When these features are present, the claimant may safely sell in reliance upon his right of lien. If any of them are absent, he is left to his other rights and remedies." *The Lord Baltimore*, (E. D. Pa. 1921) 269 Fed. 824.

V. "REPAIRS, SUPPLIES OR OTHER NECESSARIES" (p. 349)

In general.—There is no hard and fast definition of "supplies or other necessities" in the maritime law as declared by the Act of June 23, 1910. The test of what is necessary is what is reasonably needed in the ship's business. *The Penn*, (C. C. A. 3d Cir. 1921) 273 Fed. 990.

Work and materials furnished in "repairing, altering, enlarging and improving the vessel's carrying capacity" in order to fit it for the service which was desired while the boat was temporarily withdrawn from service, but while afloat and in no way removed from its maritime character and surroundings are of a maritime nature for which a lien is given by this section. *The Harvard*, (E. D. N. Y. 1920) 270 Fed. 688.

What constitutes necessities.—"No hard and fast definition of 'necessaries' can be given. When supplies are furnished to a ship on the order of one in apparent authority, whatever comes within the reasonable requirements, not of a ship, but of the ship to which furnished, are necessities. The test is whether in kind and quantity what is furnished is within the reasonable needs of the ship's business.

"In every instance of the furnishing of supplies, the situation speaks for itself to tell the claimant whether he has a right of lien. '*Res ipsa loquitur*.' We must, however, know what the *res* is which is speaking. The ship tells the story of what she does. The thing to be supplied informs the claimant of whether or not it is reasonably within the ship's requirements. By holding that whatever is reasonably within the requirements of the ship are necessities, it is not intended to rule that the owner assumes the burden of proving a negative. The lien is based upon the theory or presumption that the supplies are furnished to the ship and for the ship on the order of the owner. The natural inference is that the ship had need of them, unless something else appears. In the absence of anything contradictory of this, a finding of necessities is *prima facie* called for and may be made." *The Lord Baltimore*, (E. D. Pa. 1921) 269 Fed. 824.

Coal.—A dealer furnishing coal to a vessel is entitled to a lien under this section. *The Dana*, (E. D. N. Y. 1921) 271 Fed. 356; *The Castor*, (E. D. N. Y. 1920) 267 Fed. 606.

Gasoline regularly furnished to a motor boat on orders from her captain the bills for which are paid by the owner without question, entitles the dealer so furnishing to a maritime lien under this section. *The Norman*, (E. D. N. Y. 1921) 271 Fed. 15.

Supplies for ship's restaurant.—Supplies for the restaurant of a passenger ship are necessities within the maritime sense, for which a maritime lien against the ship can be maintained. *The Penn*, (C. C. A. 3d Cir. 1921) 273 Fed. 990.

Construction work.—Where the work performed and material furnished are clearly in the nature of construction and have no relation to trade and commerce no right to a maritime lien exists. Thus, work and material furnished in converting a war vessel purchased from the government into a fishing vessel has been held to be in the nature of construction work for which no lien is given. *The Geo. L. Harvey*, (W. D. Wash. 1921) 273 Fed. 972.

Reconstruction work.—It has been held that a lien is not created by this section where the work partakes of the character of reconstruction work rather than repair. *The Susquehanna*, (C. C. A. 2d Cir. 1920) 267 Fed. 811.

Identity of vessel lost.—Where the identity of a car float was completely lost by its conversion into an amusement steamer it was held that no maritime lien was created on the ground of repairs or supplies furnished. *The Jack-O-Lantern*, (D. C. Mass. 1920) 266 Fed. 562.

VIII. NECESSITY THAT CREDIT WAS GIVEN TO VESSEL (p. 352)

In general.—To same effect as original annotation, see *The Charles A. Day*, (D. C. Me. 1920) 265 Fed. 422.

Supplies furnished to corporation owning vessels.—No part of coal delivered to a corporation owning both factories and a fleet of fishing steamers, in pursuance of a contract to furnish such corporation with its season's supply, and thereafter by such corporation distributed in its discretion to its vessels and factories, can be said to have been furnished by the seller to the vessels upon the order of the owner, within the meaning of giving a maritime lien upon a vessel for supplies so furnished without proof that credit was given to the vessel, although the use of the greater part of the coal by the vessels of the fleet was a use which was contemplated by the parties at the time of the purchase, and although both parties understood that the law would afford a lien on the vessels for the purchase price. *Piedmont, etc., Coal Co. v. Seaboard Fisheries Co.*, (1920) 254 U. S. 1, 41 S. Ct. 1, 65 U. S., (L. ed.) — (*affirming* (C. C. A. 1st Cir. 1918) 253 Fed. 20, 165 C. C. A. 40) wherein the court said: "To hold that a lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of a vessel, subsequently appropriates the supplies to her use, would involve abandonment of the principles upon which maritime liens rest, and the substitution therefor of the very different principle which underlies mechanics' and materialmen's liens on houses and other structures. The former had its origin in desire to protect the ship; the latter mainly in desire to protect those who furnish work and materials. The maritime lien developed as a necessary incident of the operation of

vessels. The ship's function is to move from place to place. She is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners, and without any large amount of money, it is essential that she should be self-reliant,—that she should be able to obtain upon her own account needed repairs and supplies. The recognition by the law of such inherent power did not involve any new legal conception, since the ship had been treated in other connections as an entity capable of entering into relations with others, of acting independently, and of becoming responsible for her acts. Because the ship's need was the source of the maritime lien, it could arise only if the repairs or supplies were necessary; if the pledge of her credit was necessary to the obtaining of them; if they were actually obtained; and if they were furnished upon her credit. The mechanic's and materialman's lien, on the other hand, attaches ordinarily although the labor and material cannot be said to have been necessary; although at the time they were furnished there was no thought of obtaining security upon the building; and although the credit of the owner or of others had in fact been relied upon. The principle upon which the mechanic's lien rests is, in a sense, that of unjust enrichment. Ordinarily, it is the equity arising from assumed enhancement in value resulting from work or materials expended upon the property without payment therefor which is laid hold of to protect workmen and others who, it is assumed, are especially deserving, would ordinarily fail to provide by agreement for their own protection, and would often be unable to do so."

Supplies furnished under entire contract to several vessels.—"While one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies furnished are furnished to all upon orders of the owner under a single contract. Each vessel so receiving supplies may be made liable for the supplies furnished to it." *Piedmont, etc., Coal Co. v. Seaboard Fisheries Co.*, (1920) 254 U. S. 1, 41 S. Ct. 1, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 1st Cir. 1918) 253 Fed. 20, 165 C. C. A. 40.

Repairs on boat under charter.—Under this section repairs for ordinary wear and tear ordered by a representative of the owner raises the presumption that they were ordered on the credit of the vessel, although they were ordered and made at a time when the vessel was undergoing repairs under contract with the charterer whose charter, however, did not obligate him to make repairs for ordinary wear and tear. *The No. 14* (E. D. N. Y. 1921) 271 Fed. 10. But a claimant furnishing supplies to a vessel must exercise reasonable diligence to find out if the person

ordering the repairs is the owner, and where he knows that the vessel is under charter and he can by reasonable diligence ascertain the terms of the charter party and who is the owner and what relation the person ordering the supplies bears to the owner, his failure to so exercise due diligence will defeat his right to a maritime lien. *The Huron*, (E. D. Pa. 1921) 271 Fed. 781.

Effect of changing charges on books.—Changing the charge on the books of the libellant from a corporation to each vessel does not operate to create a lien on the vessel where the libellant had furnished supplies for several years to the corporation which had chartered the vessels. *The Coaster*, (W. D. Wash. 1921) 273 Fed. 609.

X. JURISDICTION (p. 353)

An account admitted or paid in part may be collected under an admiralty lien, even if there might be also a claim at law or in personam, on the doctrine of estoppel of the right to dispute liability and amount. *The Harvard*, (E. D. N. Y. 1920) 270 Fed. 668.

Vol. IX, p. 354, sec. 2. [First ed., 1912 Supp., p. 353.]

Master.—It is said that "a charter party with a provision that charterer shall provide and pay for fuel oil does not take away from the master the authority conferred by the act upon the master to bind the ship. It regulates the rights as between owner and charterer; but as to third persons the right of lien is not affected." *The Portland*, (C. C. A. 9th Cir. 1921) 273 Fed. 401.

The managing officer of a corporation to which the "working of the charter party" had been assigned by the charterer according to the charter party terms has been held to be a "person to whom the management of the vessel at the port of supply is intrusted" so as to create a lien for supplies furnished on his authority. *The Penn*, (C. C. A. 3d Cir. 1921) 273 Fed. 990.

Vol. IX, p. 355, sec. 3. [First ed., 1912 Supp., p. 353.]

Duty as to inquiry.—A supply man who knows nothing about a ship, other than it is a ship in possession of those who order supplies for her, may furnish them upon her credit, without making further inquiry, taking the chance—usually a remote one—that the possession of her was tortiously acquired. *The St. Johns*, (C. C. A. 4th Cir. 1921) 273 Fed. 1005.

The words "other necessities," used in the statute, must, under the rule of *ejusdem generis*, be limited in their meaning to such things, of the general nature of repairs and supplies, as are fit and proper for the use of a ship. *The Penn*, (E. D. Pa. 1920) 266 Fed. 933.

Master.—In the *Angie B. Watson*, (D. C.

Mass. 1921) 274 Fed. 218, it was held that it was not shown that the person furnishing the supplies knew, or by such diligence as he was bound to exercise, could have ascertained, that the master of a fishing vessel was not authorized to bind the vessel and her owners for the supplies. In this case the owners had let the vessel to the master on a one-fifth lay in accordance with a custom on another part of the coast of which it was not shown that the libellant had any knowledge.

Agent of owner and charterer.—A person representing both the owner and the charterer, who orders coal for a vessel, is within the class of persons who may, like the master, order supplies for the benefit of the vessel, and whose act will bind the vessel, unless it can be shown under this section that the person furnishing the credit knew or could by reasonable inquiry have ascertained that the person ordering the supplies did not have authority to bind the vessel. *The Dana*, (E. D. N. Y. 1921) 271 Fed. 356.

Terms of charter party as controlling.—Where the services rendered in making stability tests were not shown to have been necessary for the vessel and the libellant knew that the vessel was chartered and was put on inquiry as to the existence of the terms of the charter party, no lien was acquired on the vessel for services not shown to have been necessary for its operation nor to have been a charge for which the owners would be liable under the charter party. *The Penn*, (E. D. Pa. 1920) 266 Fed. 933.

Vol. IX, p. 357, sec. 4. [First ed., 1912 Supp., p. 353.]

Proof of waiver.—The lien given by this Act will not be deemed to have been defeated by waiver, unless such waiver is shown by clear affirmative evidence. *The Charles A. Day*, (D. C. Me. 1920) 265 Fed. 422.

Vol. IX, p. 358, sec. 5. [First ed., 1912 Supp., p. 353.]

Scope of section in general.—State laws.—This section does not affect a state statute which confers upon persons who perform labor or furnish materials in the construction, launching, or repair of vessels a possessory lien upon the vessel to secure the payment of the debt therefor. *The City of Miami*, (D. C. Mass. 1920) 265 Fed. 427.

Lien on vessel in process of construction.—"There being no maritime lien for materials and supplies furnished and work done in constructing or building a ship, the state may provide and enforce such lien. * * * The act of Congress of June 23, 1910, only affected the state statute as related to repairs on completed vessels, and not for a lien in the construction of vessels." *Lever Transp. Co. v. Standard Supply Co.*, (Ala. 1920) 87 So. 598.

1918 Supp., p. 785, sec. 1.

Purpose of Act.—"The primary purpose of the act was to provide 'army transports,' and the commercial shipping was incidental. The act is a war measure; emergency is reflected in nearly every sentence. The purpose was to acquire vessels 'for use as naval auxiliaries or army transports,' and the 'navy yards' were to be utilized. Of the great need for transports the Congress was advised, and the public later found out. Every detail of management, relation, and function of the defendant is prescribed and limited in the Marine Act, and the only use made of the incorporation act, the creation of the Congress, was the filing of articles to give it corporate entity as a matter of convenience, and nowhere is there apparent an intention to waive the sovereign privilege. On the contrary, exempting vessels from immunity and submitting them to admiralty seems conclusive that in all things else the sovereignty was asserted and retained." *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, (W. D. Wash. 1920) 268 Fed. 624, holding that a suit involving more than \$10,000 against the United States Shipping Board Emergency Fleet Corporation was not maintainable in the district court.

A suit against the Emergency Fleet Corporation is not one against the United States and does not require the consent of Congress to its maintenance. *Pope v. U. S. Shipping Board Emergency Fleet Corp.*, (S. D. Fla. 1920) 269 Fed. 319.

"There is nothing in section 1 or elsewhere in the act which prohibits a libel in personam against a corporation in which the United States has the entire stock interest, for a cause of action in which a libel in personam would lie against it under admiralty and maritime law. The apparent intent of sections 1 and 2 of the act is to prevent interference through arrest and seizure with vessels and cargoes while the vessels are being operated or the cargoes are in course of transportation, and to substitute for an action in rem against the vessel or cargo an action in personam.

"Section 13 repeals the provisions of all other acts inconsistent therewith. As the provisions of section 9 of the Shipping Act of September 7, 1916, are broad in their terms, making such vessels while employed solely as merchant vessels subject to all laws, regulations, and liabilities governing merchant vessels, and the act of March 9, 1920, by sections 1 and 2, provides for the substitution of an action in personam where an action in rem would lie, it is evident that Congress did not intend to repeal the pertinent part of section 9 of the act of 1916, so that all suits in admiralty were to be included within the terms of the act of 1920, but that it was solely intended to substitute an action in personam for an action in rem against the vessel or the cargo, and the effect was

to take such cases out of the provisions of the earlier act. There would seem to be no sound reason for construing the act of 1920 as doing more than regulating such suits in admiralty as would interfere with the operation of vessels and the possession of cargoes, if brought in rem, leaving the vessel subject in other cases to the broader provisions of section 9 of the Shipping Act of 1916.

"In my opinion sections 1 and 2 of the act of 1920 must be read together. Section 1 does not prohibit suits against corporations in which the United States has ownership of the entire outstanding stock, but prohibition of arrest and seizure of vessels and cargoes is the sole purpose of the section. It is further apparent, from the provision of section 2 that suits shall be brought in the district in which the parties reside or in which the vessel or cargo charged with liability is found, that the procedure was intended to apply only to proceedings in rem against the vessel or cargo." *Banque-Russo, etc. v. U. S. Shipping Board Emergency Fleet Corp.*, (E. D. Pa. 1920) 266 Fed. 897.

1918 Supp., p. 788, sec. 9.

Purpose.—It is said to be doubtless true that the principal reason why this section subjected government owned ships, while operated for mercantile purposes, to the laws, regulations, and liabilities governing merchant vessels, was to protect privately owned craft from unfair competition. The *Ceylon Maru*, (D. C. Md. 1920) 266 Fed. 396.

Construction.—"While it is the duty of the courts to see to it that the operations of the sovereign shall not be hampered by the seizure of its property, nor shall it, without its consent, be subject directly or indirectly, to suits, there is no reason why such legislation as that found in section 9 of the Shipping Act of 1916 shall be narrowly construed. Such statutes are remedial, and are entitled to a fair liberality of interpretation." The *Ceylon Maru*, (D. C. Md. 1920) 266 Fed. 396.

Liability of vessel to proceeding in rem.—A vessel which was under requisition by the government can be proceeded against by a suit in rem after her return to the owner for a collision occurring while in government service, as the public service in which the vessel was engaged does not afford her immunity. The *Mavisbrook*, (D. C. Md. 1921) 270 Fed. 1011.

This section expressly subjects government owned ships, when they are operated as merchantmen, to the laws governing merchant ships, and those laws, include liability to admiralty process, so that, a maritime lien in rem existing, and the only objection to its enforcement having been government ownership, and the law having provided that that immunity shall no longer exist when the ship is used as a merchant vessel, it would seem to follow that she

must now answer for a tort alleged to have been committed by her while engaged in army service. *The Ceylon Maru*, (D. C. Md. 1920) 266 Fed. 396.

Sales of ships to aliens—actions for broker's commissions.—Under this section neither a person not a citizen of the United States can buy nor an owner sell to such a person without the consent of the Shipping Board and a broker cannot recover a commission for procuring such a purchaser where the required consent is not obtained. *Keeveny v. McCormack*, (C. C. A. 2d Cir. 1920) 266 Fed. 314; *Damers v. Trident Fisheries Co.*, (1920) 119 Me. 343, 111 Atl. 418. In the latter case, the court said: "While the question is one of first impression in this court, we are of the opinion that the statute is a complete bar to the action, and this conclusion is supported by reason and the weight of authority. The option was enforceable, and the testimony shows that both parties intended to carry it out in detail, until it was known that a presidential order declaring an emergency and calling into effect the section of the statute above referred to had been issued; and after the emergency was declared, both parties sought relief by appeal to the United States Shipping Board, and were unsuccessful. The fact and date of the President's declaration are admitted. The final question is: Does such declaration making the statute effective excuse the defendant from the performance of its agreements in its option? We think it does. The general rule is that if, after such contract is entered into, a statute is passed rendering it illegal, the promisor is no longer bound. *Tiffany on Sales*, p. 310, and cases cited. But it is urged that the statute was not passed after the contract was entered into, but was enacted six months before, to wit, on September 7, 1916, and that the statute does not apply for that reason. We do not see the force of this contention. The statute was passed for a definite, serious purpose, by legislators who had in view the gravity of that purpose, and whose intentions were as serious and definite as the expected emergency could induce. The statute was but a preparation, a means to be used instantly if the emergency arose, and was necessarily inactive and without full effect until the emergency was declared by the President to exist. It then became active, and only then had the force and effect of laws passed without limitation or restriction. It could not operate before the emergency was declared, but it was the law nevertheless. It could and did operate thereafter, and possessed all the force which the Congress intended it should have. It therefore was the law after the contract was signed on February 3, 1917, and was a legal excuse and justification for the defendant's refusal to transfer the steamers involved in this action. The proclamation was issued February 5, 1917. All the conditions named

in the option were to be performed after that date. It was the duty of the plaintiffs to make a sale or obtain a binding and enforceable agreement for the sale and transfer of the steamers in the first instance; but even then, in the presence of the circumstances in this case, assuming that the plaintiffs had performed all of the conditions required by the contract, they are presumed to have acted with full knowledge of the existence of the law; for, while the statute was to be without effect until an emergency was proclaimed to exist, it was still the law, and they are charged with a knowledge of its existence and provisions, and are bound thereby. Any other conclusion would work an injustice not heretofore tolerated by courts of law."

1918 Supp., p. 790, sec. 11.

Shipping Board as a governmental agency.—See *Astoria Marine Iron Works v. U. S. S. Corp.*, (D. C. Ore. 1921) 270 Fed. 635.

Nature of functions of board.—As to this it has been said: "Any one examining this act, even in a cursory manner, will be struck by the fact that its purposes and the broad powers given as to taking over and managing the ships and shipping, and the powers to inquire into all shipping contracts, and to regulate and control them, and finally to inquire into alleged breaches of the terms of the act, must conclude that the functions of the board thereby provided for were governmental, and not those of a private business concern." *Southern Bridge Co. v. U. S. S. Corp.*, (S. D. Ala. 1920) 266 Fed. 747.

Liability of Emergency Fleet Corporation to suit.—The Emergency Fleet Corporation must be regarded as a separate entity, although all of its stock is owned by the United States, and it has the capacity to sue and may be sued the same as other corporations. *Eichberg v. U. S., etc., Corp.*, (App. Cas. D. C. 1921) 273 Fed. 886; *American Cotton Oil Co. v. U. S., etc., Corp.*, (E. D. La. 1921) 270 Fed. 296; *Ingram Day Lumber Co. v. U. S., etc., Corp.*, (S. D. Miss. 1920) 267 Fed. 283; *Perna v. U. S., etc., Corp.*, (E. D. Pa. 1920) 266 Fed. 896; *Banque-Russo, etc., Co. v. U. S., etc., Corp.*, (E. D. Pa. 1920) 266 Fed. 897. But an action cannot be maintained against the Emergency Fleet Corporation for a tort committed by its attorney. *Keeley v. Kerr*, (D. C. Ore 1921) 270 Fed. 874.

Jurisdiction of suits against Emergency Fleet Corporation—Immunity from process.—In *Lord, etc., Co. v. United States, etc., Corp.*, (N. D. Ill. 1920) 265 Fed. 955, the defendant moved to dismiss the action on the ground that the corporation was a mere instrumentality of the United States and that the federal court lacked jurisdiction of an action against it. In overruling the motion, the court said: "The Shipping Act provides no jurisdiction in which con-

trousers may be litigated, except the provision relating to the enforcement by action in the United States courts of orders of the board (sections 29, 30, 31), and except that section 10 provides that disputes growing out of the taking by the President of vessels for naval or military purposes may be settled by appraisers. If the Emergency Fleet Corporation was a mere instrumentality of the United States, performing only governmental functions, an action against it would be in effect an action against the United States, that could only be maintained in some manner prescribed by statute.

"If, on the other hand, the corporation was only used for the purpose of forwarding the commercial shipping interests of the country, it would be subject to suit the same as any other corporation. *Bank of the U. S. v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244; *Panama R. Co. v. Curran et al.*, 256 Fed. 772, 168 C. C. A. 114. Ownership by the government of all of the stock of a corporation does not change the situation. It remains a corporation just the same as though it had a dozen or more stockholders. *Pullman's Palace Car Co. v. Mo. Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Bank of the U. S. v. Planters' Bank*, supra; *Panama R. Co. v. Curran et al.*, supra.

"One of the objections to the Shipping Act before Congress was that in the bill there was a tendency toward government ownership, and, in refutation of that charge, it was explained to Congress that:

"If there is in this bill any feature of government ownership, it contains in itself the means for the automatic elimination of all elements of government ownership.' May 16, 1916, Cong. Rec. p. 9163.

"Then follows a rather elaborate explanation of the provisions of section 11, above cited, from which it is clearly apparent that it was intended that individuals might become subscribers to a part or all of the capital stock of any such corporation, and that the government's only control over it would be the same as that of a private owner of a majority of the stock, if it remained a stockholder at all. The language of section 11, providing for the creation of the defendant, limits the powers of the board to the formation of a corporation under the general laws of the District of Columbia for a limited and a purely commercial purpose, viz. to deal merely with merchant vessels in the commerce of the United States. I am of opinion that the language of the act justified the interpretation before Congress.

"A note under section 11 in a 1917 government printed copy of the Shipping Act, handed this court, says the defendant 'has been incorporated in accordance with this provision.' It must be assumed, from the very fact of the provision for the incorporation of the defendant, that it was intended that it should be a real corporation, with all its powers, rights, and obligations intact.

To hold otherwise would be to hold that Congress did the wholly purposeless thing of incorporating a corporation, which should not be a corporation at all, to perform, under the board, things which, as a government agency, the board had ample authority to do.

"It is thought that subsequent legislation and executive orders, referred to in defendant's motion, affect the question here raised, viz. the Urgent Deficiencies Appropriation Act approved June 15, 1917, and executive orders relating thereto and to some extent involving the defendant. The emergency shipping fund provision of the Urgent Deficiencies Appropriation Act gave to the President very broad powers with reference to placing orders for such ships and materials as the necessities of the government might require, and authorized the President to exercise those powers and spend the moneys appropriated through such agency or agencies as he should determine, but that act does not in any way refer to the defendant, except as follows:

"Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended." Section 1.

"This indicates not an intention to change the corporation, but does clearly indicate that in expending such moneys it should act as a corporation. . . .

"It is not to be believed, except on the clearest evidence, that Congress, when it authorized the incorporation of the defendant under the general laws of the District of Columbia, to forward a specific, limited, and purely commercial undertaking, intended to take away all those corporate rights, and leave those who might deal with the corporation no place to adjudicate those rights, except in and through the slow and cumbersome processes of the Court of Claims, where over \$10,000 is involved."

In *Ingram Lumber Co. v. U. S., etc., Corp.*, (S. D. Miss. 1920) 267 Fed. 283, it was contended that a suit against the Emergency Fleet Corporation should be dismissed because it was in fact a suit against the United States. In overruling this contention, the court said: "I do not think this ground is supported by the record, which says clearly it is a suit against the United States Shipping Board Emergency Fleet Corporation (a distinct legal entity), organized as above set forth. True, the United States may have a dual relation to it: (1) That of stockholder and corporation; (2) principal and agent. It has no other connection or relation to the government, and certainly it is not the United States, which has not been made a defendant in this case in any manner known to the law."

Amount in controversy.—A suit against the Emergency Fleet Corporation for a claim in excess of \$10,000 can not be maintained in

the district court. *Sloan Shipyards Corp. v. U. S., etc., Corp.*, (W. D. Wash. 1921) 272 Fed. 132.

It is held that for its acts performed in its capacity as a governmental entity the Fleet Corporation is not suable except in the Court of Claims for an amount involving in excess of \$10,000. *Astoria Marine Iron Works v. U. S., etc., Corp.*, (D. C. Ore. 1921) 270 Fed. 635.

1920 Supp., p. 232, sec. 2.

Purpose of act.—"The principal purpose of the statute under which the proceeding was brought was to prevent within the United States the arrest upon judicial process of any government owned ship or cargo, without thereby working injustice or hardship to those who as against either, had valid claims which, if the vessel or the merchandise had belonged to private persons, they might have asserted in rem; but there is in it, and in its legislative history, cause to believe that it may also have intended to give the consent of the United States to being made a respondent in suits in personam upon some classes of maritime liabilities in which individuals would have been liable in personam, but upon which proceedings in rem could not have been maintained." *Blamberg v. U. S.*, (D. C. Md. 1921) 272 Fed. 978.

Scope of section.—"There is no reason to suppose that Congress intended to make the United States suable under any circumstances in which a suit could not have been instituted in this country, were the ship or cargo privately owned, and yet, if the libelants' contention be sustained, that will be the result here. There was no privity of contract between the United States and the shippers of cargo by the *Catskill*, nor has the United States done them any actionable wrong. If it were an individual, no proceeding in personam could be brought against it, either in admiralty or at common law. Nor could any libel be maintained against the ship in rem in any court of the United States, because none of them could have taken possession of her. The grant of jurisdiction made by the second section of the act is expressly limited to such proceedings as 'could be maintained at the time of the commencement of the action herein provided for,' and in the instant case at that time there was no court in the United States in which the suit could have been maintained, either in rem or in personam, had an individual occupied the same relation to the cause of action as was borne by the United States.

"Nor is this a narrow construction. It is one in perfect harmony with the most liberal and far-reaching purpose which can

reasonably be attributed to Congress. To hold that it intended that a citizen should be no worse off because of government ownership is as far as any one will be justified in going. There is no reason to suppose that it intended to open the doors of its courts, as against the United States, to suits which could not there have been prosecuted against an individual or his property. The general language of every statute must be read in the light of the legislative intent, in so far as that is unmistakably expressed." *Blamberg v. U. S.*, (D. C. Md. 1921) 272 Fed. 978.

Suit by alien.—The provision that suit shall be brought in the "district court of the United States for the district in which the parties so suing or any of them reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found," has been held not to apply in the case of an alien who neither resides nor has a place of business in any district in the United States. *Middleton v. U. S.*, (E. D. S. C. 1921) 273 Fed. 199, wherein the court said: "Assuming, however, that the Japanese corporation is the party alone interested, then, inasmuch as it neither resides nor has any principal place of business in any district in the United States, it would be impossible for it to sue, under the construction placed upon the act by the counsel for the government, in any district in the United States, save one in which the vessels might be found. If no vessel can be found within the United States, then no matter how meritorious the claim of the alien may be, whether in rem or in personam, it would be impossible for him to sue.

"This would not appear to be in accordance with the intention of the statute. Under the principles to be deduced from preceding decisions of the federal courts in analogous cases, it would appear that, where the provision of the act is that the suit must be brought in the district of the residence of one of the parties, then in the case of an alien defendant such restriction does not apply, as that would mean that, unless the alien sued should be found capable of service in the district of the residence of the citizen desiring to sue him, he could not be sued at all. The principle would seem to be that an alien may be considered for the purposes of jurisdiction, if he enters the United States, or is brought into it, for the purposes of suit, to reside in any district.

"If this is a proceeding in personam, brought on behalf of the Japanese corporation alone, an alien corporation, under the principles of these decisions it would appear that it could sue in any district in the United States."

SOLDIERS' AND SAILORS' CIVIL RELIEF

1918 Supp., p. 812, sec. 100.

Constitutionality.—To same effect as 1919 Supplement annotation, see *Erickson v. Macy*, (1921) 231 N. Y. 86, 131 N. E. 744; *Pierrard v. Hoch*, (1920) 97 Ore. 71, 191 Pac. 328.

Purpose of act.—See *Halle v. Cavanaugh*, (N. H. 1920) 111 Atl. 76.

Necessity of induction into service.—In *Continental Jewelry Co. v. Minsky*, (1920) 119 Me. 476, 111 Atl. 801, it was held that this act had no application to a person who had been accepted for military service but not actually inducted into active service.

1918 Supp., p. 812, sec. 101.

Effect of termination of military service.—The act of Congress known as the Soldiers' and Sailors' Civil Relief Act by its express language becomes inoperative and without effect upon the death or discharge of a soldier or sailor within its protection, and an order of a court, requiring a refundment or return of money paid prior to his entry into the service upon an executory contract for the sale of land as a condition to a cancellation thereof, is not authorized by the act in an action or proceeding commenced subsequent to such death or discharge. *Nelson Real Estate Agency v. Seeman*, (1920) 147 Minn. 354, 180 N. W. 227.

In *Hickernell v. Gregory*, (Tex. 1920) 224 S. W. 691, in sustaining the forfeiture of an oil and gas lease for nonpayment of rent it was said: "Hickernell cannot defend under the Soldiers' and Sailors' Civil Relief Act of Congress of March 8, 1918. He did not enter the military service until June, 1918, after his lease was executed in February, and he states that he was discharged from the service January 24, 1919. The rent was not due until February 6, 1919. It is provided by section 101, subd. 2, that the 'period of military service' of a soldier or sailor 'shall terminate with the date of discharge from the active service or,' etc. Then, according to his own testimony, he cannot claim the advantages and privileges conferred by the act."

A civilian captain of a transport is not within the protection of the act. *Greenwood v. Puget Mill Co.*, (1920) 111 Wash. 464, 191 Pac. 393.

1918 Supp., p. 814, sec. 200(1).

Who may object to noncompliance.—To attack a default judgment for noncompliance with this section the defendant must show that he was in the military service. *Mader v. Christie*, (Cal. App. 1921) 198 Pac. 45.

Time for filing affidavit.—An affidavit filed after the entry of a default but before the entry of judgment is seasonably filed. *Mader v. Christie*, (Cal. App. 1921) 198 Pac. 45.

1918 Supp., p. 814, sec. 200(4).

Application must be made within ninety days after the termination of the military service of the applicant to set aside a default entered in violation of this section. *Combs v. Combs*, (1920) 180 N. C. 381, 104 S. E. 656.

Application must show meritorious defense.—"It is nowhere made to appear that the defendant has a meritorious or legal defense to the action. In his affidavit the defendant fails to set out that he has any defense to the cause of action as stated in the complaint. While he declares that he has a good and meritorious defense to said action, he fails to set out what that defense is. The statute says that it must be made to appear that the defendant has a meritorious or legal defense. It is not left to the defendant to say that his defense is meritorious or legal, but it must be made to appear so to the judge of the court; for that reason the defendant is required to set out the facts constituting his defense." *Combs v. Combs*, (1920) 180 N. E. 381, 104 S. E. 656.

1918 Supp., p. 815, sec. 202.

Interest of soldier in subject matter previously extinguished.—Where it appears that the rights of a certain person in property were based on a mortgage which was foreclosed before the war, and that any interest derived from him by the present owners passed before the war, the act has no application, and the fact that the person referred to is in the military service is irrelevant in an action involving the title to which he is not a party. *Chance v. Hawkinson*, (Minn. 1921) 182 N. W. 911.

1918 Supp., p. 816, sec. 205.

Suit on indemnity insurance policy.—In *Steinfeld v. Massachusetts Bonding, etc., Co.*, (N. H. 1921) 112 Atl. 800, this section was held applicable to a suit on an indemnity insurance policy, which contained a stipulation as to the time within which a suit must be brought after payment of loss. The court said: "The defendant's argument is that the time for bringing suit was limited by the contract, and not by 'any law,' and that therefore the statute does not apply. The defect in the argument is its assumption that the contract is binding, irrespective of any law. This plainly is not so. The contract is valid because some law so declares it. In the defendant's brief it of necessity appeals to the law to sustain its position that the contract stipulation is valid. It is by virtue of the decided cases cited by the defendant that it is able to demonstrate the correctness of that position. Actions are not limited without law. It was the agreement plus the law that created the legal limita-

tion in this case. It is true, as the defendant argues, that a contract is not a law. It is equally true that an agreement without law is not a contract.

"The application of the federal act is not limited to statutory provisions. It applies to all law, and provides, in substance, that, notwithstanding the state law limits the action as by contract agreed, that law shall not apply while the plaintiff is in the service.

"It is manifest that the present case is within the spirit and intent of the act. The purpose was to extend the time for bringing actions generally. *Id.* § 100. It was not the legislative intent that the remedial purpose of the act should be defeated by a narrow or technical construction of the language used. *Halle v. Cavanaugh*, 111 Atl. 76."

Suit by husband as executor of wife's estate.—This section does not apply to a suit by a husband as executor of his wife's estate to recover damages for death by wrongful act, but he may appear and prosecute such a suit as one interested in her estate. *Halle v. Cavanaugh*, (N. H. 1920) 111 Atl. 76.

Running of time to redeem from a sale under a vendor's lien, made prior to the enactment of the statute, is not stayed by this section. *Wood v. Vogel*, (1920) 204 Ala. 692, 87 So. 174, wherein it was said: "The right of redemption under section 5746 et seq. from judicial and quasi judicial sales of real estate is not a property right, but is a mere personal privilege accorded by the statute, to be exercised in the manner and within the time prescribed by law. *Lewis v. McBride*, 176 Ala. 134, 57 South. 705; *Burke v. Brewer*, 133 Ala. 389, 32 South. 602; *Parmer v. Parmer*, 74 Ala. 285. It is not a right of action in the sense in which statutes of limitations are applicable, and the prescription of a period of two years within which the privilege must be exercised does not create a statute of limitations. That prescription affects the right, and not the remedy, whereas a statute of limitations operates upon the remedy only, except in actions for the recovery of property."

1918 Supp., p. 816, sec. 300 (1).

[*Eviction or distress, etc.*]

Power of justice's court.—A justice's court is within the provision as to "leave of court" and the jurisdiction of justices of the peace in eviction proceedings is not divested by this act. *Riordan v. Zube*, (Cal. App. 1921) 195 Pac. 65, wherein the court said: "Though not mentioned in the Constitution as such, the justices' courts are courts of the state of uniform, though limited, jurisdiction. They find their life and power in the acts of the Legislature, which the Constitution expressly authorizes the Legislature to enact. The argument of appellant seems to be that, as the Moratorium Act prohibited the eviction of such dependents except upon leave of court, and that as the term 'court' as used in that act was therein

defined to include 'any court of competent jurisdiction of the United States or of any state, whether or not a court of record,' the application should have been made to a superior court, because justices' courts are not included in the enumeration of state courts in the state Constitution. But the Moratorium Act does not pretend to change the jurisdiction of any court which is created under state authority. The provisions of that act are made applicable to all courts of competent jurisdiction, whether created by the Congress or the various states."

Equitable relief against judgment.—In denying equitable relief against a judgment of eviction entered by a justice of the peace, the court in *Riordan v. Zube*, (Cal. App. 1921) 195 Pac. 65, said: "The justice's court, therefore, had jurisdiction to render the judgment, and it was not void upon its face. The execution was stayed for three months, which was the maximum period of leniency authorized by the Moratorium Act. Section 300, subd. 2. Appellant was thus given the full protection of the law. The justice's court having had jurisdiction of both the person and subject-matter of the action, its judgment was valid upon its face. Defendant in that case having been given all the protection provided by the Moratorium Act, he had no cause in equity to prevent the execution of that judgment. On the other hand, if aggrieved by the judgment in the justice's court, the statute gave him an adequate remedy by appeal to the superior court. His failure to pursue that remedy does not warrant an equitable action to set aside the judgment, which is valid on its face."

1918 Supp., p. 817, sec. 302 (1).

Obligations secured by mortgage, when originating.—Where a mortgage was dated prior to the passage of this act but was not delivered or the consideration paid until after its enactment, the obligation secured by it did not originate prior to the approval of this act. And if a mortgage originating prior to the passage of this act is satisfied after its enactment but is kept alive and assigned as additional security for a new mortgage given at the time of payment, and the new mortgage is subsequently foreclosed, the obligation of the old mortgage is a debt secured by the new one and hence is one originating subsequent to the passage of this act. *Kendall v. Bolster*, (Mass. 1921) 131 N. E. 319.

State legislation abrogated.—This section abrogates a state moratorium law forbidding absolutely mortgage foreclosure proceedings against persons in the military or naval service. *Pierrard v. Hoch*, (1920) 97 Ore. 71, 184 Pac. 494, 191 Pac. 328.

Foreclosure completed before act.—In an action to set aside a sheriff's deed upon a mortgage foreclosure by advertisement, relying upon the federal and state moratorium acts, where it appeared that on December 1,

1917, the foreclosure sale was held; that on January 29, 1918, the state act, and on March 8, 1918, the federal Soldiers' and Sailors' Civil Relief Act were enacted; that on December 6, 1918, the sheriff's deed was issued; that the plaintiff was in the military service from July, 1917, to May 22, 1919; and that in October, 1920, he instituted this action, it was held that the execution of a sheriff's deed evidenced only the ministerial act of the officer to complete the formal transfer of the naked legal title after the expiration of the equity of redemption, and

did not affect the expiration of the equity of redemption; that the federal act was not applicable, even though it be assumed that the plaintiff's equity of redemption was suspended during the period of his military service and for three months thereafter, for the reason that such equity of redemption thereafter fully expired before the institution of the present action, and without any alleged offer or tender made to redeem. *Olson v. Gowan Lenning Brown Co.*, (N. D. 1921) 182 N. W. 929.

STATE DEPARTMENT

Vol. IX, p. 376, sec. 205. [First ed., vol. VII, p. 116.]

Duty of Secretary of State as to amendments.—Under this section it is the duty of the Secretary of State, upon receiving notice from three-fourths of the several states that the proposed amendment has been adopted, to issue his proclamation and publish the amendment. He is not required, or authorized, to investigate and determine whether or not the notices state the truth but must accept them as doing so, if they are in due

form. *U. S. v. Colby*, (App. Cas. D. C. 1920) 265 Fed. 998.

Proclamation as essential to validity.—The validity of a constitutional amendment does not depend in any wise upon the proclamation of the Secretary of State under this section. It is the approval of the requisite number of states in accordance with article 5 of the Constitution, and not the proclamation, that gives vitality to the amendment and makes it a part of the Constitution. *U. S. v. Colby*, (App. Cas. D. C. 1920) 265 Fed. 998.

STATUTES

Vol. IX, p. 393, sec. 13. [First ed., vol. VII, p. 136.]

Applied.—This section was applied in *Es p. Lamar*, (C. C. A. 2d Cir. 1921) 274 Fed. 160.

STEAM VESSELS

Vol. IX, p. 468, sec. 4493. [First ed., vol. VII, p. 195.]

Relation to R. S. sec. 4283.—In *The Virginia*, (D. C. Md. 1920) 264 Fed. 986, it is said that this section is in no way restricted

by section 4283 (6 Fed. St. Ann. (2d ed.) p. 336).

Application.—This section has no application to cargo claims. *The Virginia*, (D. C. Md. 1920) 264 Fed. 986.

TELEGRAPHS, TELEPHONES AND CABLES

1918 Supp., p. 834. [*Government control, etc.*]

Federal decisions are controlling as to the construction of the resolution and the proclamation and general orders issued thereunder. *Western Union Tel. Co. v. Conditt*, (Tex. 1920) 223 S. W. 234.

Government control as defense to action.—In *Western Union Tel. Co. v. Poston*, (1921) 256 U. S. —, 41 S. Ct. 598, 65 U. S. (L. ed.) — (*reversing* (S. C. 1920) 107 S. E. 516), it was held that a telegraph company was not liable for damages resulting from negligent delay in delivering a message while its telegraph system was, pursuant to this joint resolution of Congress, and the proclamation of the President of July 22, 1918, in the exclusive possession and control of the federal government, and was being operated by the Postmaster General.

"The complete control and the exclusive possession of this, as well as all other wire lines within the resolution of Congress, as effected through the proclamation of the President, having passed to the United States, the defendant (appellee) was not and could not have been engaged in the business described in the complaint, except, and that only, under the derivative authority, a mere agency, imposed upon the telegraph company by the paramount governmental processes set forth in the plea, to the end that whatever service the physical properties and the company's personnel might render in the transmission of intelligence by wire should be and was a public governmental service or function, to or in respect of the discharge of which, within the realm of the company's legitimate activity under the complete control and exclusive possession of the government, neither the company, as such, nor the persons so serving in the operation of any of the functions of the company so dominated, were subject to individual, corporate, or personal liability to third persons for a breach of a contract or for a tort (the breach of a public duty) predicated alone of a contract for the transmission of intelligence by

wire." *Candidate v. Western Union Tel. Co.*, (1920) 203 Ala. 675, 85 So. 10.

That a telegraph company did not disclose to the sender the fact of government control does not make it liable as the agent of an undisclosed principal, all persons being charged with knowledge of the public acts by which federal control was assumed. *Western Union Tel. Co. v. Glover*, (1920) 17 Ala. App. 374, 86 So. 154.

Recovery cannot be had against a telephone company for death caused by negligence occurring during federal control. *McFeena v. Paris Home Telephone, etc., Co.*, (1921) 190 Ky. 299, 227 S. W. 450.

A telegraph company under federal control is not liable for negligence in the transmission of money by telegraph. *Dessery v. Western Union Tel. Co.*, (Kan. 1920) 192 Pac. 728. See also *Western Union Tel. Co. v. Conditt*, (Tex. 1920) 223 S. W. 234.

The complete and exclusive possession, supervision, control, and operation of all the telegraph and telephone systems within the jurisdiction of the United States and of all the equipment, supplies, and materials belonging or pertaining thereto for war purposes by the government of the United States, authorized by Joint Resolution No. 38 of the Sixty-Fifth Congress and taken and assumed by the Postmaster General, under and by virtue of a proclamation issued by the President, is not inconsistent with right, power, and duty on the part of an owner of such a system to extend its lines and improve, maintain, and repair it, within the period of such possession, supervision, control, and operation. Accordingly, while there is no liability for negligence in operation there is for negligence in construction, maintenance or repair work. *Spring v. American Tel., etc., Co.*, (1920) 86 W. Va. 192, 103 S. E. 208, 10 A. L. R. 951 (overruling demurrer to declaration on ground that it did not appear that truck alleged to have been negligently driven was used in operation and not in repair).

Resolutions and proclamations thereunder judicially noticed.—See *Western Union Tel. Co. v. Conditt*, (Tex. 1920) 223 S. W. 234.

TERRITORIES

Vol. IX, p. 540, sec. 1840. [First ed., vol. VII, p. 250.]

Suits to enforce statutory and administrative restrictions affecting Indians.—The United States, though without pecuniary interest in the relief sought, may maintain a suit to enforce statutory and administrative

restrictions on the disposal and leasing of allotments to Indians who have not been fully emancipated, but are still wards of the United States. *La Motte v. U. S.*, (1921) 254 U. S. 570, 41 S. Ct. 204, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1919) 256 Fed. 5, 167 C. C. A. 277.

TIMBER LANDS AND FOREST RESERVES

Vol. IX, p. 590, sec. 4. [First ed., vol. X, p. 405.]

Rights of municipality.—In *Langdon v. Walla Walla*, (1920) 112 Wash. 446, 183 Pac. 1, this section was referred to, the court in answer to a contention that a proposed system of municipal water works was impracticable saying: "The suggestion that the city of Walla Walla might be impeded

because it in no event can exercise the right of eminent domain within the limits of the Wenaha National Forest Reserve seems to be answered by the fact that the city has already acquired all necessary rights within the limits of that reservation. If not, it seems plain that it will be enabled to do so under the act of Congress of February 1, 1905, which makes express provision for the acquiring of such rights by the city."

TRADE COMBINATIONS AND TRUSTS

Vol. IX, p. 644, sec. 1. [First ed., vol. VII, p. 336.]

III. Construction of act.

1. In general.

3. Words and terms defined and construed.

IV. Mode of determining question of violation.

1. General principles.

V. Application of act.

1. General principles.

2. Application in particular instances.

a. Combinations and contracts to affect prices and terms of sale.

c. Coal companies and producers.

e. Railroads.

f. Miscellaneous cases.

VI. Proceedings under Act.

1. In general.

VII. Violation of Act as defense to suit on contract.

1. In general.

2. Particular actions.

III. CONSTRUCTION OF ACT

1. In General (p. 647)

Necessity of overt act.—To same effect as original annotation, see *Langenberg Hat Co. v. United Cloth Hat, etc., Makers*, (E. D. Mo. 1920) 266 Fed. 127.

3. Words and Terms Defined and Construed (p. 649)

"Trade or commerce."—"The word 'trade,' in its broadest signification, includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally." *May v. Sloan*, 101 U. S. 231, 237 (25 L. Ed. 797). It means "the buying as well as the selling of property." *United States v. United States Steel Corporation et al*, (D. C.) 223 Fed. 55, 177.

Webster's Dictionary defines trade as "the act or business of exchanging commodities by barter; the business of buying and selling for money; commerce; traffic; barter"—and says that "Commerce, in its simplest signification, means exchange of goods. * * * It may be said to be trade, traffic, or exchange between different places and communities." And according to the Century Dictionary, commerce is defined as "interchange of goods, merchandise or property of any kind; trade; traffic." "Commerce, briefly stated, is the sale or exchange of commodities." *United States v. Swift & Co.*, (C. C.) 122 Fed. 529. Substantially the same definitions are given in the cases of the *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. ed. 325; *Gibbons v. Ogden*, 9 Wheat. 1, 189, 190, 6 L. ed. 23; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158; *In re Charge to Grand Jury*, (D. C.) 161 Fed. 834.

Through these definitions runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another. The concomitant of this concept is the principle, approved by the Supreme Court of the United States, that "importation into one state from another is the indispensable element, the test, of interstate commerce." *National League, etc., v. Federal Baseball Club*, (App. Cas. D. C. 1921) 269 Fed. 681.

Manufacturing is not "commerce." *Gable v. Vonnegut Machinery Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 66.

IV. MODE OF DETERMINING QUESTION OF VIOLATION

1. General Principles (p. 651)

Reasonableness of restraint.—It is said that one of the most satisfactory ways to "determine what is the reasonableness or unreasonableness of the restraint put upon trade by a contract is to consider the motive.

extent and effect of the contract, consider the circumstances under which it was made, consider what the parties had in mind, what motives served to move them to the various ends they sought to attain, and then, in the light of those considerations, say whether or not that which they did was, under all the circumstances obtaining, in its nature and effect, unreasonable in its restraint upon the free flow of the commerce involved. So measured and tested, if it be unreasonable in its restraints upon trade, it lies within the prohibitions of the Sherman Law; if not, that law has no concern with it." *Continental Candy Corp. v. California, etc., Sugar Refining Co.*, (N. D. Cal. 1920) 270 Fed. 302.

"Rule of reason."—In this connection it is said: "Aside from all other considerations taking the decisions in the Tobacco Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. ed. 663, the Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, the Trans-Missouri Case, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, the Keystone Watch Case (C. C.) 218 Fed. 502, and even the Steel Trust Case of last spring (decided March 1, 1920) 251 U. S. 417, 40 Sup. Ct. 293, 65 L. Ed. —, 8 A. L. R. 1121, as I read them and as I now recollect them (recalling particularly the emphasis with which Mr. Justice Harlan dissented in some of those cases, and the growing vehemence with which he indicated that the Supreme Court was reading into that law that which Congress had definitely and deliberately refused to incorporate into it, to wit, "the rule of reason")—taking all those cases into consideration, giving the latest expressions paramount weight, and endeavoring to arrive at the proper path to be traveled by us in the construction of the Sherman Anti-Trust Act, it seems to me that this much clearly lies within the realm of legal indispute: Regardless of the precise and definite and seemingly controlling language of the statute, as the same has been read here this morning, the Supreme Court of the United States, which is really the final arbiter of our destinies in this country, has said that a contract in restraint of trade, to be within the prohibitions of the Sherman Act, must not only be in restraint of trade, but it must be so unreasonably—to an unreasonable degree." *Continental Candy Corp. v. California, etc., Sugar Refining Co.*, (N. D. Cal. 1920) 270 Fed. 302.

Direct or indirect effect of contract, etc.—Covenants in a contract are not in unreasonable restraint of trade where they at most operate as a partial and not as a general restraint, and are "merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party," or are covenants necessary to protect the corporation in its retained busi-

ness. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, (D. C. Del. 1920) 269 Fed. 796.

The statute does not apply "where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect." If the necessary effect is but incidentally or indirectly to restrict the commerce, "while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of this law." *National League, etc. v. Federal Baseball Club*, (App. Cas. D. C. 1921) 269 Fed. 681.

Neither the Sherman nor Clayton Acts furnishes a remedy against acts merely because they incidentally and indirectly affect interstate commerce; they apply only to acts which directly and immediately relate thereto. *Gable v. Vonnegut Machinery Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 66.

Effect of war conditions.—A contract entered into in regard to a sale of sugar which in accordance with suggestions by the government contained restriction against its resale by the vendee, was held, in view of war conditions and circumstances at the time, not to violate this act. *Continental Candy Corp. v. California, etc., Sugar Refining Co.*, (N. D. Cal. 1920) 270 Fed. 302.

V. APPLICATION OF ACT

1. General Principles (p. 657)

Manufacture of articles.—Where goods are being manufactured with the intention of shipping them in interstate commerce when they come into existence in fulfillment of orders therefor, it has been held that the manufacturers are engaged in interstate commerce and that unlawful acts of others in the nature of a conspiracy which prevent such goods from coming into existence are in restraint of interstate commerce within the meaning of this Act. *Herket, etc., Trunk Co. v. United Leatherworkers' International Union*, (E. D. Mo. 1920) 268 Fed. 662.

2. Application in Particular Instances

a. Combinations and Contracts to Affect Prices and Terms of Sale (p. 660)

Combination to fix resale prices.—[The essential agreement, combination, or conspiracy to violate the Sherman Anti-Trust Act of July 2, 1890, by maintaining resale prices, may be implied from a course of dealing or other circumstances. But it is reversible error to charge the jury in a three-fold damage suit founded on an alleged contract, combination, or conspiracy to maintain resale prices, contrary to this act, that, if they find that defendant manufacturer indicated a sales plan to wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and find that defendant called this particular feature of this plan to their attention on many different occasions, and find a great majority of them not only expressing no dissent from such plan, but actu-

ally co-operating in carrying it out by themselves selling at the prices named, they may reasonably find from such fact that there was an agreement or combination forbidden by the statute. *Frey v. Cudahy Packing Co.*, (1921) 256 U. S. —, 41 S. Ct. 451, 65 U. S. (L. ed.) —, *affirming* (C. C. A. 4th Cir. 1919) 261 Fed. 65, 171 C. C. A. 661.

An agreement by the manufacturer of a talking machine and a retail dealer that the machine supplied the dealer should not be retailed except at a fixed price is an unlawful restraint of trade under this Act and for injury arising out of their mutual conduct neither party can obtain legal redress against the other. However, if after the breach of such a contract by the retailer, the manufacturer in addition to cancelling the dealer's agreement, induces distributors of its machines to whom it has sold them, to refuse to fill the retailer's orders already given or to refrain thereafter from selling him any of its products, it is guilty of an unlawful restraint of trade for which the retailer may recover damages based on the loss he sustains through a sale of his stock in an incomplete condition due to his inability to purchase additions, but he cannot recover for loss of anticipated profits based on evidence of profits made when engaged with the defendant in an unlawful business. *Victor Talking Mach. Co. v. Klemeny*, (C. C. A. 3d Cir. 1921) 271 Fed. 810.

A contract of absolute sale, made by a medical corporation of its various manufactured preparations, in which the purchaser is to sell all goods purchased at regular retail prices to be fixed by the corporation, where its entire product is sold throughout the country only by means of like restrictive contracts, operates as a "restraint of trade," unlawful as to interstate commerce under Act Cong. July 2, 1890, c. 647, 26 Stat. 209. *Brooks v. J. R. Watkins Medical Co.*, (Okla. 1921) 196 Pac. 956.

c. Coal Companies and Producers (p. 663)

A contract which an anthracite coal company, controlled by an interstate railway carrier through stock ownership and common officers, made with a sales company, the stockholders in which were practically identical with those in the railway company, whereby the coal company is to sell the coal mined by it to the sales company, the latter to pay therefor at 65 per cent of the New York prices, and to sell no other coal than that purchased from the coal company, there being further provisions that the coal company shall lease all its facilities, structures, and trestles to the sales company; that either party shall have the right to abrogate and cancel the contract upon giving six months' notice, and that the sales company shall not buy coal except from the coal company,—violates both the commodities clause of the Act of June 29, 1906, (see vol. 4, p. 363) making it unlawful for any railway company to transport in interstate commerce any

article which it may own or in which it may have any interest, and the Sherman Anti-trust Act of July 2, 1890, prohibiting contracts in restraint of trade. *U. S. v. Lehigh Valley R. Co.*, (1920) 254 U. S. 255, 41 S. Ct. 104, 65 U. S. (L. ed.) —, (*reversing* [S. D. N. Y. 1914] 226 Fed. 399) wherein it was further held that the combination must be so dissolved as to give each of such companies its entire independence, and all contract relations between the coal company and the sales company which would serve in any manner to render the sales company not entirely free to extend its business of buying and selling where and from and to whom it chooses with entire freedom and independence must be enjoined, so that the sales company may in effect, as well as in form, become an independent dealer, free to act in competition with the coal company or railway company.

e. Railroads (p. 665)

Giving exclusive privilege to transfer company.—The giving by a railroad company of an exclusive privilege to a transfer company to transport passengers and baggage from its station does not violate this act. *Clisbee v. Chicago, etc., R. Co.*, (Tex. 1921) 230 S. W. 235.

f. Miscellaneous Cases (p. 669)

Baseball club.—To same effect as original annotation, see *National League, etc., v. Federal Baseball Club*, (App. Cas. D. C. 1921) 269 Fed. 691, wherein it was held that baseball contracts by reason of the reserve clause contained therein did not affect interstate commerce.

Bill posters.—In *Sullivan v. Associated Billposters, etc.*, (S. D. N. Y. 1919) 272 Fed. 323, it appeared that in 1891 a number of billposters located in the various cities of the United States combined to monopolize and control the billposting business throughout the United States and Canada, and formed an association, which thereafter, in 1902, was incorporated and became the first of the defendants named in each of the above actions. All of its officers and directors have participated in the combination. The measures adopted to control interstate and foreign trade and commerce were: (a) Membership confined to one billposter in each town; (b) rules preventing members of the association from dealing with any advertiser who furnished business to a nonmember; (c) agreed schedules of prices for billposting; (d) furnishing members with funds to buy competing plants; (e) since July, 1911, prohibiting members from accepting work from advertisers direct, and permitting them only to accept work through solicitors licensed by the association, who were to pay a fixed license fee of \$1,000 and receive a commission of 16½ per cent.; (f) threatening to discriminate against lithographers who furnished sample posters to independent billposters or to advertisers desiring to employ

independents, by refusing to deal with such lithographers. The court said:

"It is strongly urged by the defendants that they have merely furnished additional facilities for advertising and have been neither engaged in interstate commerce nor have directly affected it. The direct result and intended purpose of the alleged combination, however, was to prevent posters from being transported from state to state, except for erection on billboards by the defendants or their agents. Lithographers who dealt with any independent billposter could not deal with them. As a result, the defendants in the billposting business caused a continuous transmission of billposters from state to state, to be placed by members of the association in their respective localities. No advertiser could place his posters, except through their agency. The members of the association were freed from the competition of independent billposters, for, if the advertiser or the lithographer, dealt with an independent billposter, he could not deal with defendants. Lithographers, who allowed their posters to be placed by independents, would lose the privilege of having their posters placed by the defendants, and could only have their posters handled by independent billposters, who had become few in number and consequently offered limited facilities. The advertiser cannot have his billposters delivered for placing in the various states, unless he arranges his billposting through one of the defendants' solicitors. He cannot even buy his posters from the lithographer, unless he deals with the billposters in the defendant association, for the lithographers cannot allow their posters to be placed by independent posting concerns, because of the risk of boycott by the association. The scheme is not only so devised as to define the agencies which must be employed in placing posters, but is so arranged as to prevent the possibility of purchasing posters from the leading lithographers unless the requisites of the association are met.

"Within the doctrine laid down by the Supreme Court in the case of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. ed. 290, this arrangement would not constitute a restraint of interstate commerce, in violation of the Sherman Act, if it was limited to preventing members of the association who had purchased posters from the lithographers from being employed by advertisers to post their bills who did not give all their billposting business to such members. But in the complaints under consideration it is stated that billposters not only put up posters for advertisers, but at times themselves purchased sample posters and sold them to, as well as placed them for, advertisers. An agreement among the defendants to purchase from no lithographer who sold sample posters to an independent billposter would clearly be in restraint of interstate commerce. It would be a direct interference with the sale and transmission

of posters from one state to another and would violate the Sherman Act."

Forbidding agents to handle auxiliary device.—For an automobile manufacturer to forbid its agents to handle an auxiliary device made by another for use on the automobile is not a violation of this act. *McMaster v. Ford Motor Co.*, (1920) 114 S. C. 100, 103 S. E. 87.

Sale of part of business.—In *Coca-Cola Bottling Co. v. Coca Cola Co.*, (D. C. Del. 1920) 269 Fed. 796, it was held that a contract was not violative of this act or the Clayton Act under which the manufacturer of a syrup known as "Coca-Cola" sold the rights to bottle such syrup to another corporation, the purchaser agreeing to buy all of the Coca-Cola syrup necessary to a compliance with the agreement from the seller. The court said: "It is next contended by the defendant that, if the contract be construed as it is now construed by the court, it is void under the law of Georgia, the Sherman Act and the Clayton Act. In this connection it should be observed that the effect of the contract was not a merger or consolidation of businesses theretofore existing in severalty, but was the complete severance of the bottling business from the business of supplying soda fountains with the syrup, while the result which the defendant seeks under statutes intended to prevent monopoly would give to the defendant a complete and exclusive monopoly of both the fountain business and the bottling business. The accomplishment of this result through the instrumentality of the anti-monopoly statutes would, indeed, be unique."

Sale of magazines.—Where the members of a state council of defense in New Mexico during the War with Germany in a publication issued under its authority sought to prevent the sale and distribution of magazines published by a New York corporation and shipped to Mexico for sale such action was held to be in excess of their authority and in violation of the Interstate Commerce Act, it appearing that the magazines contained no objectionable matter and that the action of the council was based on alleged derelictions of a principal stockholder of the corporation as an individual in newspapers published by him. *Council of Defense v. International Magazine Co.*, (C. C. A. 8th Cir. 1920) 287 Fed. 390. The court said: "Whatever may have been the derelictions of Hearst as an individual or in his newspapers, it is absolutely clear that complainant, which was engaged solely in publishing and selling magazines, had published no objectionable matter in its magazines, and it had nothing to do with the Hearst newspapers, nor any interest in them. The declared and obvious purpose was to destroy complainant's business in New Mexico. This purpose was proceeding toward success, when halted by the injunction of the court below. The various defendants were planning and

acting together to effectuate the above purpose. They were doing so without legal warrant or protection. Their acts amounted to a conspiracy to boycott or blacklist the magazines published by complainant. All of these publications came into the state through interstate commerce. The only purpose of shipping the magazines into New Mexico was for sale there; hence a movement which sought to prevent, and was succeeding in preventing, newsdealers, who were here the importers, from receiving, handling, and selling such magazines, directly interfered with that commerce. We think this situation within the prohibition of the Sherman Act."

VII. PROCEEDINGS UNDER ACT.

1. *In General* (p. 677).

Jurisdiction of state court.—"The state courts have no jurisdiction of an original action brought under the act of Congress to obtain the relief therein provided for." *McMaster v. Ford Motor Co.*, (1920) 114 S. C. 100, 103 S. E. 87.

VII. VIOLATION OF ACT AS DEFENSE TO SUIT ON CONTRACT.

1. *In General* (p. 682).

Contract valid.—Recovery of the price on a contract for the sale of goods is not prevented by the fact that the seller is an unlawful combination or trust under this act. *Dreyfus v. Corn Products Co.*, (Ala. 1920) 204 Ala. 593, 96 So. 386.

2. *Particular Actions* (p. 684)

Action on lease of machinery.—In a suit on leases of shoe-machinery where the defendant sets up in defense that the plaintiff is an illegal combination in violation of this Act, and that the leases sued on are direct and material parts of the combination, but sets out no facts in connection therewith, such allegations are mere conclusions of the pleader and not admitted by demurrer. *Witherell, etc., Co. v. United Shoe Machinery Co.*, (C. C. A. 1st Cir. 1919) 267 Fed. 950.

Vol. IX, p. 687, sec. 2. [First ed., vol. VII, p. 340.]

II. PARTICULAR INSTANCES (p. 694)

Railroad in control of coal company.—A railway company which, in combination with a subsidiary coal company controlled by it through stock ownership and common officers, deliberately enters upon a policy of making extensive purchases of anthracite land tributary to the railway company's lines, for the purpose of controlling the mining, transportation, and sale of coal to be obtained therefrom, and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and continues this policy after the passage

of the Anti-trust Act of July 2, 1890, with increasing energy and tenacity of purpose, with the result that a practical monopoly is attained of the transportation and sale of anthracite coal derived from such lands, violates the provisions of sections 1 and 2 of such act, forbidding restraints of interstate trade or commerce, and monopolization of or attempts to monopolize a part of such trade or commerce. *U. S. v. Lehigh Valley R. Co.*, (1920) 254 U. S. 255, 41 S. Ct. 104, 65 U. S. (L. ed.) —, *reversing* (S. D. N. Y. 1914) 225 Fed. 399.

Vol. IX, p. 701, sec. 4. [First ed., vol. VII, p. 344.]

I. Jurisdiction in general.

II. Who may maintain action.

III. Pleading and evidence.

IV. Remedies and relief.

I. JURISDICTION IN GENERAL (p. 701)

Suit to enjoin consolidation of corporations.

—A suit by a stockholder to enjoin the consolidation of two corporations as being a combination in violation of this act is not maintainable under this section. *General Invest. Co. v. Lake Shore, etc., R. Co.*, (C. C. A. 6th Cir. 1920) 269 Fed. 235.

II. WHO MAY MAINTAIN ACTION (p. 702)

Who may sue to enjoin.—Private parties cannot maintain a suit for injunction under this section. *Gable v. Vonnegut Machinery Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 66.

III. PLEADING AND EVIDENCE (p. 704)

Evidence.—A conspiracy to interfere with interstate commerce need not be proved by direct evidence. It may be shown by circumstantial evidence. *Herket, etc., Trunk Co. v. United Leatherworkers' International Union*, (E. D. Mo. 1920) 268 Fed. 662.

IV. REMEDIES AND RELIEF (p. 704)

Remedies provided by Act as exclusive.—The remedies provided by the Sherman Anti-trust Act, for enforcing the rights created by it, are exclusive. *Geddes v. Anaconda Copper Min. Co.*, (1921) 254 U. S. 590, 41 S. Ct. 209, 65 U. S. (L. ed.) —, (*reversing*, (C. C. A. 9th Cir. 1917) 245 Fed. 225, 157 C. C. A. 417, which held however that the lower federal courts properly assumed jurisdiction of the case presented by a bill filed by minority stockholders to set aside a sale of corporate property on the ground that the purchase was made in pursuance of a purpose to violate the Sherman Anti-trust Act, where such suit was begun before it had become the settled law that the remedies provided by that act for enforcing the rights created by it are exclusive.

Modification of decree.—The jurisdiction of the court is not limited to the making of decrees initially to prevent and restrain

violations of the Anti-Trust Act, but extends upon proper occasion to the modification of decrees looking to the continued prevention and restraint of violations. This may be more readily be done where, the modification proposed does not call for revision of the decree on the merits, or against any person concluded thereby. *U. S. v. Du Pont De Nemours*, (D. C. Del. 1921) 273 Fed. 869.

Vol. IX, p. 713, sec. 7. [First ed., vol. VII, p. 345.]

- II. Right to sue.
- III. Pleading, practice and procedure.
- IV. Evidence.
- V. Damages.

II. RIGHT TO SUE (p. 717)

Who may sue.—It is not necessary that a person suing for damages under this section be himself engaged in interstate commerce. *Sullivan v. Associated Billposters, etc.*, (S. D. N. Y. 1919) 272 Fed. 323; *Charles A. Ramsay Co. v. Associated Bill Posters, etc.*, (C. C. A. 2d Cir. 1921) 271 Fed. 140.

Under this statute those who may sue for threefold damages by virtue of its terms are limited to those "who shall be injured in his business or property." Accordingly, in order to maintain an action it is not sufficient to show that the defendants might have been subjected to criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the Interstate Commerce Commission, but it must be shown that the complainant sustained pecuniary damages. *Keogh v. Chicago, etc., R. Co.*, (C. C. A. 7th Cir. 1921) 271 Fed. 444.

III. PLEADING, PRACTICE AND PROCEDURE (p. 719)

Limitation of action.—The state statute of limitations applies to a suit brought to recover damages for injuries which are alleged to have resulted from acts done in violation of this act. *Jones v. West Pub. Co.*, (C. C. A. 5th Cir. 1921) 270 Fed. 563.

IV. EVIDENCE (p. 724)

In general.—The plaintiff in an action under this act must show a direct relation between the restraint and the injury. *Sullivan v. Associated Billposters, etc.*, (S. D. N. Y. 1919) 272 Fed. 323.

V. DAMAGES (p. 725)

Measure of damages.—Only actual damages, proved by facts not based on conjecture or estimation recoverable. *Keogh v. Chicago, etc., R. Co.*, (C. C. A. 7th Cir. 1921) 271 Fed. 444.

Lawful rates under illegal combination.—Where rates have been declared to be reasonable by the Interstate Commerce Commission a complainant cannot recover under this sec-

tion, although it appears that the rates are higher because of an unlawful combination of railroads in restraint of interstate commerce than they would have been in the absence of such combination. *Keogh v. Chicago, etc., R. Co.*, (C. C. A. 7th Cir. 1921) 271 Fed. 444.

Vol. IX, p. 730, sec. 1. [First ed., 1916 Supp., p. 267.]

Application.—Neither the Sherman nor Clayton Acts furnishes a remedy against acts merely because they incidentally and indirectly affect interstate commerce. They apply only to acts which directly and immediately relate thereto. *Gable v. Vonnegut Machinery Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 66.

Vol. IX, p. 733, sec. 3. [First ed., 1916 Supp., p. 269.]

Constitutionality.—To same effect as original annotation, see *U. S. v. United Shoe Machinery Co.*, (E. D. Mo. 1920) 264 Fed. 138.

Section as retroactive.—In *U. S. v. United Shoe Machinery Co.*, (E. D. Mo. 1920) 264 Fed. 138, it was held that this section was not retroactive. The court in this case referred to *Elliott Mach. Co. v. Center*, (W. D. Mich. 1915) 227 Fed. 124 (noted in 9 Fed. Stat. Ann. (2d ed.) p. 733) and declared that the statement therein on this point was obiter.

Purpose.—The object of the section was to make unlawful acts which were not unlawful under the Sherman Act or other antitrust acts. *U. S. v. United Shoe Machinery Co.*, (E. D. Mo. 1920) 264 Fed. 138, wherein the court said: "There is nothing in the Sherman Act, or any other act of Congress, making the acts enumerated in section 3 of the Clayton Act unlawful, 'where the effect' of them 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce.'"

Application.—This section does not apply to a contract of sale made and performed in the same state. *Quincy Oil Co. v. Sylvester*, (Mass. 1921) 130 N. E. 217, 14 A. L. R. 111.

Parties.—Railroad companies were held to be necessary parties to a proceeding to annul a contract between them and a can company containing an exclusive clause, in *Fruit Growers' Express v. Federal Trade Commission*, (C. C. A. 7th Cir. 1921) 274 Fed. 205.

The words "lease," "sale," "contract for sale," "lessee," and "purchaser," being the words used, and no other relation than lease and sale being mentioned, there is no expressed purpose in the clause quoted to make it cover any other subject than leases, sales, or contracts for sales, and to embrace no other persons than lessees and purchasers. The words are so clear they require no construction, and to needlessly construe, in order to broaden the scope of the statute, whether done by the Trade Commission in

administering, or by this court in supervising the administration of, the statute, would be for either or both such agencies to write into the statute what Congress has not expressly written. *Curtis Pub. Co. v. Federal Trade Commission*, (C. C. A. 3d Cir. 1921) 270 Fed. 881.

Combination made in course of interstate commerce.—The lease or combination made unlawful by this act is one made in the course of interstate commerce. *Witherell, etc., Co. v. United Shoe Machinery Co.*, (C. C. A. 1st Cir. 1919) 267 Fed. 950.

Legality of shoe machinery leases.—Regarding such leases, the court said: "The question to be decided is: Do the clauses complained of, or any of them, put it in their power, or have the effect, or tend, if enforced, as the defendants would have the right to do, if they are not unlawful under the Clayton Act—and that is their intention—'to substantially lessen competition' or 'establish a monopoly in trade'?"

"In the opinion of the court there can be no doubt that the enforcement of some of the provisions hereinafter mentioned will have that effect. If shoe manufacturers are not permitted to use machines manufactured by competitors without being penalized, such prohibition tends to lessen competition, and eventually will result in giving the defendants a monopoly in that part of trade or commerce. Who will invest the millions necessary to establish such manufacturing plants, and the evidence convinces that it will require these large sums to establish them, when the product cannot be sold, or at best can find but a very limited market. It is true, there are some competitors; but they are few, and they manufacture only some of the machines required. Some have been obliged to go out of business for lack of trade, caused by these tying clauses, and eventually all will have to discontinue, if shoe manufacturers are prevented from purchasing, leasing, or using their machines, by reason of a strict enforcement of the tying clauses and the rebates and discounts, or those which, in the opinion of the court, are in violation of the Clayton Act." *U. S. v. United Shoe Machinery Co.*, (E. D. Mo. 1920) 264 Fed. 138.

In an action on leases of shoe machinery an answer which alleges that the leases were transactions in the course of interstate commerce but sets out no facts showing wherein they are of such a character is a conclusion of the pleader and being such the allegation is not admitted by demurrer. *Witherell, etc., Co. v. United Shoe Machinery Co.*, (C. C. A. 1st Cir. 1920) 267 Fed. 950.

Leasing tanks exclusively to distribute products of lessor.—The practice of leasing, at a nominal rental, tanks and automatic measuring pumps, for the storing and distributing of gasoline, upon condition that the tanks and pumps so leased be used by the

lessee, the retailer, exclusively for the purpose of storing and marketing gasoline purchased from the lessor, is not a violation of this section. *Campbell Oil Co. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1921) 274 Fed. 571; *Standard Oil Co. v. Federal Trade Commission*, (C. C. A. 2d Cir. 1921) 273 Fed. 478.

License to manufacture patented article.—A license giving the licensee a right to manufacture a patented article, the patent on which is owned by the licensor, by which the licensee agrees to purchase all materials to be used in making the article from the licensor or persons designated by him is not violative of this act. *Westinghouse Electric, etc., Co. v. Diamond State Fibre Co.*, (D. C. Del. 1920) 268 Fed. 121. The court said:

"A patent gives to the patentee the right, not only to prevent others from making the patented article, but also to prevent others from making any ingredient or part of such patented article with intent that such ingredient or part shall be used in the patented article, for as a patentee may maintain a suit for infringement against a person making such patented article, so he may also maintain a suit for contributory infringement of the ingredients or parts for use in the patentment against a person making and selling the patented article. The right to make the parts and material entering into the patented article, and to exclude others from making them, if such parts and material are unpatented as in this case, would seem to be an inevitable adjunct of the patent and a part of the patent monopoly. There is no evidence in this case that the patentee or his assignee, the plaintiff, ever surrendered this monopoly to the public. I do not see, therefore, that the effect of granting a license to manufacture the Conrad gears, but reserving to the licensor the right to continue to make the gear material, was to surrender to the public the licensor's monopoly to make the material entering into such gears, or to create a 'line of commerce' within the meaning of the Clayton Act.

"Nor do I see how the effect of reserving such right to the licensor may be to lessen competition that never existed or tend to create a monopoly that was complete in the licensor before the contract was made."

Contract between magazine publishers and agents.—In *Curtis Pub. Co. v. Federal Trade Commission*, (C. C. A. 3d Cir. 1921) 270 Fed. 881, a contract between a magazine publisher and its agents was held not to constitute a "lease or make a sale or contract for the sale of goods." The following extract from the opinion of the court shows the nature and the substance of the contract:

"We note, first that the agreement, which is entitled a 'District Agency Agreement,' is in form and verbiage an appointment by a publisher of an agent, and an agent for limited territory and for a mutually optional

time, for the purpose of (a) selling and (b) distributing its magazines. Now, there are no words in the contract which purport or contemplate the sale of such magazines, and there is express provision, if (a) a sale, or (b) a distribution, to third parties, is not effected, the magazines consigned are to be returned to the publisher. Indeed, the nature of the transaction, the necessary haste to get the magazines into the hands of the boys at once, shows of itself that there was no reason for transferring title by sale. It was not the handling of commodities of which sales would naturally be made. It was a contract for distributing and speeding up deliveries of an article whose whole value depended on the haste with which it passed from the agent's possession. Confirming these statements, we note that in clause 1, 'appoint the said second party as district agent for the Saturday Evening Post,' etc., are words aptly used in constituting an agency, viz. 'appoint,' and of restricted territory, 'district agent.'

"We note that clause 3 provides for the return and credit, at consignment prices, of unsold copies, and that clause 5 provides for the payment of interest at 5 per cent. on the money deposit, made by the agent, as security for the magazines consigned. As to the agent making sales of the magazine, clause 8 obligates him to sell a certain number of copies of the magazine, and clause 9 binds him to deliver the magazine to dealers and boys 'early on the morning of the sale date' and at certain specified prices. We also note that, by clause 10, the agent binds himself not to display, distribute, or sell any of the magazines before an authorized sale date, and by clause 11 not to sell any copies in territory controlled by another agent. All of these and other details that might be cited evidence that the relation created by this contract, and by its expressed terms meant to be created, was one of agency, and that there is an entire absence in the contract of any terms or words usual or requisite to effecting or evidencing a sale, as well as of circumstances inviting or necessitating a sale.

"We have not overlooked the fact that the contract provides for the maintenance by the agent in the hands of the publisher of an advance sum of money sufficient to indemnify the publisher for all magazines forwarded. But in our judgment this deposit cannot, in view of the right of return, be regarded as a payment, but rather as an indemnity to secure payment, for all copies the agent does not return. . . . Such being the case, we hold the Commission erred in the legal construction of this contract, and therefore had no proof before it to find, as it did in its third finding, that 'the respondent has made sales of its magazines to, or entered into contract for the sale of the same, with certain persons,' etc., and therefore its legal conclusion from such findings, viz. 'that the

act and conduct set forth in paragraph 3 of said findings are, under the circumstances therein set forth, in violation of the provisions of section 3' of the Clayton Act, was in error, as was also the part of its decree which enforced such conclusion."

Vol. IX, p. 737, sec. 5. [First ed., 1916 Supp., p. 271.]

Scope of section.—This provision is only a rule of evidence. Conclusions of law embodied in the decree could only have the force of precedents, nor can the decree as adjudging facts be taken to override allegations of fact as to the nature of defendants' combination appearing elsewhere in the complaint. *Sullivan v. Associated Billposters, etc.*, (S. D. N. Y. 1919) 272 Fed. 323.

Failure to state object of suit.—Where the object of the suit in which the decree, sought to be set up as prima facie evidence under this section, was entered, is not stated, the court cannot say what matters were considered, and hence will reach its own conclusions as to the alleged violation of the statute from the facts before it. *Charles A. Ramsay Co. v. Associated Billposters, etc.*, (C. C. A. 2d Cir. 1921) 271 Fed. 140.

Vol. IX, p. 737, sec. 6. [First ed., 1916 Supp., p. 272.]

Purpose and scope of section.—"The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the Anti-trust Laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-trust Laws." *Duplex Printing Press Co. v. Deering*, (1921) 254 U. S. 443, 41 S. Ct. 172, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 2d Cir. 1918) 252 Fed. 722, 164 C. C. A. 562.

Extent of right to strike.—The right to refuse to serve may lawfully be asserted singly or in concert with others. A strike is a concerted refusal to serve in an industry, either to assert a supposed right or to obtain an economic advantage. For either pur-

pose, if conducted without violence or intimidation, it is lawful, though if done, not in self-interest, but for the sole purpose of injuring the employer, it may be a malicious tort. If directed against interstate commerce, it may be an unlawful conspiracy except as provided in Clayton Act Oct. 15, 1914, c. 323, 38 Stat. 730. *Birmingham Trust, etc., Co. v. Atlanta, etc., R. Co.*, (N. D. Ga. 1921) 271 Fed. 743.

Combination in restraint of interstate commerce.—The provisions of this section contemplate only such organizations as lawfully carry out their legitimate objects, consequently labor unions enforcing an agreement not to handle any nonunion merchandise transported or operated on in any way by any firm, individual or corporation that refused to recognize the unions, and under which the members of various unions refused to handle an interstate shipment because it was brought to a dock by an express company employing both union and non-union men, were held to constitute an unlawful combination in restraint of interstate commerce, and therefore subject to restraint by injunction. *Buyer v. Guilan*, (C. C. A. 2d Cir. 1921) 271 Fed. 65.

Injunction against strikers.—An order granting a permanent injunction against interference by strikers and others with the conduct and operation of the complainant's business and forbidding picketing, has been held not to violate this section. *Quinlivan v. Dail-Overland Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 56.

Vol. IX, p. 741, sec. 11. [First ed., 1916 Supp., p. 275.]

The words "where applicable to common carriers," in this section mean that the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. *Fruit Growers' Express v. Federal Trade Commission*, (C. C. A. 7th Cir. 1921) 274 Fed. 205.

Vol. IX, p. 745, sec. 16. [First ed., 1916 Supp., p. 278.]

Injunctive relief from secondary boycott.—See *supra*, p. 633.

Relief granted by section as effective from time of passage of Act.—In so far as the Clayton Act provided for relief by injunction to private suitors, imposed conditions upon granting such relief under particular circumstances, and otherwise modified the Sherman Anti-trust Act (see Vol. 9, p. 644), it was effective from the time of its passage and applicable to pending suits for injunction not brought to a hearing until after the passage of the Clayton Act. *Duplex Printing Press Co. v. Deering*, (1921) 254 U. S.

443, 41 S. Ct. 172, 65 U. S. (L. ed.) —, reversing (C. C. A. 2d Cir. 1918) 252 Fed. 722, 164 C. C. A. 562.

Extent of relief.—This section supplements the Sherman Act by giving a private party a right to maintain a suit for injunction. *Gable v. Vonnegut Machinery Co.*, (C. C. A. 6th Cir. 1921) 274 Fed. 66.

Jurisdiction confined to federal courts.—The grant of jurisdiction by this section is to the courts of the United States and is not given to the state or even territorial courts. *General Invest. Co. v. Lake Shore, etc., R. Co.*, (C. C. A. 6th Cir. 1920) 269 Fed. 235. The court said: "The grant of jurisdiction is to the 'courts of the United States.' This language has been expressly held not to reach even territorial courts, although they were created by the laws of the United States. *McAllister v. U. S.*, 141 U. S. 174, 179, 11 Sup. Ct. 949, 35 L. ed. 693. Much less can it reach those courts which are wholly of another jurisdiction. It is true there are cases where this term has been thought to reach some of the courts of the District of Columbia (see *Page v. Burnstine*, 102 U. S. 664, 26 L. ed. 268; *United States v. Mills*, 11 App. D. C. 500, 504); but that was because the language and purpose of the act in question were especially appropriate to be so extended. In the present case the statute was dealing solely with a subject-matter of exclusively federal jurisdiction, interstate commerce, and while Congress might have intrusted some of its exercise to the state courts, there is no reason to presume such an intention; the natural presumption is rather to the contrary. Not only had the ordinary meaning of the phrase 'courts of the United States' become fixed by familiar judicial construction long before the Clayton Act was passed, but it had been customarily used by Congress with the same definite meaning; for example, section 256 of the Judicial Code refers to the 'courts of the United States' and the 'courts of the several states' as different classes, exclusive of each other. Further, this section pertains only to the remedy, and there would be a strong presumption that a federal remedial statute did not relate to the remedies of another jurisdiction. From these considerations we are satisfied that a suit brought in a state court can get no help from section 16."

Sufficiency of evidence.—Evidence from which it is impossible to infer monopolistic control of the price of copper by the purchasers of all the property of a mining company, and from which it cannot be determined to what, if any, substantial extent they restrained or monopolized the production of copper, is insufficient to justify injunctive relief to minority stockholders of the mining company against the sale, under the provisions of this section, that any person shall be entitled to sue and have injunctive relief

in any court of the United States having jurisdiction over the parties against threatened loss or damage by a violation of the Anti-trust Laws, under the conditions and principles regulating the granting of such relief

by courts of equity. *Geddes v. Anaconda Copper Min. Co.*, (1921) 254 U. S. 590, 41 S. Ct. 209, 65 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1917) 245 Fed. 225, 157 C. C. A. 417.

TRADEMARKS

Vol. IX, p. 747, sec. 1. [First ed., 1909 Supp., p. 676.]

Purpose and effect of act.—In addition to the benefit accorded the owner of a trademark it is the purpose of the trademark law to confer a benefit on the ultimate consumer. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307.

The function of a trademark is to identify the origin and ownership of the goods to which it is attached. *Imperial Cotto Sales Co. v. N. K. Fairbanks Co.*, (App. Cas. D. C. 1921) 270 Fed. 686.

Character of property in.—"It is true that a trademark is not the subject of property, except in connection with an existing business. It is a right appurtenant to a business in which it is used, and grows out of its use, but not its adoption. It is not a right in gross, for its purpose is to designate the goods made by a particular person, and to protect the good will of that person's business against the sale of the same variety of goods made by others." *Vermont Maple Syrup Co. v. F. N. Johnson Maple Syrup Co.*, (D. C. Vt. 1921) 272 Fed. 478.

A trademark is not property which can be owned in gross. It can not be sold or mortgaged apart from the business with which it is connected. *In re Leslie-Judge Co.*, (C. C. A. 2d Cir. 1921) 272 Fed. 886.

The right to a trademark, in the absence of registration in the patent office, arises at common law from priority of appropriation. *Edgar-Morgan Co. v. Alfocorn Milling Co.*, (E. D. Mo. 1921) 270 Fed. 344.

"While there is a property right in a trademark (Trade-Mark Cases, 100 U. S. 82, 92, 93, 25 L. ed. 550), the right is grounded not in the mark itself, but in the right to be protected in the reputation and good will of the business designated and known by the use of the trademark. This property right in the trademark ceases with the discontinuance of its use." *Imperial Cotto Sales Co. v. N. K. Fairbanks Co.*, (App. Cas. D. C. 1921) 270 Fed. 686.

A person has property or a property right in a trademark used by him. It is said, however, that "trademark is not a right in gross or at large. As an abstract right, wholly disassociated from the business or merchandise with which it has become established, it is not property, and may not be assigned. *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141.

For no one may sell his goods as the goods of another. Such an act would be a fraud upon the public. But where the trademark of a retailer is assigned by him to the manufacturer of the commodity to which the trademark was affixed, there is no false representation to the public, and such assignment is valid. *Witthaus v. Braum et al.*, 44 Md. 303, 22 Am. Rep. 44. The last proposition arises, apparently, from the fact that a trademark does not as a matter of necessity and law import that the articles upon which it is used are manufactured by the user. It is sufficient that they are manufactured for him, that he controls their production, or that in the course of trade they pass through his hands. *Nelson v. Winchell & Co.*, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1150; *McLean v. Fleming*, 96 U. S. 245, 253, 24 L. Ed. 828. If a retailer may assign his trademark to the manufacturer of the article sold by the retailer, it would seem that the converse is necessarily true, and that the manufacturer may assign his trademark to another, who sells the goods of the manufacturer." *Coco-Cola Bottling Co. v. Coca-Cola Co.*, (D. C. Del. 1920) 269 Fed. 796.

"It must be remembered that 'the right of property in trade-marks has come to be recognized as of immense and incalculable value,' and that the 'proprietor of a trademark by virtue of the manufacture or offering for sale of his goods is entitled to the protection which the highest powers of the court can afford.'" *Bourjois v. Katzel* (S. D. N. Y. 1920) 274 Fed. 856.

The right to use a trademark does not depend on any particular period of usage but having been adopted in good faith the right thereto inures and will prevail against any subsequent user. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307.

Territorial extent of trademark rights.—"A trademark cannot travel to markets where there is no article to wear the badge and no trader to supply the article. *Hanover Star Milling Co. v. Metcalf*, supra, 240 U. S. 416, 36 Sup. Ct. 361, 60 L. Ed. 713, but this rule does not mean that the person who first uses the trademark of another as his licensee in new territory thereby becomes the absolute owner of it in that territory, for a person may introduce his trademark and create a demand for his variety of goods in new territory by licensees. His mark thus travels to markets where there is an

article to wear the badge and a trader to supply the article." *Vermont Maple Syrup Co. v. Johnson Maple Syrup Co.*, (D. C. Vt. 1921) 272 Fed. 478.

Effect of judgment as right of registration.—A judgment as to a right of registration is not *res judicata* where comparing the marks it appears that the mark in the second opposition is so different from the mark of the first opposition that judgment against applicant in the first could not, under any circumstances, work estoppel in the second. *Sheffield-King Milling Co. v. Theopold-Reid Co.*, (App. Cas. D. C. 1921) 269 Fed. 716.

Vol. IX, p. 751, sec. 2. [First ed., 1909 Supp., p. 675.]

Nature of use contemplated.—"Clearly the use contemplated by the statute is a use by the applicant himself, or by some one for him, and not an independent or incidental use by a third party; the reason being that before an applicant is entitled to registration he must show that his business extends beyond the boundaries of his own state or into the territory of an Indian tribe." *Kuhn v. Letts*, (App. Cas. D. C. 1920) 267 Fed. 748.

Interstate sales.—The fact that persons outside the state had purchased goods through friends within the state by whom they had been shipped to the purchasers does not show an interstate use. *Kuhn v. Letts*, (App. Cas. D. C. 1920) 267 Fed. 748.

Vol. IX, p. 753, sec. 5. [First ed., 1914 Supp., p. 400.]

I. In general.

II. Particular words, names, marks or symbols.

1. Arbitrary or fanciful names.
2. Personal and corporate names.
3. Descriptive words.
4. Color.
5. Geographical names.
6. Expired patent.
7. Similar names.
11. Insignia and symbols.

I. IN GENERAL (p. 755)

Section as declaratory of accepted law.—The language used in this section in depriving what may be registered as a trademark only declares "the accepted law of trademarks." *Hercules Powder Co. v. Newton*, (C. C. A. 2d Cir. 1920) 266 Fed. 169.

Effect of proviso.—Where a trademark is duly registered under the ten-year proviso of this section it is immaterial that it may once have been descriptive or that to a degree it may still be so. *Coca-Cola Co. v. Old Dominion Beverage Corp.*, (C. C. A. 4th Cir. 1921) 271 Fed. 600.

Test of registrability.—Where the goods have the same descriptive properties the test is whether or not the marks are so similar

as to be likely to cause confusion in the public mind or to deceive purchasers. *Coca-Cola Co. v. Chero-Cola Co.*, (App. Cas. D. C. 1921) 273 Fed. 755.

The facts, in the case of words, that they do not sound quite alike and that the number of letters in each are not the same are only arguable differences which will not defeat opposition to registration. *Coca-Cola Co. v. Chero-Cola Co.*, (App. Cas. D. C. 1921) 273 Fed. 755. The court said: "Of course, if the two marks were placed together, or if a person's attention was in some other way directed to them, there would be no difficulty in apprehending the difference between them. This, however, is not the way to make the test. Ordinarily the prospective purchaser does not carry more than a faint impression of the mark he is looking for. If the article offered to him bears a mark having any resemblance to the one he is thinking of, he is likely to accept it. He acts quickly. He is governed by a general glance. The law does not require more of him."

Right to registration.—There must be actual trademark use to entitle the owner to registration. *Hay v. Malone*, (App. Cas. D. C. 1921) 273 Fed. 363.

Effect of registration.—Registration of a common law trademark neither confers any greater rights in the use of that name or mark on the registrant nor diminishes the rights of others entitled to the use thereof. *Andrew Jergens Co. v. Woodbury*, (D. C. Del. 1921) 273 Fed. 952.

The failure of the owner of a trademark to register it before a competitor registers an infringing trademark, in no way affects the former's rights nor does the prior registration of the competitor's trademark give him the right to continue the infringement. *Ansehl v. Williams*, (C. C. A. 8th Civ. 1920) 267 Fed. 9.

Identity of use.—There is not an identity of use in the case of a mark which in one case is applied to a portable building and in the other to building materials. *Denver Gas, etc., Light Co. v. Alexander Lumber Co.*, (App. Cas. D. C. 1921) 269 Fed. 859. The court said: "A portable or knockdown building does not possess the same descriptive properties as the material of which it is composed. A structure is one thing and the materials out of which it was erected, when considered apart from the building, are quite different things."

Use in interstate commerce.—The mere shipment of goods bearing the mark from the factory to a distributing branch in another state would not constitute use of the mark in interstate commerce within the Trade-Mark Act. *Ault, etc., Co. v. Jaenecke Ault Co.*, (App. Cas. D. C. 1920) 269 Fed. 672.

The origin of a proposed trademark is immaterial. If it is likely to cause confusion it is unregistrable. *Proctor, etc., Co. v. Enev Shortening Co.*, (App. Cas. D. C. 1920)

267 Fed. 344. The courts said: "The applicant says that its mark is made up 'or the initials of the corporation with the termination "Co." Eney Shortening Co., "Esco,"—and seems to think that there is something in that which should entitle it to have the mark registered, but we perceive no force in the suggestion. The trademark statute takes no account of the origin of a mark. The question is: Would its use be likely to result in confusion? If so, it is unregistrable. As was said by the Examiner of Interferences, the 'consuming public know little and care less about the origin of any mark, and very seldom, if ever, take it into consideration.' The statute does not contemplate that the public should do so."

Extending use of mark to other articles. The rule relating to the use of marks in the natural development of business extends only to the use of the same mark on goods of the same descriptive properties. But the right of extension applies only to the specific mark, and not to a similar mark. *Berghoff Brewing Assoc. v. Popel-Giller Co.*, (App. Cas. D. C. 1921) 273 Fed. 328, holding that the extension of the mark "Burg Brau" on beer to "Burg" on nonalcoholic beverages, would not come within the rule, since the marks are radically different.

Trademarks for beverages.—"The Eighteenth Amendment to the Constitution and the laws for its enforcement, relating to the subject of prohibition, have compelled transition from the production and sale of alcoholic beverages to non-alcoholic beverages, which calls for liberal protection of trademark rights affected by this enforced change. *Sexton v. Schoenhofen Co.*, (App. Cas. D. C. 1921) 273 Fed. 327.

In case of doubt as to the right of the parties where the registration of a trademark is offered the doubt should be resolved against the applicant and the opposition sustained. *Coca-Cola Co. v. Chero-Cola Co.*, (App. Cas. D. C. 1921) 273 Fed. 755.

II. PARTICULAR WORDS, NAMES, MARKS OR SYMBOLS

1. *Arbitrary or Fanciful Names* (p. 758)

Word which has acquired fixed meaning in language.—Where a word registered as a trademark has acquired a fixed meaning in the language and is recognized in the dictionaries, its owner may obtain relief against the use of that word by another although the goods or product to which it is applied are not of the same descriptive properties. This principle was applied in the case of the word "Cottolene." *Imperial Cotto Sales Co. v. N. K. Fairbanks Co.*, (App. Cas. D. C. 1921) 270 Fed. 686. The court said:

"It appears that the predecessor in business of the opposer, the N. K. Fairbanks Company, coined the word 'Cottolene' in 1887 as a trade-mark to designate a cooking fat made from cotton seed oil and oleo-

stearine. The mark has been registered in most of the countries of the civilized world, and the goods of the opposer company bearing the mark have a wide international reputation. The word 'Cottolene,' coined and used exclusively by the opposer and its predecessor in business for over 30 years, has come to have a fixed meaning in the language. It appears in the modern editions of the dictionaries. In the latest edition of the *Standard Dictionary*, it is defined as 'a derivative of cotton seed used as a substitute for lard.' It will therefore be observed that the word has come into the language solely by reason of its application by opposer to a certain class of goods, and the character of the goods defines its meaning.

"This is not, therefore, the ordinary case which may be turned merely upon the question whether the goods of the opposing parties are of the same descriptive properties and the use of the mark would be likely to lead to confusion in trade. . . . It may well be that no purchaser would mistake a stock food for a lard substitute, merely because they bear the same trade-mark. But this is not the exclusive test. While the likelihood of confusion in trade arising from the use of the same or similar marks is sufficient to establish damage it is not the only ground upon which injury may be predicated. Manifestly it would be too narrow a ground upon which to rest the present case. The goods are derived from the same product. The stock food is produced by the extraction of the oil from the cotton seed. A poor or adulterated grade of cotton seed meal, bearing the mark 'Cottolene,' would, we think, reflect upon the reputation of opposer's product, which is known the world over by that name. It is clear that, if these goods, derived from the same product, bear the same name, the public would be justified in concluding that they originated from the same trader. In other words, 'Cottolene,' having been coined and used for more than a generation exclusively as the name of a cotton seed product, when adopted as the name of an inferior cotton seed product, would lead to a comparison damaging to the reputation derived from its original use."

Illustrations.—In *Aunt Jemima Mills Co. v. Blair Milling Co.*, (App. Cas. D. C. 1921) 270 Fed. 1021, where an opposition to registration had been filed by appellant the appellant's device consisted of the words "Aunt Jemima's," having underneath the bust picture of a full-faced smiling negress, with a handkerchief wrapped about her head and shoulders. This mark has been used by appellant company and its predecessor in business at St. Joseph, Mo., on pancake flour since 1889, and on buckwheat flour since 1904. Appellee's mark consisted of the word "Sambo," having underneath the representation of a full-faced, clean-shaven, smiling negro, having a white cap on his head and wearing a long apron, bearing in one hand

a plate of smoking cakes, and in the other hand a cake turner. This mark had been used by appellee company at Atchison, Kan., on pancake flour since 1913, and on pancake buckwheat flour since August 7, 1916.

The opposition was based upon the similarity of the marks and the likelihood of confusion in trade, when the marks were applied to goods of the same descriptive properties. The court reversed an order of the patent office dismissing the notice of opposition. It was said:

"The goods on which the marks are used are the same, and we think the marks are deceptively similar. It is urged that the goods would be distinguished as 'Sambo' and 'Aunt Jemima's' brands, but we doubt this conclusion. The Aunt Jemima flour has become so widely known that a glance at the picture would satisfy the average purchaser. In other words, while the goods are known by the name, the picture is the distinguishing feature by which the goods are visually identified.

"In determining the question of possible confusion and resulting damage, it is proper to consider the manner in which appellee's mark may be used. Cartons were produced at bar as exhibits, on which the lower part of the figure of the negro cook was so covered with printed matter that to the casual observer only the shoulders and head were plainly visible. Should registration be granted, the printed matter could be extended until only a bust picture remained, and nothing would prevent the registrant from using whatever coloring it desired in setting forth the mark, so long as the style of dress and the features of the negro were retained. . . . The adoption of the mark before us by appellee company, situated only 23 miles from where appellant company has for years been manufacturing and widely distributing its goods bearing the Aunt Jemima mark, will admit of but one inference—that of gaining advantage from the wide reputation established by appellant in the goods bearing its mark.

"While the case is a close one, the court will adhere to its rule and resolve the doubt in favor of the opposer."

2. Personal and Corporate Names (p. 759)

Individual name.—Although a person has the right to use his own name in connection with a business which he has established and is conducting, he may not use it in such a manner as to mislead the public and cause it to believe that the business is one which was established by a person well-known in the trade and is merely being continued after such person's death. *W. R. Speare Co. v. Speare*, (App. Cas. D. C. 1920) 265 Fed. 876.

2. Personal and Corporate Names (p. 759)

Corporate name—Generally.—The use by a defendant of a word in its name which is

calculated to lead the public to believe its goods are the goods of the plaintiff may be enjoined. Thus, where the plaintiff and its predecessors had used the word "Overland" which name was registered in the United States Patent Office as a trade-mark for automobiles, it was held that an injunction would be granted restraining and enjoining the defendant from using that word as the whole or as a part of its corporate name, from listing its capital stock upon the New York curb market, or any other association or exchange where listed stocks and securities are dealt in, under any name containing the word "Overland," and from designating its tires, or other automobile accessory made or sold by it, by the word "Overland," or by any combination of words containing that name. *Willys-Overland Co. v. Akron-Overland Tire Co.*, (D. C. Del. 1920) 268 Fed. 151.

Where a name is a substantial part of the corporate name of the opposing company, which was organized long prior to the applicant's entry into the field, registration will be denied. *Beechnut Cereal Co. v. Beechnut Packing Co.*, (App. Cas. D. C. 1921) 273 Fed. 367, denying the application of the Beechnut Cereal Company for the registration of the term "Beechnut" as a trademark for cereal breakfast food.

3. Descriptive Words (p. 762)

"Merely descriptive."—This term as here used means only descriptive or nothing more than descriptive. *Hercules Powder Co. v. Newton*, (C. C. A. 2d Cir. 1920) 266 Fed. 169. The court said: "It may be that the force of the adverb is satisfied by the addition to the descriptive word of a picture or device, or by qualifying the description through the addition of another word."

Generic name.—To same effect as first paragraph of original annotation, see *In re Reid*, (App. Cas. D. C. 1921) 273 Fed. 368; *Lilly & Co. v. Warner & Co.*, (E. D. Pa. 1920) 268 Fed. 156; *Hercules Powder Co. v. Newton*, (C. C. A. 2d Cir. 1920) 266 Fed. 169.

Illustrations.—"Coco-Quinine" is held to be a descriptive name and not subject to exclusive appropriation, and where no unfair selling methods are shown an injunction will not be granted restraining a defendant from calling a preparation put up by him "Quin-Coco." *Lilly v. Warner*, (E. D. Pa. 1920) 268 Fed. 156.

A shield bearing the word "Efficiency" is not registerable as a trademark for hot water bottles, ice bags and other hospital supplies. *In re Reid*, (App. Cas. D. C. 1921) 273 Fed. 368.

The word "infallible" was held not to be registerable as trademark for smokeless powder in *Hercules Powder Co. v. Newton*, (C. C. A. 2d Cir. 1920) 266 Fed. 169.

The word "photoplay" has been held to be a descriptive word and not a proper sub-

ject matter of a registered trademark for a publication. *Photoplay Pub. Co. v. La. Verne Pub. Co.*, (C. C. A. 3d Cir. 1921) 269 Fed. 730. The court said: "The word was coined in a contest for a 'new one-word name for a "moving picture show." The object of the Essanay Film Manufacturing Company in starting the contest was 'to select a name which would be descriptive of the entertainment given in motion picture theaters.' The company selected three 'men of acknowledged authority in moving picture affairs' as judges, to whose decision were submitted more than 2,500 words. They selected the word 'Photoplay' as being 'more closely descriptive * * * than any other of the long list submitted.' In announcing their decision, the judges stated that they were influenced in their selection 'by the necessity of adopting a term which would be easily remembered, descriptive in character, simple, and appropriate.' The judges recognized in the word 'Photoplay' a term 'more closely descriptive of the entertainment given in motion picture theaters * * * than in any other of the long list submitted.' The fact of its selection called attention to the word, and to-day it is used entirely by some persons in the film and moving picture business, instead of the words 'moving pictures,' 'moving picture shows,' 'movies,' etc. The word denotes the reproduction of a play by means of photography. It is purely descriptive of that art. The plaintiff appropriated it as part of the title of its publication, which is devoted to the art to which the word relates. Being a trade word, descriptive of the art, it was publici juris, may not be exclusively appropriated, and is not the proper subject of a registered trademark."

Descriptive device.—A drawing showing a hand holding an arch support under a foot, may not be registered as a trademark for an arch support since it is merely a descriptive device. *In re Scholl Mfg. Co.*, (App. Cas. D. C. 1920) 267 Fed. 348.

4. Color (p. 764)

Rule stated.—One cannot have a trademark monopoly in the color of paper alone. *Smith-Kline, etc., Co. v. American Druggists Syndicate*, (C. C. A. 2d Cir. 1921) 273 Fed. 84.

5. Geographical Names (p. 764)

General rule.—To the same effect as the original annotation, see *Sheffield-King Milling Co. v. Theopold-Reid Co.*, (App. Cas. D. C. 1921) 269 Fed. 716.

When name has secondary meaning.—To same effect as original annotation, see *McIlhenny Co. v. Bulliard*, (W. D. La. 1920) 265 Fed. 705.

6. Expired Patent (p. 766)

Expiration of patent as entitling competitor to use trademark.—Where the use of the name claimed as a trademark antedated

the existence of the patent and it further appears that the name, and not the patent, gave its value to the article, the expiration of the patent does not entitle a competitor of the former patentee to make use of the trademark. *McIlhenny Co. v. Bulliard*, (W. D. La. 1920) 265 Fed. 705.

7. Similar Names (p. 766)

Illustrations—Automobiles and accessories.—So in *French Battery, etc., Co. v. Prest-O-Lite Co.*, (App. Cas. D. C. 1920) 265 Fed. 1013, an application to register the words "Ray-O-Lite," as a trademark for storage batteries and electric lamps, was denied as to the batteries because of the prior use by another company of the words "Prest-O-Lite" as a trademark for batteries, but was permitted as to electric lamps.

But in *Prest-O-Lite Co. v. Play-O-Lite Co.*, (App. Cas. D. C. 1920) 267 Fed. 350, it was held that the words "Play-O-Lite" were not so similar to the words "Prest-O-Lite" as to furnish ground for the denial of the registration of the former as a trademark for electric lamps because of the use of the latter in that connection.

Beverages.—In the following cases involving names applied to beverages, the name first given was held to be infringed by the name which follows: "Bergo"—"Burg." *Berghoff Brewing Assoc. v. Popel-Giller Co.*, (App. Cas. D. C. 1921) 273 Fed. 328; "Coca-Cola."—"Chero-Cola" *Coca-Cola Co. v. Chero-Cola Co.*, (App. Cas. D. C. 1921) 273 Fed. 755.

"Christo" and "Chrismo" as applied to nonintoxicating beverages held so similar that the registration of the latter term was denied because of prior use of the former. *Christo Mfg. Co. v. Christian Moerlein Brewing Co.*, (App. Cas. D. C. 1920) 265 Fed. 1010.

Food products and confectionery.—In the following case, involving the name applied to a food product or confection, the name first given was held to be infringed by the name which follows: "Highland"—"Highland Brand." *In re Schluderberg*, (App. Cas. D. C. 1920) 269 Fed. 269. (Canned meats.)

"Crisco" and "Esco" applied to a lard substitute, held so similar that registration of the latter term was denied because of prior use of the former. *Proctor, etc., Co. v. Eney Shortening Co.*, (App. Cas. D. C. 1920) 267 Fed. 344.

Paper.—In the following case the name first given was held to be infringed by the name which follows: "Mail"—"Mail Order." *In re Taylor-Logan Co.*, (App. Cas. D. C. 1921) 273 Fed. 883.

Tobacco, cigars and cigarettes.—Use of word "Yankee" in connection with cigarette cases enjoined at suit of one showing an earlier appropriation of the words, as a trademark for such cases. *Wightman, etc., Co. v. Nivois*, (C. C. A. 2d Cir. 1920) 264 Fed. 98.

Soap.—To the same effect as the first paragraph of the original annotation, "Dutch Cleanser" — "Beat the Dutch," *Morrison Co. v. Cudahy Packing Co.*, (App. Cas. D. C. 1921) 270 Fed. 358 (similarity of dress).

Toilet articles.—In *Ansehl v. Williams*, (C. C. A. 8th Cir. 1920) 267 Fed. 9, the word "Lashbrow," used as a trademark for a preparation for promoting and stimulating the growth of eyebrows and lashes, was held to be infringed by the words "Lash-Brow-Ine" used as a trademark for a similar preparation.

11. *Insignia and Symbols* (p. 775)

A trademark having "U. S." as its most prominent feature may not be registered under this section. *In re United States Rubber Co.*, (App. Cas. D. C. 1920) 265 Fed. 1016.

Vol. IX, p. 775, sec. 6. [First ed., 1909 Supp., p. 675.]

When opposition should be sustained.—Opposition to registration proceedings should be sustained where the prior user establishes that he would be injured by the registration of the mark in question. *Hay v. Malone*, (App. Cas. D. C. 1921) 273 Fed. 363.

Vol. IX, p. 777, sec. 10. [First ed., vol. X, p. 412.]

The legal effect as an assignment of a contract which discloses a purpose to transfer and does in fact transfer all rights in a trademark is not altered by the fact that the word "license" may be used. *Andrew Jergens Co. v. Woodbury*, (D. C. Del. 1921) 273 Fed. 952.

Effect of license.—A license to use a trademark in a certain territory does not confer an exclusive right to its use there in the absence of a contract to that effect. *Vermont Maple Syrup Co. v. F. N. Johnson Maple Syrup Co.*, (D. C. Vt. 1921) 272 Fed. 478.

Sale of trademark as transferring good will.—A sale of a trademark should be accompanied by a transfer of the good will. *Andrew Jergens Co. v. Woodbury*, (D. C. Del. 1921) 273 Fed. 952.

The rights of the transferee from a corporation of a trademark cannot be affected by the acts or statements of one of the officers of the corporation subsequent to the transfer. *Andrew Jergens Co. v. Woodbury*, (D. C. Del. 1921) 273 Fed. 952.

Vol. IX, p. 779, sec. 13. [First ed., vol. X, p. 412.]

When trademark will be cancelled.—Where trademarks are so similar as to be likely to lead to confusion and the goods, while different in themselves, are used for the same purpose, the prior user is entitled to a cancellation of the later similar registered trademark. Thus, "White lily" used as a

trademark for coffee was held subject to cancellation at the suit of a prior user of the trademark "Lily White" for tea and a large line of groceries. *Macy v. New York Grocery Co.*, (App. Cas. D. C. 1920) 267 Fed. 749.

Evidence.—An order for cancellation is justified by books of petitioner showing orders for and shipments of goods bearing the mark over a year before it was registered by the other user. *Ault, etc., Co. v. Jaenecke Ault Co.*, (App. Cas. D. C. 1920) 269 Fed. 672.

Vol. IX, p. 780, sec. 16. [First ed., vol. X, p. 413.]

Loss of trademark rights.—A petitioner who is not using a trademark but has abandoned it at the time he files an application for the cancellation of its registration by another is not in a position to urge that he is being damaged by the registrant's use of it. *Skene v. Marinello Co.*, (App. Cas. D. C. 1921) 270 Fed. 701. Such an abandonment is a matter of intention. *Andrew Jergens Co. v. Woodbury*, (D. C. Del. 1921) 273 Fed. 952.

Defenses—Laches.—The owner of a trademark cannot be chargeable with laches for failure to prosecute an infringement before he knows or has such notice as would lead an ordinarily prudent person to inquire and learn the existence of the infringement. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307.

Accounting for damages.—Where it appears that the defendant did the acts complained of not only before, but after, full warning and with knowledge of the plaintiff's rights and its intentions and did not at any time modify its business conduct but continued to infringe without acquiescence or consent of the plaintiff, the latter is entitled to an accounting. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307.

Vol. IX, p. 787, sec. 19. [First ed., vol. X, p. 414.]

Power of court to grant injunctions.—An injunction is an appropriate remedy to prevent the passing by another of his goods as those of a competitor by imitation of the trade name and general appearance of the goods of the latter. *Coca-Cola Co. v. Old Dominion Beverage Corp.*, (C. C. A. 4th Cir. 1921) 271 Fed. 600.

The extent of the use of the infringing trademark is immaterial in a suit to enjoin an infringement. *Ansehl v. Williams*, (C. C. A. 8th Cir. 1920) 267 Fed. 9, wherein the court said:

"The foregoing in a general way is what the evidence shows as to the business done by appellant and appellee. That of appellee was larger than that of appellant, but this fact is not decisive. In the case of *Kathreiner's Malzkaffee Fab. v. Kneipp Medicine*

Co., 82 Fed. 321, 27 C. C. A. 351, the Court of Appeals of the Seventh Circuit said:

"It is not essential that its use has been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high and general reputation, and of long-continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the user of the trade-mark." See, also, *Waldes et al. v. International Manufacturers' Agency*, (D. C.) 237 Fed. 52; *Walter Baker & Co. v. Delapenha* (C. C.) 160 Fed. 746."

Laches.—A delay of about two years by the owner of a trademark in bringing an action for injunction after learning of the use by a competitor of an infringing trademark, does not constitute laches. *Ansehl v. Williams*, (C. C. A. 8th Cir. 1920) 267 Fed. 9.

Extent of relief.—The courts afford protection in trademarks only in so far as they maintain and extend the reputation and good will of the owner in the business for which they are adapted and used. *Imperial Cotto Sales Co. v. N. K. Fairbanks Co.*, (App. Cas. D. C. 1921) 270 Fed. 686.

But relief will be denied to a complainant where he has been guilty of gross misconduct in the operation of his business, as where the complainant made misrepresentations concerning patent protection which did not exist. *Perfection Mfg. Co. v. B. Coleman Silver's Co.*, (C. C. A. 7th Cir. 1921) 270 Fed. 576.

Accounting limited to date of notice.—Both the account of profits and the damages in a suit for the infringement, of a registered trademark, brought in a federal district court without diversity of citizenship, are limited to the date when notice was given of the registered mark by section 28 of this Act [9 Fed. Stat. Ann. (2d ed.) 789], which makes it the duty of the registrant to give notice to the public by attaching certain specified words or abbreviations to the trademark, or to the receptacle wherein the article is inclosed, and provides that "in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered except on proof that the defendant was duly notified of infringement and continued the same after such notice," notwithstanding an earlier notice calling on the defendant "to discontinue the unfair competition and infringement on our rights," and the wilful character of defendants' wrongdoing. *Stark Bros. Nurseries, etc., Co. v. Stark*, (1921) 255 U. S. 50, 41 U. S. Ct. 221, 65 U. S. (L. ed.) —, affirming (C. O. A. 8th Cir. 1919) 257 Fed. 9, 168 C. C. A. 221.

Evidence.—Where unfair selling methods on the part of a defendant are alleged the evidence must, in order to establish such allegations be direct, clear and positive. *Lilly & Co., v. Warner & Co.*, (E. D. Pa. 1920) 268 Fed. 156.

In a suit for an injunction to restrain the use by defendant in its name of a word calculated to lead the public to believe that defendant's goods are the goods of the plaintiff, it is not essential for the evidence to show that any particular person has actually been misled. *Willys-Overland Co. v. Akron-Overland Tire Co.*, (D. C. Del. 1920) 268 Fed. 151, affirmed (C. C. A. 3d Cir. 1921) 273 Fed. 674.

Vol. IX, p. 788, sec. 21. [First ed., vol. X, p. 415.]

Intent to abandon as controlling.—Abandonment of a trademark, in the strict sense, rests upon an intent to abandon. *Ansehl v. Williams*, (C. C. A. 8th Cir. 1920) 267 Fed. 9, holding that a short absence of the owner of a trademark from the city in which he conducted his business, during which time the business was conducted by his relatives, did not show an intent to abandon the trademark.

Although the appearances may be sufficient to indicate an abandonment, this may be satisfactorily explained by showing a want of intention to relinquish the right claimed. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307.

What constitutes abandonment.—*In general.*—To give up for a long period and to discontinue the use of a trademark and permit others to use it indiscriminately without prosecution amounts to an abandonment. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307.

Nonusage.—There is no penalty which inflicts the loss of right of property in trademarks by nonusage, unless there also be found an intent to abandon. Of course, intent may be inferred from the facts shown; but the fact must be adequate to support a finding of abandonment. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307, wherein it was held that an abandonment by a candy manufacturer of the trademark "Bluebird" or a dedication of it to public use was not shown by granting an exoneration to another candy manufacturer from willful infringement and the granting of permission to it to continue the sale of boxes of candy, provided it continued to use two bluebirds and that such candy was not advertised as the "Blue Bird brand" or the "Blue Bird box" and it appeared that the boxes used were hand painted with no lettering of any kind thereon.

The burden of proving abandonment of a trademark is upon the person alleging it. *Ansehl v. Williams*, (C. C. A. 8th Cir. 1920) 267 Fed. 9.

Abandonment as defense.—In order that an abandonment of a trademark may be established as a defense it is essential to show, not only acts indicating practical aban-

donment, but an intent to abandon. *Wallace v. Repetti*, (C. C. A. 2d Cir. 1920) 266 Fed. 307.

Vol. IX, p. 789, sec. 28. [First ed., vol. X, p. 415.]

Accounting limited to date of notice.— Both the account of profits and the damages

in a suit for the infringement of a registered trademark, brought in a federal district court without diversity of citizenship, are limited by this section to the date when notice was given of the registered mark. *Stark Bros. Nurseries, etc., Co. v. Stark*, (1921) 255 U. S. 50, 41 S. Ct. 221, 66 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1919) 257 Fed. 9, 168 C. C. A. 221.

TRADING WITH THE ENEMY

1918 Supp., p. 847, sec. 1.

Constitutionality.—The Trading with the Enemy Act, whether taken as originally enacted on October 6, 1917, or as thereafter amended by the Acts of March 28, 1918, November 4, 1918, July 11, 1919, and June 5, 1920, is strictly a war measure, and finds its sanction in the constitutional provision empowering Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. *Stoehr v. Wallace*, (1921) 255 U. S. 239, 41 S. Ct. 293, 66 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1920) 269 Fed. 827. In that case it was further held that Congress in time of war, may authorize and provide for the seizure and sequestration, through executive channels, of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake.

1918 Supp., p. 847, sec. 2.

Partnership.—A partnership composed of citizens of the United States and citizens of a foreign country is dissolved by war between the two nations and consequently the partnership cannot be regarded as an "enemy" within the meaning of this section. *Rossie v. Garvan*, (D. C. Conn. 1921) 274 Fed. 447.

1918 Supp., p. 849, sec. 3 (c).

Scope of section.—It is held that this section covers two offenses: First, the bringing in or sending out of the United States such a letter in any other way than "in the regular course of mail"; and, second, the sending out of the United States in any way a communication intended for an enemy or ally of enemy. The description of each of these offenses is prefaced by the words "It shall be unlawful," indicating that they are distinct. The first covers any letter or tangible communication whatever, and the second only such communications as are intended for an enemy or ally of enemy. *Welsh v. U. S.*, (C. C. A. 2d Cir. 1920) 267 Fed. 819.

1918 Supp., p. 852, sec. 5 (a).

Determination of liability of property to seizure.—The President having delegated his

authority to the Alien Property Custodian under this section, the latter may conclusively determine what property is liable to seizure as being that of an alien enemy. *Garvan v. \$20,000 Bonds*, (C. C. A. 2d Cir. 1920) 265 Fed. 477. To same effect, see *Garvan v. \$100,000 Bonds*, (C. C. A. 2d Cir. 1920) 265 Fed. 481.

1918 Supp., p. 854, sec. 7 (b).

Transfer of choses in action prior to declaration of war.—Under this provision absolute transfers of choses in action before April 6, 1917, were valid. *Stöhr v. Wallace*, (S. D. N. Y. 1920) 269 Fed. 827.

1918 Supp., p. 856, sec. 7 (c).

Constitutionality.—This act is constitutional. As to this question it is said: "The sole basis for the plaintiff's claim of unconstitutionality comes down, therefore, to the Custodian's power of initial sequestration *ex parte*. But how does this differ in substance from the customary right upon libels of information in rem to arrest whatever property officials may decide to be forfeit? Such property may not be reclaimed pendente lite by filing a bond; the claimant must endure the temporary loss of possession until the innocence of the res is adjudicated. The public purpose of the statute so far overrides this incident of his rights of property. How much more is this the case in time of war where the interests are vital? The difference is one merely of procedure; the substantial rights are the same, for capture effects no more than an arrest in rem. The right to sell is the only addition, and I have shown that this is at least subject to judicial control in the event of a bill filed under section 9. The act, therefore, affords a complete remedy to all claimant friends, and is constitutional." *Stöhr v. Wallace*, (S. D. N. Y. 1920) 269 Fed. 827.

This section made mandatory the delivery of such property as should be ordered to be turned over by the President. *In re Garvan*, (E. D. N. Y. 1921) 270 Fed. 1002.

Conclusiveness of determination of Alien Property Custodian that certain property is liable to seizure.—The determination of the

Alien Property Custodian that certain property is liable to seizure as being that of an alien enemy must, whether right or wrong, be deemed conclusive in a possessory action brought by that officer to obtain immediate possession, the President having delegated his authority to him under § 5, and the act providing in this section that, "if the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of an enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian," to which the amendatory Act of November 4, 1918, (see 1919 Supp. p. 355) added, after the requirements of transfer, the words, "or the same may be seized by the Alien Property Custodian, and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act," provision being made in § 9 for immediate claim for a return of the property and for suit, in which case the property is to be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, to abide the result. *Central Union Trust Co. v. Garvan*, (1921) 254 U. S. 554, 41 S. Ct. 214, 65 U. S. (L. ed.) —, [affirming (C. C. A. 2d Cir. 1920) 265 Fed. 477] wherein it was said that "the natural interpretation of the provision of the Trading with the Enemy Act as amended by the Act of November 4, 1918, that the sole relief and remedy of any person having any claim to any property transferred to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of the act, is that it refers to the remedies expressly provided by § 9, viz., the filing of a claim for a return of the property and the bringing of suit, and that property required to be transferred, and property seized, stand on the same footing, not that the resort by the Custodian to the courts instead of to force opens to the person who has declined to obey the order of the statute, or who has prevented a seizure, a right by implication to delay what the statute evidently means to accomplish at once."

A determination by the Alien Property Custodian that certain property is enemy-owned must be regarded as the act of the President, within the meaning of the Trading with the Enemy Act, in view of the provision of § 5, authorizing the President to exercise any of the powers with which he is invested by that act, respecting the sequestration, custody, and disposal of enemy property through such officer or officers as he shall direct, and of the orders of the President, committing to the Alien Property Custodian the administration of this section of the Act, including the power to determine,

after investigation, whether property was enemy-owned. *Stoehr v. Wallace*, (1921) 255 U. S. 239, 41 S. Ct. 293, 65 U. S. (L. ed.) —, affirming (S. D. N. Y. 1920) 269 Fed. 827. See also *In re Garvan*, (E. D. N. Y. 1921) 270 Fed. 1002.

Rule promulgated by President as to title vesting in Alien Property Custodian was held valid in *Kohn v. Kohn*, (S. D. N. Y. 1920) 264 Fed. 253.

Effect of treaty.—Treaty provisions which relate only to the rights of merchants of either country, residing in the other when war arises, are inapplicable to a controversy as to whether the beneficial ownership of property seized and proposed to be sold under this Act, as the property of a German corporation, is in truth in an American corporation under a pre-war contract between such corporation and the German corporation. *Stoehr v. Wallace*, (1921) 255 U. S. 239, 41 S. Ct. 293, 65 U. S. (L. ed.) —, affirming (S. D. N. Y. 1920) 269 Fed. 827.

Effect of seizure.—A seizure of property by the Alien Enemy Custodian settles nothing except the bare sequestration and possession of the property. *Stoehr v. Wallace*, (S. D. N. Y. 1920) 269 Fed. 827.

Stock held by citizen for benefit of alien enemy.—Shares of stock standing in the name of one who is neither an enemy nor an ally of an enemy could, consistently with due process of law, be seized and required to be transferred to the Alien Property Custodian in virtue of a determination by that official in an ex parte administrative proceeding that they belonged to an alien enemy, conformably to the provisions of the Trading with the Enemy Act, since such act distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy, a right to assert and establish his claim by a suit in equity, unembarrassed by the precedent executive determination, and provides that, pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Alien Property Custodian to abide the result, and, if the claimant prevails, is forthwith to be returned to him.

No such an interest in shares of stock in a domestic corporation, which were seized by the Alien Property Custodian under the Trading with the Enemy Act, as the property of a German corporation, as entitles another domestic corporation in whose name the stock stands to demand that such shares be freed from the seizure, was given to the latter corporation by a pre-war contract between it and the German corporation, where such contract was not prompted by commercial motives, nor based on an estimate of mutual advantages, and was not intended as a genuine transaction, but was made to avoid inconvenience which otherwise might ensue from a state of war; the parties intending to leave the beneficial ownership in the German corporation, and

not pass it to the domestic corporation. *Stöehr v. Wallace*, (1921) 255 U. S. 239, 41 S. Ct. 293, 65 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1920) 269 Fed. 827.

A debt is included in the terms of this section requiring the transfer or payment of money to the Alien Property Custodian. *Kohn v. Kohn*, (S. D. N. Y. 1920) 264 Fed. 253.

Workmen's compensation award — *Alien heir as party*.—Where an award under the Workmen's Compensation Act is made payable to the Alien Property Custodian, the heir of the decedent being a nonresident enemy alien, the heir is not a necessary party to a proceeding by the Industrial Commission to review the award. *Milwaukee Western Fuel Co. v. Industrial Commission*, (1920) 172 Wis. 561, 179 N. W. 763.

1918 Supp., p. 856, sec. 7 (e).

The regulations of the War Trade Board dated July 14, amended July 20, 1919, did not cover property which before July 14, 1919, had been reported to the Alien Property Custodian, or which he had required to be delivered to him. *Garvan v. \$25,000 Canada Southern R. Co. 5% Bonds*, (C. C. A. 2d Cir. 1920) 270 Fed. 217.

Bank protected in complying with Alien Property Custodian's demand, see *American Exch. Nat. Bank v. Garvan*, (C. C. A. 2d Cir. 1921) 273 Fed. 43.

1918 Supp., p. 857, sec. 8 (a).

Right of American citizen in partnership with aliens, see *Mayer v. Garvan*, (D. C. Mass. 1920) 270 Fed. 229.

Trustees of securities as lienholders.—Trustees of securities, deposited by foreign insurance companies for the protection of policyholders in conformity with state statutes, are not lienholders within the meaning of this section. *Garvan v. \$20,000 Bonds*, (C. C. A. 2d Cir. 1920) 265 Fed. 477. The court said:

"Connecticut and Massachusetts require, as do almost all the states, that insurance companies of foreign nations, before doing business in the state, shall deposit funds or securities for the protection of the company's policy holders and creditors in the United States. The exact terms of the statutes need not be stated. The Munich Reinsurance Company, a German corporation did deposit a quantity of securities with trustees in conformity with the law of the state of Connecticut. The Franklin General Insurance Company and the Allianz Insurance Company, both German companies, deposited securities with trustees in conformity with the requirements of the law of Massachusetts.

"It will not be necessary to set out the terms of the trust at length; it is enough to say, that, although the income of the securities is payable to the companies and they can withdraw them, or any of them,

upon substituting others equally good, and can change the trustees, still the trustees hold the securities in trust to pay the claim of any policy holder or creditor admitted to be due by the company or established by the claimant in due course of law. It is apparent that the trustees hold primarily for the benefit of the policy holders and creditors, and secondarily for the benefit of the companies; but their duties are active, and they are not merely lienholders. The companies cannot take the securities out of their possession until the rights absolute or contingent, of all policy holders and creditors in this country are secured, and in the meantime the trustees have the active duty of collecting and paying over the income, investing and reinvesting, and paying claims properly proved." To same effect, see *Garvan v. \$100,000 Bonds*, (C. C. A. 2d Cir. 1920) 265 Fed. 481.

1918 Supp., p. 858, sec. 9.

Persons entitled to maintain suit — *In general*.—"Construing the Act by its terms as well as in the light of its purpose, it is evident that the only person given a right to prosecute a claim against property of an enemy in the hands of the Custodian is one 'not (himself) an enemy, or ally of enemy,' and that a district court of the claimant's residence has jurisdiction of a claim so asserted only when it positively appears that the claimant comes within this negative characterization. Any other construction of the Act would permit property which had been taken by the Government from one enemy to be immediately acquired by another and would completely defeat its purpose. As a corollary to the plain terms of Section 9 giving a person, not an enemy, the right during war to assert a claim against enemy property and conferring jurisdiction upon the district court to hear it, the Act provides under Section 12 that the assertion of 'any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian' shall be postponed until after the end of the war, to be prosecuted then only in such manner as Congress shall later direct." *Garvin v. Kogler*, (C. C. A. 3d Cir. 1921) 272 Fed. 442.

***Alien friends*.**—Where an alien enemy subsequently becomes an alien friend he may sue but only under this section. *Kohn v. Kohn*, (S. D. N. Y. 1920) 264 Fed. 253.

***Members of partnership*.**—A partnership composed of citizens of the United States and Germany having been dissolved by the declaration of war between the two nations, the partners who are citizens of the United States are entitled to maintain an action under this section to recover their share of the firm assets. *Rossie v. Garvan*, (D. C. Conn. 1921) 274 Fed. 447.

Jurisdiction.—The fact that a plaintiff has claimed jurisdiction erroneously under sec-

tions 24 and 57 of the Judicial Code in an action against the Alien Property Custodian does not prevent the court from acquiring jurisdiction under this section. *Stöhr v. Wallace*, (S. D. N. Y. 1920) 269 Fed. 827.

Notice by publication in alien's native land directed, see *Lovinger v. Garvan*, (S. D. N. Y. 1920) 270 Fed. 298.

Pleading.—Where there is no jurisdictional averment that the plaintiff was not, at the time of the commencement of the action, an enemy or ally of enemy, the District Court was without jurisdiction to enter, and the Circuit Court of Appeals is without jurisdiction to review, the decree below. *Garvin v. Kogler*, (C. C. A. 3d Cir. 1921) 272 Fed. 442.

1918 Supp., p. 862, sec. 12.

Sale of property.—Although under this section the powers of the Alien Property Custodian are extended to include the power to sell, in case a claimant friend files a bill against the custodian such a bill either automatically stays the sale or at least the court may stay it in a proper case. *Stöhr v. Wallace*, (S. D. N. Y. 1920) 269 Fed. 827.

1918 Supp., p. 865, sec. 17.

Enforcing demand of alien property custodian for property liable to seizure.—A demand by the Alien Property Custodian under the Trading with the Enemy Act for the delivery to him of property to which he is entitled, may be enforced by the federal district courts under this section. *Central Union Trust Co. v. Garvan*, (1921) 254 U. S. 554, 41 S. Ct. 214, 65 U. S. (L. ed.) — (affirming [C. C. A. 2d Cir. 1920] 265 Fed. 477, 481), wherein the court said: "There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of mistake. As it can authorize a seizure in pais, it can authorize one through the help of a court. The only questions are whether it has done so, as supposed by the libellant, and if so, whether the conditions imposed by the act have been performed."

Under this section the Alien Property Custodian has the right to apply to the court for aid in making a seizure and petition it to order the United States marshal to seize the property and deliver it to him. *Garvan v. \$20,000 Bonds*, (C. C. A. 2d Cir. 1920) 265 Fed. 477, wherein it was said: "We have no doubt of the right of the Alien Property Custodian to apply to the court for aid; if he did not know where the securities were, he would evidently be entitled to the aid of the court to compel the trustees to discover and

deliver them. In this case he did know where they were, but it was much more orderly and decent to obtain possession by the aid of the court than to seize them by violence and the strong hand." To same effect, see *Garvan v. \$100,000 Bonds*, (C. C. A. 2d Cir. 1920) 265 Fed. 481.

Nature of Alien Property Custodian's possession.—A proceeding brought by the Alien Property Custodian under this section, to obtain possession of property as being that of an alien enemy, gives nothing but the preliminary custody, such as would have been gained by seizure, although the property is to be conveyed to him, and by the amendatory Act of March 28, 1918 (1918 Supp. Fed. Stat. Ann. p. 862, note) he is vested with all the power of a common-law trustee in respect of all property other than money which has been or shall be, or which has been or shall be required to be, conveyed to him, and is given the power to sell and manage the same as though he were absolute owner, since this act did not repeal § 9 of the earlier act, (see 1918 Supp. p. 858) which provides for the immediate filing of a claim for a return of the property and the bringing of suit, the property, in case of suit, to be retained in the custody of the Custodian or in the Treasury of the United States, to abide the result. *Central Union Trust Co. v. Garvan*, (1921) 254 U. S. 554, 41 S. Ct. 214, 65 U. S. (L. ed.) —, affirming (C. C. A. 2d Cir. 1920) 265 Fed. 477.

Procedure.—Under this section the proceeding could be by petition and order to show cause instead of by a bill in equity. *In re Garvin*, (E. D. N. Y. 1921) 270 Fed. 1002. See also *Garvin v. \$25,000 Canada Southern R. Co. 5 per cent. Bond*, (C. C. A. 2d Cir. 1920) 270 Fed. 217.

1919 Supp., p. 355, sec. 1.

Power of Alien Property Custodian to seize choses in action, see *American Exch. Nat. Bank v. Garvan*, (C. C. A. 2d Cir. 1921) 273 Fed. 43.

1920 Supp., p. 268. [Claims against property, etc.]

Right to intervene.—In *Aronstam v. James*, (E. D. N. Y. 1921) 273 Fed. 545, the right of a citizen of France to intervene in a suit involving property in the hands of the Alien Property Custodian was denied. See also *Aronstam v. James*, (C. C. A. 2d Cir. 1921) 273 Fed. 688, denying a motion for a stay.

Right of attorney to recover for services rendered in defense of an action against alien corporation recognized as to services rendered prior to Oct. 6, 1917, but denied as to services subsequent thereto, see *Wilson v. Miller*, (E. D. N. Y. 1921) 274 Fed. 808.

WAR DEPARTMENT AND MILITARY ESTABLISHMENT

Vol. IX, p. 911, sec. 220. [First ed., vol. VII, p. 946.]

Transportation of mounts belonging to officers.—In the absence of a statute authorizing payment for the transportation of mounts which are the private property of officers of the army, the Secretary of War has no authority, by the promulgation of a regulation, to bind the government for such transportation, and this section confers no authority upon the Secretary to incur such liability on behalf of the government. *Atchinson, etc., R. Co. v. U. S.* (1920) 55 Ct. Cl. 339.

Vol. IX, p. 1028, sec. 27. [First ed., 1918 Supp., p. 947.]

Enlistment of minors — Generally.—To the same effect as third paragraph of original annotation, see *Ex p. Beaver*, (N. D. Ohio 1921) 271 Fed. 493.

This section by indirectly but none the less explicitly recognizing and authorizing enlistments of all minors under eighteen years of age with the consent of parents or guardians, repeals the minimum limit of eighteen years provided in section 4 of the Act of March 2, 1899 (9 Fed. Stat. Ann. [2d ed.] 1033) even if it does not restore and reenact the limit of sixteen years originally found in R. S. §§ 1116 and 1118. In the event that the eighteen year minimum is repealed and the sixteen year minimum is not restored, then the common law applicable to the enlistment of minors under eighteen years of age will be in force, under which a minor of the age of discretion might enlist regardless of any age limit. This being so the instant case is governed by that long line of authorities holding that a minor over 16 years of age, who has enlisted without the previous consent of his parents or lawful guardian, cannot, on his own application, be released in any event, and cannot be released on their application, after he has committed an offense punishable by military law and is being held to answer the same." *Ex p. Beaver*, (N. D. Ohio 1921) 271 Fed. 493.

Right to discharge — Pending prosecution for military offense.—The right of a non-consenting parent or guardian to the release of a minor from military service is subordinate to the right of the military authorities to hold him to answer for an offense triable by military law. *Ex p. Beaver*, (N. D. Ohio 1921) 271 Fed. 493.

Vol. IX, p. 1032, sec. 2. [First ed., vol. VII, p. 961.]

Application of section — Discharge of aliens.—The provision of this section relat-

ing to aliens is applicable only in times of peace, and as at the time of the decision of this case, April 12, 1921, the United States was still at war, an alien who had enlisted in the army could not obtain his discharge by reason of the provisions of this section. But even in time of peace an alien duly enlisted cannot obtain his discharge by writ of habeas corpus from military service and escape liability for offenses against military law by invoking the provisions of this section. Being *sui juris*, it is settled that the United States alone may plead his disability to avoid his enlistment contract and he may not. *Ex p. Beaver*, (N. D. Ohio 1921) 271 Fed. 493.

Vol. IX, p. 1033, sec. 4. [First ed., vol. VII, p. 960.]

This section is repealed by implication by section 27 of the National Defense Act (9 Fed. Stat. Ann. 1028). *Ex p. Beaver*, (N. D. Ohio 1921) 271 Fed. 493.

Vol. IX, p. 1095, sec. 1. [*Transportation of troops in time of war, etc.*] [First ed., 1918 Supp., p. 975.]

Liability of railroad for negligence.—A railroad company operated by the federal government under a lease made under this section is liable for negligence, and recovery against the carrier in such cases will not be affected by the return of these corporations to their owners, or rather the abandonment of supervision by the government, which has since taken place on March 1, 1920. *Gilliam v. Atlantic Coast Line R. Co.*, (1920) 179 N. C. 508, 103 S. E. 10.

Vol. IX, p. 1117, sec. 1230. [First ed., vol. VII, p. 1014.]

Power of President.—See annotation under Vol. IX, p. 1296, art. 118, *infra*, p. 809.

Vol. IX, p. 1136, sec. 1. [First ed., 1918 Supp., p. 1010.]

- I. Construction of selective service act.
3. Exemptions.
5. Offenses against conscription law.

I. CONSTRUCTION OF SELECTIVE SERVICE ACT

3. Exemptions (p. 1141)

Effect of exemption claim by neutral alien.—A claim by a neutral alien, who had declared his intention to become a citizen, of exemption under this section has been held to amount to a withdrawal of such declaration. *In re Trachsel*, (S. D. Ohio

1921) 271 Fed. 779. This act was subsequently amended by the Act of July 9, 1918, which provides that a claim of exemption by a neutral alien shall operate and be held to cancel his declaration of intention to become an American citizen.

5. Offenses against Conscription Law
(p. 1142)

Desertion.—Intent.—The regulations promulgated by the President under authority vested in him by the Act of May 18, 1917, commonly known as the "Selective Service Law" (second edition, Selective Service Regulations, p. 104), section 140, subsec. 1, paragraphs (a), (b), and (c), prescribe who shall be deemed a deserter, namely, a registrant, who, after the time for his induction into military service, and with the intent to evade such service (a) fails to report for military duty under induction orders, etc.; (b) fails to entrain for mobilization camp pursuant to orders; or (c) who absents himself from his party en route to embarkation camp, etc. Before either one of these requirements respecting desertion can become effectual, and the right of a citizen to a hearing in a civil as distinguished from a military court denied, it must appear that the registrant acted "with intent to evade" such service. The intent with which the alleged act was committed, and, a fortiori, knowledge on the subject, is of the very essence of the offense. Thus, where a registrant appeared for examination, was accepted and informed that he would be notified by mail when to report for military duty, it was declared that it could not be said that the mailing of a notice, which he did not receive or know of, inducted him into the military service and that for his failure to respond he was a deserter therefrom. *Farley v. Ratliff*, (C. C. A. 4th Cir. 1920) 267 Fed. 682.

Conspiracy.—An acquittal on a charge of conspiracy with another to enable a third person to violate the Selective Service Law was held not to bar a prosecution for the crime of aiding and assisting another to evade the requirements of this law, as the offenses are distinct. *Bens v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 152.

Rejection at mobilization camp as barring registrant from bonus.—In *Bannister v. Soldiers' Bonus Board*, (1921) 112 Atl. 422, 13 A. L. R. 589, it was held that a registrant who was inducted into military service by his local board under this Act but was rejected at the mobilization camp for physical unfitness, was not entitled to receive a bonus under a state statute which provided for giving such a bonus to each "enlisted man . . . who was mustered into federal service and reported for active duty" between certain dates.

Obstruction of draft as ground for disbarment.—See *In re Margolis*, (1921) 269 Pa. St. 206, 112 Atl. 478, 12 A. L. R. 1181.

An attorney's services in claiming exemption are not in contravention of public policy so as to deprive him of the right to recover compensation therefor, where the registrant on whose behalf the services are rendered is a non-declarant alien who is not within section 2 of this act. *Spaulding v. Lambros*, (1920) 58 Mont. 536, 193 Pac. 565.

Sufficiency of indictment, see *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808; *Underwood v. U. S.*, (C. C. A. 6th Cir. 1920) 267 Fed. 412.

Admissibility of evidence.—Evidence of acts as admissible to show intent, possession and knowledge. see *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

Vol. IX, p. 1156, sec. 2. [First ed., 1918 Supp., p. 1015.]

Induction into military service.—In *Ex p. Thieret*, (C. C. A. 6th Cir. 1920) 268 Fed. 472, it was held that a person was in contemplation of law inducted into the military service when he received his preliminary instructions and his order to report for entrainment.

Vol. IX, p. 1157, sec. 4. [First ed., 1918 Supp., p. 1016.]

Effect of claiming exemption.—See *In re Miegel*, (E. D. Mich. 1921) 272 Fed. 688. See also *In re Rubin*, (E. D. Mich. 1921) 272 Fed. 697.

Right to industrial exemption, see *Ex p. Thieret*, (C. C. A. 6th Cir. 1920) 268 Fed. 472.

Power of President to revoke certificate of conditional exemption was recognized in *Ex p. Thieret*, (C. C. A. 6th Cir. 1920) 268 Fed. 472.

Relief by habeas corpus proper where exemption arbitrarily denied.—See *Ex p. Thieret*, (C. C. A. 6th Cir. 1920) 268 Fed. 472.

Pendency of indictment held no bar to trial by military court, see *Ex p. Thieret*, (C. C. A. 6th Cir. 1920) 268 Fed. 472.

Vol. IX, p. 1159, sec. 5. [First ed., 1918 Supp., p. 1018.]

Computing time for giving notice of induction.—See *U. S. v. Bergdoll*, (E. D. Pa. 1921) 272 Fed. 498.

Sufficiency of notice to registrant under Selective Service Rule 133 to appear for examination, see *Ex p. Bergdoll*, (D. C. Kan. 1921) 274 Fed. 458.

Registrant bound to know rules governing execution of questionnaires.—*In re Tomarchio*, (E. D. Mo. 1920) 269 Fed. 400.

Induction on default without notice as constituting "due process of law," see *Rome v. Marsh*, (D. C. Mass. 1920) 272 Fed. 982.

Questionnaire drawn by scrivener as sub-

ject to contradiction, see *In re Tomarchio*, (E. D. Mo. 1920) 269 Fed. 400.

Action of state director of military enrollment held to supersede notice from local board to appear for examination, see *Rome v. Marsh*, (D. C. Mass. 1920) 272 Fed. 982.

Sufficiency of indictment for conspiracy to violate this section, see *Anderson v. U. S.*, (C. C. A. 9th Cir. 1921) 269 Fed. 65.

Review of work of draft boards.—In reviewing the work of the selective service boards they should not be held to the “verbal niceties and sometimes almost painful preciseness and accuracy of special pleading.” *U. S. v. Bergdoll*, (E. D. Pa. 1921) 272 Fed. 498.

Vol. IX, p. 1159, sec. 6. [First ed., 1918 Supp., p. 1019.]

Repeal of section by Espionage Act.—This section was not repealed by section 3 of the Espionage Act (1918 Supp. Fed. Stat. Ann. 122), and where an act constitutes a violation of both sections, the defendant should be prosecuted under this section. *Snitkin v. U. S.*, (C. C. A. 7th Cir. 1920) 265 Fed. 489.

Rights of party—law determining.—Until inducted into military service, the rights of a party are to be determined, not according to military law or the law of courts-martial, but according to the standards of the civil law. *Ex p. Goldstein*, (D. C. Mass. 1920) 268 Fed. 431.

Desertion.—A person is not inducted into the military service and therefore cannot be guilty of desertion where he did not receive the notice to report, it having been mailed to a wrong address. *Ex p. Goldstein*, (D. C. Mass. 1920) 268 Fed. 431.

Jurisdiction of court-martial to try draft evader.—*Necessity of investigation by local board*.—A registrant under the Selective Service Act who evades military service, may upon his arrest be tried by a court-martial for desertion without any preliminary investigation by his local board as to whether his desertion was willful. *U. S. v. Lehman*, (D. C. Md. 1920) 265 Fed. 852, wherein it was said:

“The petitioner, Young, in June, 1917, as required by the Selective Service Act of May 18 of that year, duly registered before local draft board No. 1 in Hagerstown, in this state. In due course he was ordered to report for military service. Instead of doing so, he fled and remained in hiding for more than two years. He returned to Hagerstown in the fall of 1919, and was then arrested by the sheriff, turned over to the military authorities, tried for desertion, convicted, and sentenced to five years’ imprisonment. He asks for his release because, as he says, the court-martial had no jurisdiction to try him. His contention is that by the regulation of the President, in force at the time he deserted, he should, upon his apprehension, have been taken before the local draft board, so that it might inquire whether his deser-

tion was willful, and that he is not subject to court-martial until the draft board had first decided that question in the affirmative. Some months before his arrest, all use for the draft boards being at an end, the President discharged them from service. If the petitioner is right, any deserter who succeeded in escaping arrest until their abolition cannot now be punished. Very many persons failed to respond punctually to their orders, but only in a small minority of these cases was there any real attempt to evade service. There would have been an enormous waste of time in sending every one of these technical defaulters before a court-martial. There would scarcely have been courts enough to try them. For that reason, the President directed that such cases should receive preliminary investigation by the draft boards. Such action was not primarily for their protection. These boards had no power to condemn or acquit. Consideration there was a mere procedural step, in which the drafted man had no vested right or interest, and its abolition does him no harm. Before the petitioner or any one else can be punished for desertion, the court-martial must decide that in evading service he acted willfully.”

Determination of question of guilt.—If, the military authorities have jurisdiction to try the petitioner in habeas corpus proceedings, on the charge of desertion, the question whether, under the facts and law involved, he is guilty of the crime of desertion, is a question to be determined by such authorities under the legal rules and principles applicable, and in conformity with due process of law. *In re Scott*, 144 Fed. 79, 75 C. C. A. 237; *Dillingham v. Booker*, 163 Fed. 696, 90 C. C. A. 280, 16 Ann. Cas. 127, 18 L. R. A. (N. S.) 956. And where it is not alleged by petitioner, it will not be assumed by the federal court, that the proper military tribunal will deny to petitioner a full and fair hearing or will deprive him of any rights to which he is entitled. *Ex p. Kerekes*, (E. D. Mich. 1921) 274 Fed. 870.

Vol. IX, p. 1162, sec. 12. [First ed., 1918 Supp., p. 1022.]

Purpose of section.—“We think the plain intent of section 12 and of the regulations of June 27, 1918, is this: That from and after May 18, 1917, it shall be unlawful to sell to a soldier in uniform at any time or place, except if and as permitted by the Secretary of War for medicinal purposes; that from and after May 18, 1917, it shall be unlawful to sell to any one, soldier or civilian, or have in possession, intoxicating liquor at any place being used for military purposes, except if and as permitted for medicinal purposes; and that from and after June 27, 1918, it shall be unlawful to sell or give or deliver alcoholic liquor to any soldier, whether in or out of uniform, and whether anywhere within the United States or within other places under its control, ex-

cept if and as used for permitted medicinal purposes. From this construction, no inconsistency results between different sections and regulations; it gives effect to the plain meaning of the words used, and no substantial reason is suggested why it should not be adopted." *Bailey v. U. S.*, (C. C. A. 6th Cir. 1920) 267 Fed. 559.

Vol. IX, p. 1163, sec. 13. [First ed., 1918 Supp., p. 1022.]

Section as effective on September 7, 1919. — See *U. S. v. Meyers*, (E. D. Mich. 1920) 265 Fed. 329.

Acts or conduct embraced within act, see *Hunter v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 235.

Naval ordinance plant as within purview of statute, see *Hunter v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 235.

Duty and liability of hotel proprietor in general, see *Hunter v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 235.

Necessity of prosecution of offense by indictment, see *Hunter v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 235.

Sufficiency of information.—An information is sufficient where the offense is set forth in substantially the language of the statute, the place specifically alleged as a certain named hotel in a designated city, and the defendant charged with having set up and kept this hotel as a house of ill fame, and as having received and permitted to be received into it both men and women for immoral purposes; that is to say, for the purposes of lewdness, assignation, and prostitution. *Hunter v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 235.

Proof of reputation of hotel held admissible, see *Hunter v. U. S.* (C. C. A. 4th Cir. 1921) 272 Fed. 235; *Gray v. U. S.*, (C. C. A. 3d Cir. 1920) 266 Fed. 355.

Vol. IX, p. 1163, sec. 14. [First ed., 1918 Supp., p. 1023.]

Section 6 of the Penal Code as repealed by this provision, see *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

Vol. IX, p. 1254, art. 2. [First ed., 1918 Supp., p. 977.]

Military prisoners.—Military prisoners confined in a United States military prison under previous court-martial sentences are subject to military law and trial by court-martial for offenses committed during such imprisonment, even if their discharge as soldiers resulted from the previous sentences. *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —.

Marine corps.—Under this section a marine who had been detached for military service and who deserted while so serving may be tried by a naval court-martial after such detachment ceases. *Ex p. Clark*, (E. D. N. Y. 1921) 271 Fed. 533.

Vol. IX, p. 1256, art. 3. [First ed., 1918 Supp., p. 978.]

Review of courts-martial by civil courts.—*Organization of court-martial.*—The denial of relief by habeas corpus to a person imprisoned under sentence of a court-martial will not be disturbed on appeal on suggestions based upon the supposed duty, on the trial before the court-martial, to negative every possible condition the existence of which might have prevented that court from trying the case, including the possibility that the officer under trial might have belonged to a command which did not come within the power to call a court-martial conferred upon the convening officer, particularly where the suggestion made in this regard seems to have been an afterthought, and not to have been called to the attention of the court below. *Givens v. Zerbat*, (1921) 255 U. S. 11, 41 S. Ct. 227, 65 U. S. (L. ed.) —, *affirming* (N. D. Ga. 1920) 262 Fed. 702.

"In time of peace."—Peace in the complete legal sense, officially proclaimed, is what is meant by the phrase "in time of peace" in the provision of the 92d Article of War [9 Fed. Stat. Ann. (2d ed.) 1286] that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace. *Givens v. Zerbat*, (1921) 255 U. S. 11, 41 S. Ct. 227, 65 U. S. (L. ed.) —, *affirming* (N. D. Ga. 1920) 262 Fed. 702.

Designation of place of imprisonment.—Error, if any, in the designation of the place for carrying out the sentence of a court-martial, did not involve the jurisdiction of that court so as to require relief by habeas corpus, but could only lead to retaining the accused for a new designation of place of confinement. *Givens v. Zerbat*, (1921) 255 U. S. 11, 41 S. Ct. 227, 65 U. S. (L. ed.) —, *affirming* (N. D. Ga. 1920) 262 Fed. 702.

Vol. IX, p. 1257, art. 4. [First ed., 1918 Supp., p. 978.]

Retired officers.—Retired Army officers are officers in the military service of the United States within the meaning of the provision in the 4th Article of War, governing the composition of courts-martial, and an order assigning such officers to the court was within the authority conferred upon the Secretary of War by the Act of April 23, 1904, to assign retired officers of the Army, with their consent, to active duty on courts-martial. *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —.

Officers of United States Guards.—Officers of the United States Guards must be deemed competent to be assigned to court-martial duty, since there can be no doubt that the President was fully empowered by the Selective Service Act of May 18, 1917, § 2, to exert the power which he did by special regulation organizing the military force known as the United States Guards, and that such force, under the express terms of section 1 of that act, are a part of the Army of the United States. *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —.

Vol. IX, p. 1258, art. 5. [First ed., 1918 Supp., p. 978.]

Number of officers discretionary.—The exercise of discretion as to fixing the number of officers, with reference to the condition of the service, who shall compose a court-martial, within the maximum and minimum limits fixed by the 5th Article of War, is executive, and not subject to judicial review. *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —.

Vol. IX, p. 1259, art. 8. [First ed., 1918 Supp., p. 978.]

Order convening court.—A camp commander, in exerting the power which he possesses by virtue of a general order of the President, sanctioned by this article, to convene general courts-martial, need not refer to such order. *Givens v. Zerbst*, (1921) 255 U. S. 11, 41 S. Ct. 227, 65 U. S. (L. ed.) —, *affirming* (N. D. Ga. 1920) 262 Fed. 702.

Power granted to camp commander.—The authority of the President, under this article, to empower "the commanding officer of any district or of any force or body of troops" to appoint general courts-martial, was not exceeded by a general order giving the power stated to certain designated camp commanders. *Givens v. Zerbst* (1921) 255 U. S. 11, 41 S. Ct. 227, 65 U. S. (L. ed.) —, *affirming* (N. D. Ga. 1920) 262 Fed. 702.

Judicial notice of President's order.—A general order of the President giving to certain designated camp commanders the power to appoint general courts-martial, being authorized by this article, is a part of the law of the land which the federal courts judicially notice without averment or proof. *Givens v. Zerbst*, (1921) 255 U. S. 11, 41 S. Ct. 227, 65 U. S. (L. ed.) —, *affirming* (N. D. Ga. 1920) 262 Fed. 702.

Vol. IX, p. 1267, art. 37. [First ed., 1918 Supp., p. 984.]

Questions of procedure.—Where the question is one of procedure and not of jurisdiction, a court-martial having obtained jurisdiction is competent to decide it. Thus, the

fact that the order convening the court was signed by a staff officer of the general in command of the department, is immaterial. *McRae v. Henkes*, (C. C. A. 8th Cir. 1921) 273 Fed. 108. The court said: "We regard the insistence, however, as relating purely to a matter of form, and not substance. The order shows on its face that the court was convened and the detail fixed by command of the brigadier general, and the caption shows the department of which he was commanding officer. In both respects we regard the objections as not well taken. We cannot draw the desired inference that, whereas the suggested form would show that the order received both the personal and official attention of the commanding officer, the one used would not."

Vol. IX, p. 1273, art. 50. [First ed., 1918 Supp., p. 986.]

Alteration of sentences by civil courts.—Sentences of courts-martial are not alterable by civil courts. *McRae v. Henkes*, (C. C. A. 8th Cir. 1921) 273 Fed. 108.

Vol. IX, p. 1281, art. 74. [First ed., 1918 Supp., p. 991.]

Delivery of offenders in time of war.—The provision of this article relieving a commanding officer from the duty of delivering an offender to the civil authorities in time of war does not violate a provision of the Bill of Rights of a state guaranteeing a speedy trial to a person accused of crime. *People v. Maniatis*, (1921) 297 Ill. 72, 130 N. E. 323.

Vol. IX, p. 1283, art. 82. [First ed., 1918 Supp., p. 993.]

Application.—In *U. S. v. McDonald*, (E. D. N. Y. 1920) 265 Fed. 754, it was held that R. S. sec. 1343, which was superseded by this article, was general in its terms and applicable to all persons acting as spies, whether citizens of the United States or not.

Vol. IX, p. 1286, art. 92. [First ed., 1918 Supp., p. 994.]

"In time of peace."—Peace in the complete legal sense, officially proclaimed, is what is meant by the phrase "in time of peace" in the provision of this article that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." *Givens v. Zerbst*, (1921) 255 U. S. 11, 41 S. Ct. 227, 65 U. S. (L. ed.) —, *affirming* (N. D. Ga. 1920) 262 Fed. 702. See to the same effect *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —, where the court said: "This

brings us to the final contention, that because, when the trial occurred, it was time of peace, no jurisdiction existed to try for murder, as article 92 provided that '... no person shall be tried by court-martial for murder or rape committed with the geographical limits of the states of the Union and the District of Columbia in time of peace.' That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106. It is therefore difficult to appreciate the reasoning upon which it is insisted that although the government of the United States was officially at war, nevertheless, so far as the regulation and control by it of its Army is concerned, it was at peace. Nor is it any less difficult to understand why reliance to sustain that proposition is placed on *Caldwell v. Parker*, 252 U. S. 376, 64 L. ed. 621, 40 Sup. Ct. Rep. 388, since that case involved no question of the want of jurisdiction of a court-martial over a crime committed by a soldier, but solely whether the jurisdiction which it was conceded such a court possessed was intended to be exclusive of a concurrent power in the state court to punish the same act, as the mere result of a declaration of war, and without reference to any interruption, by a condition of war, of the power of the civil courts to perform their duty; and, moreover, in that case the question here raised was expressly reserved from decision.

"Coming now to consider that question in the light (1) of the rulings in *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213; and *Caldwell v. Parker*, *supra*; (2) of the differences between the articles of 1874 and those of 1916, showing a purpose to rearrange the jurisdiction of courts-martial; (3) of the omission of the qualification, 'except in time of war,' from the clauses of the latter articles conferring jurisdiction as to designated offenses, including those capital (arts. 92 and 93), and its retention in the article dealing with the duty of the military to deliver to the state authorities (art. 74); and (4) of the placing in a separate article (art. 92) of the provision conferring jurisdiction as to murder and rape, and qualifying that jurisdiction by the words 'in time of peace,' not used in the previous articles,—we are of opinion that that qualification signifies peace in the complete sense, officially declared. The fact that the articles of 1916 in other respects make manifest the legislative purpose to give effect to the previous articles as interpreted by the decided cases to which we have referred, at once convincingly suggests that a like reason controlled in adopting the limitation, 'except in time of peace,' contained in article 92. See *McElrath v. United States*, 102 U. S. 426,

438, 26 L. ed. 189, 191, where it was expressly decided that the limitation, 'except in time of peace,' on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress, and had been made the basis for the adjustment of controversies dependent upon the time when peace was established."

Vol. IX, p. 1288, art. 96. [First ed., 1918 Supp., p. 996.]

Effect of prosecution under another article for same offense.—An officer who has been tried and convicted on specifications drawn under the Ninety-fifth Article of War, may not be tried under this Article for the same offenses on specifications framed in identical language. *Ex p. Henkes*, (D. C. Kan. 1919) 267 Fed. 276, wherein it was said: "Petitioner was charged on three specifications drawn under the Ninety-fifth Article of War, was also charged on three specifications in identical language framed under the Ninety-Sixth Article of War, and was adjudged guilty and sentenced on each, all, and every of said specifications to be dismissed from the service and to be confined at hard labor for 25 years. Under article 95, the sentence of dismissal alone could enter against him. Under article 96, both dismissal and confinement are permitted. The Ninety-Sixth Article of War is a re-enactment of the old Sixty-Second Article of War. It is never resorted to, unless the offense charged falls under no other article. It has been termed the 'drag-net Article of War,' and the specifications, under both charges in this case, being identical in language, the proofs in support of the charges being identical, it must be thought, the court, having charged, tried, convicted, and sentenced petitioner under the specific provisions of the Ninety-Fifth Article of War, it was without further power to charge, try, convict, and punish him under the general provisions of the Ninety-Sixth Article of War. This would appear from the language of the Ninety-Sixth article, which reads as follows:

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

"Hence the record so made discloses petitioner to have been twice placed in jeopardy for the same identical offense."

Vol. IX, p. 1296, art. 118. [First ed., 1918 Supp., p. 1001.]

Power of President.—This article supercedes R. S. sec. 1230 and vests power in the President to dismiss an officer in time of war without a trial by a court-martial. *Wallace v. U. S.*, (1920) 55 Ct. Cl. 396.

Vol. IX, p. 1299, sec. 1. [First ed., 1918 Supp., p. 889.]

Effect on other remedies for personal injury.—"By the War Risk Insurance Act (38 Stat. 711), compensation is provided by the government to a soldier for death or injuries sustained by him while a soldier, if he avails himself of the terms of the act. The amount of compensation and the remedy therein prescribed is exclusive of other measures of and for liability and remedies provided for the protection of the civilian population of the general public." *Moon v. Hines*, (Ala. 1921) 87 So. 603, 13 A. L. R. 1020.

Vol. IX, p. 1305, sec. 13. [First ed., 1918 Supp., p. 896.]

Procedure.—The procedure in suits against the United States under this Act is governed by the provisions of the Tucker Act of March 3, 1887, ch. 359, §§ 5, 6, 24 Stat. L. 506 (5 Fed. Stat. Ann. (2d ed.) 1118, 1119). Hence, where in a suit against the United States on an insurance certificate issued by the Bureau of War Risk Insurance, the defendant is not served in accordance with provisions of such Act, the summons will be quashed on motion of the United States attorney. *Cassarello v. U. S.*, (M. D. Pa. 1919) 265 Fed. 326; *Shepherdson v. U. S.*, (E. D. Pa. 1921) 271 Fed. 330.

Vol. IX, p. 1326, sec. 402. [First ed., 1918 Supp., p. 917.]

Change of beneficiary.—This section prescribes no form in which a change of beneficiary shall be expressed, consequently it may take the form of a letter. Thus, it has been held that a soldier desiring to change the beneficiary in his certificate of war risk insurance, who had his superior officer write a letter to the Bureau of War Risk Insurance, which he signed, and in which he expressed the desire that the change be made, had sufficiently complied with the requirements for a change of beneficiary. *Shepherdson v. U. S.*, (E. D. Pa. 1921) 271 Fed. 330, wherein it was said: "The act of Congress gives the right to the insured to change the beneficiary, without further limitation of the right than that it shall be effectuated in accordance with regulations. There were at the time no regulations controlling it, so that the right was an absolute one. If the question now presented

involved the protection of the United States in a payment made in accordance with the records, it would be one of more importance than it now presents as a question wholly between contesting beneficiaries. Having the opinion, which we have expressed, that the insured had the right to make the change, this carries with it the vested right of the beneficiary in the policy as soon as the change was in fact made. The beneficiary having this right, we are of the further opinion that it is not lost to her because the official records of the transaction have been mislaid or destroyed. The written paper, if in existence, or the official record of it, would be merely the evidence that the change had been made. This evidence we do not have, but we do have the legal equivalent of it."

Vol. IX, p. 1340, sec. 124. [First ed., 1918 Supp., p. 966.]

Jurisdiction of state court over action by employee in nitrate plant.—Congress having taken jurisdiction of Muscle Shoals, and having adopted a Workmen's Compensation Act (6 Fed. St. Ann (2d ed.) 282) which has been held to apply to employees of companies operating nitrate plants at Muscle Shoals, a state court has no jurisdiction of an action for personal injuries by such an employee. *Webb v. J. G. White Engineering Corp.*, (1920) 204 Ala. 429, 85 So. 729.

Vol. IX, p. 1343, sec. 120. [First ed., 1918 Supp., p. 964.]

Application of section to contracts.—This section applies only to requisitions and not to contracts between private individuals and the government for the furnishing of supplies. *American Smelting, etc., Co. v. U. S.*, (1920) 55 Ct. Cl. 466.

Government contracts as defense to non-performance of contracts with private individual.—See *Roxford Knitting Co. v. Moore*, (C. C. A. 2d Cir. 1920) 265 Fed. 177, *affirming* (N. D. N. Y. 1918) 250 Fed. 278, 288.

Form of order.—See *Roxford Knitting Co. v. Moore*, (C. C. A. 2d Cir. 1920) 265 Fed. 177, *affirming* (N. D. N. Y. 1918) 250 Fed. 278, 288.

1918 Supp., p. 895, sec. 4. [First ed., 1918 Supp., p. 1015.]

Scope and effect of section.—This section "was merely declaratory of the law. It neither added to, nor detracted from, the power inherent in the courts under the naturalization laws to hold a plea of alienage in bar to the performance of military service operated likewise as a bar to admission to citizenship. The bona fides of the intent and desire of an applicant for American citizenship constitutes one of the salient and material issues involved in a naturalization

proceeding. The attitude, conduct, and actions of a candidate, as disclosed in his questionnaire, are matters that must be taken judicial notice of, in a naturalization proceeding; and where in such questionnaire the petitioner is shown to have anywhere claimed exemption from military service on the ground of alienage, he is not eligible or qualified to be, nor should be, admitted to American citizenship. The courts seem to be in more or less uniformity as to this." In re Tomarchio, (E. D. Mo. 1920) 269 Fed. 400.

1919 Supp., p. 389, sec. 15.

Rights of beneficiary in insurance installments.—Under this section a beneficiary has no vested right in installments of insurance that do not accrue until after his death and hence cannot dispose of them by will. Instead such installments must under this section be distributed among the next of kin of the insured who are within the permitted class of beneficiaries. *Cassarello v. U. S.*, (N. D. Pa. 1919) 271 Fed. 486.

1919 Supp., p. 390, sec. 19.

Installments accruing prior to beneficiary's death.—Where installments of insurance have accrued before the death of the beneficiary they become vested in him and hence may be disposed of by will. *Cassarello v. U. S.*, (M. D. Pa. 1919) 271 Fed. 486.

1920 Supp., p. 338, art. 39.

Effect of expiration of enlistment before commencement of proceedings.—The fact the term of enlistment expires before proceedings against an enlisted man for desertion are begun does not affect the jurisdiction of the naval authorities over him. *Ex p. Clark*, (E. D. N. Y. 1921) 271 Fed. 533, wherein it was said: "It is apparent that as relator had deserted and could not be found, during the period of his desertion there was such a 'manifest impediment' in the way of bringing him to justice as would justify excluding the period of his desertion from any computation of the time within which a prosecution must be begun. I have carefully considered the decision of the Judge Advocate General in the Matter of George M. Runyon, dated December 29, 1920, and if the effect thereof is that a man may desert, remain in hiding until the time of his enlistment expires, and then escape all responsibility, I cannot agree with such a conclusion. The effect thereof upon the morale of army and navy alike would be disastrous. While there is no obligation to serve after the period of enlistment, it does not follow that conduct during that period may go unpunished for the reason assigned. If that were the law, it might be well urged that a court-martial has no power to imprison after the expiration of the enlistment."

WATERS

Vol. IX, p. 1349, sec. 2339. [First ed., vol. VII, p. 1090.]

- I. Construction in general.
- II. Appropriation of waters.
- III. Local laws.
- IV. Easements.
- V. Riparian rights.

I. CONSTRUCTION IN GENERAL (p. 1349)

Reason for act.—The act is said to have been the outgrowth of a recognition by Congress of "the necessity of permitting persons in these arid regions to acquire an interest in water sources on public lands distinct from the lands themselves." *Simons v. Inyo Cerro Gordo Min. Co.*, (Cal. App. 1920) 192 Pac. 144.

II. APPROPRIATION OF WATERS (p. 1351)

When right of appropriation accrues.—As against the right of the government to withdraw lands, no rights vest until completion of the work. The rule that the right to an easement for a reservoir ditch or canal relates back to the notice of appropriation if the work is prosecuted with diligence, does not apply as against the government. Verde

Water, etc., Co. v. Salt River Valley Water Users' Assoc., (Ariz. 1921) 197 Pac. 227.

Discovery insufficient.—Mere discovery of the springs could not give a right to divert or use any of the water. Nor could mere development of the water, unaccompanied by any actual diversion for beneficial use, give any right. It is only by some species of "appropriation"—i. e., reducing the water to actual possession, made as provided by the act of 1866 (Rev. Stat. § 2339)—that one can acquire title to a right in or to waters situated or flowing wholly on public lands. *Simons v. Inyo Cerro Gordo Min. Co.*, (Cal. App. 1920) 192 Pac. 144, the court adding: "It will be noticed that the language of the act of 1866 is:

"Whenever by priority of possession, rights to the use of water * * * have vested," etc.

"The right is the right to the 'use,' and it can be acquired only by 'priority of possession'; i. e., by actual diversion with a bona fide intent to use the water for a beneficial purpose."

III. LOCAL LAWS (p. 1356)

Rights subject to state laws.—Defendant's rights under his patent are subject to water

rights which, under the California law of possessory rights, had vested prior to defendant's entry, for the federal statutes provide for the protection of those rights to waters upon the public domain, acquired by diversion, which are recognized and acknowledged by the local customs, laws, and decisions of the courts of the localities where such rights are claimed. *Haight v. Costanich*, (Cal. 192) 194 Pac. 26.

IV. EASEMENTS (p. 1358)

Pipe lines.—One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded by the act of 1866 to the constructors of ditches and canals; that is, a right of way for such pipe line is given by the government. *Simons v. Inyo Cerro Gordo Min. Co.*, (Cal. App. 1920) 192 Pac. 144.

V. RIPARIAN RIGHTS (p. 1359)

Patent relates back.—“The granting of a patent to a settler on public lands is held to relate back to the filing of the entry of the land in the United States land office and to confer the rights of a riparian owner upon the grantee of the patent from the date of his entry.” *Haight v. Costanich*, (Cal. 1920) 194 Pac. 26.

Vol. IX, p. 1362, sec. 1. [First ed., vol. VII, p. 1097.]

Rights of United States.—Where the proposed disposition of the water is incidental to the construction and maintenance of a reclamation project, a proposed canal is within the scope of the authority conferred by law, and for it the government may occupy rights of way under the act of August 30, 1890, or expropriate them by suitable condemnation proceedings. *Griffiths v. Cole*, (D. C. Idaho 1919) 264 Fed. 369.

Vol. IX, p. 1363, sec. 1. [First ed., vol. VII, p. 1098.]

Right in respect to Interstate Canal in Wyoming and Nebraska.—In a case involving the rights of the United States in respect to the appropriation for irrigation purposes of waters flowing in the Interstate Canal through Wyoming and Nebraska it was said on appeal from a decree in favor of the United States: “Counsel further argue that appellee has not a valid legal appropriation for land in Nebraska under the Interstate Canal, because the canal has its headgate in Wyoming and carries water from that state to irrigate lands in Nebraska. The theory of counsel is that, as neither Wyoming nor Nebraska has jurisdiction of the entire works of the Pathfinder project, both states exceeded their jurisdiction when they issued permits to the appellee for the reclamation project. *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. 231, and *Turley v. Furman*, 16 N. M. 253, 114 Pac. 278, are cited

in support of this contention. It is doubtful as to whether these cases support the contention; but, conceding that they do, they have no application as to the Interstate Canal between Wyoming and Nebraska, especially in view of the fact that this question has been passed upon directly by both the Supreme Court of Wyoming and the United States Circuit Court of Appeals for the Eighth Circuit in a Nebraska case. *Wille v. Decker*, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939; *Perkins County, Neb. v. Graff*, 114 Fed. 441, 52 C. C. A. 243. The rights of appellee in connection with the reclamation project must be considered in view of the Reclamation Act (32 Stat. 388), the Warren Act (36 Stat. 925), and the legislation of Wyoming and Nebraska; and, when thus considered, we see no objection to the right of the United States to appropriate and use for irrigation purposes, in either Wyoming or Nebraska, the waters diverted by it from the North Platte river in Wyoming and flowing in the Interstate Canal through Wyoming and Nebraska.” *Rams-horn Ditch Co. v. U. S.*, (C. C. A. 8th Cir. 1920) 269 Fed. 80, *affirming U. S. v. Rams-horn Ditch Co.*, (D. C. Neb. 1919) 254 Fed. 842.

Vol. IX, p. 1366, sec. 3. [First ed., vol. VII, p. 1099.]

Effect of withdrawal.—Land withdrawn under this section cannot be selected as lieu land by the state of California under the Act of May 2, 1914, 38 St., p. 372, granting the right to select “vacant” and “unreserved” land in lieu of certain school lands. *Donley v. Van Horn*, (Cal. App. 1920) 193 Pac. 514.

Vol. IX, p. 1367, sec. 4. [First ed., vol. VII, p. 1099.]

Authority of secretary.—It is said that by the Reclamation Act Congress has chosen to confer authority upon the Secretary of the Interior only to undertake projects the primary or predominant purpose of which is to reclaim public land. *Griffiths v. Cole*, (D. C. Idaho 1919) 264 Fed. 369.

Charges.—*In general.*—As to what are proper charges it has been said: “It is difficult to draw the line of demarcation between chargeable and nonchargeable expenses. It could hardly have been intended that the place where the service is rendered, or the obligation incurred, is a controlling consideration. If the accounts of the project are kept in Washington, or if supplies are purchased by an agent in New York, or if specifications are gotten up in Denver, the contribution to the project may be quite as direct and beneficial as it would be, were such services rendered in the immediate vicinity. Neither could it have been intended to decide that to be chargeable the service must be rendered by one who is employed exclusively upon a single project. Upon the other

hand, general expense of a strictly administrative character, such as the salaries of the administrative officers and of those who assist them in performing their administrative duties, and all expenses strictly incidental to such performance, would seem to be excluded." *Payette-Boise Water Users' Ass'n v. Bond*, (D. C. Idaho 1920) 269 Fed. 159.

Contested claims.—As to charging claims which are contested by the government it has been said: "Presumably it is the opinion of the reclamation officials that the claim is invalid, or they would have recognized it and caused it to be paid. If it is invalid, the settlers ought not to be charged with it. If it is valid, the contractors ought to be paid. If its status is uncertain, the settlers ought not to be charged with the full amount thereof. It is a matter of common knowledge that such claims are usually susceptible to compromise and adjustment, and if the settlers are to be charged with a specific amount, the best settlement possible should have been made. Why not give them an opportunity to adjust it, if they are to be held responsible for it? The government should be fully protected, but not to the unnecessary hurt of the settler. . . . If the reclamation officials and the plaintiff cannot agree as to the proper amount to be charged on account of the contingent liability, or if a settlement agreeable to all parties cannot be made with the claimants, the full claim should be permitted to stand as a charge only upon condition and with the understanding that, in case the government is successful in defeating it, appropriate credit be given the settlers." *Payette-Boise Water Users' Ass'n v. Bond*, (D. C. Idaho 1920) 269 Fed. 159.

Computation of acreage in estimating area to be charged, see *Payette-Boise Water Users' Ass'n v. Bond*, (D. C. Idaho 1920) 269 Fed. 159.

Review of action of Secretary of Interior by the courts, see *Payette-Boise Water Users' Ass'n v. Bond*, (D. C. Idaho 1920) 269 Fed. 159.

Vol. IX, p. 1369, sec. 7. [First ed., vol. VII, p. 1100.]

Destruction of business, etc., as element of compensation.—The United States does not impliedly promise to compensate persons engaged in stock raising for the destruction of their business, or the loss sustained through the enforced sale of their cattle, the result of the inundation of their lands by the construction of a dam which arrests flood waters. *Bothwell v. U. S.*, (1920) 254 U. S. 231, 41 S. Ct. 74, 45 U. S. (L. ed.) —, *affirming* (1918) 54 Ct. Cl. 203.

Interest.—An award in condemnation proceedings which were instituted by the United States to appropriate for reclamation purposes lands already actually taken properly included interest at 6 per cent from the

time of the actual taking to the time of the deposit of the awards in court in payment of the same, especially where such allowance of interest is in harmony with the policy of the state wherein the lands are situated. *U. S. v. Rogers*, (1921) 255 U. S. 163, 41 S. Ct. 281, 65 U. S. (L. ed.) — (*affirming* (C. C. A. 8th Cir. 1919) 257 Fed. 397, 168 C. C. A. 437), wherein the court said: "In fixing the compensation the district court, and the circuit court of appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 per cent. This was in conformity with a former ruling of the circuit court of appeals applying the statute of Minnesota to lands appropriated in that state. *United States v. Sargent*, 89 C. C. A. 81, 162 Fed. 81.

"The government urges that the Conformity Act of August 1, 1888, does not require the United States government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the state where the lands are situated does not militate against, but makes for the justice and propriety of, its adoption. *United States v. Sargent*, *supra*." See to the same effect, *U. S. v. Highsmith*, (1921) 255 Fed. 170, 41 S. Ct. 282, 65 U. S. (L. ed.) —.

Vol. IX, p. 1374, sec. 5. [First ed., 1909 Supp., p. 543.]

Application of section.—This section applies to homestead entries. *Edwards v. Bodkin*, (S. D. Cal. 1919) 267 Fed. 1004. The court said: "Counsel for the defendant states that section 5 of the act of June 27, 1906, does not apply to homestead entries, that the decision of the Circuit Court of Appeals, wherein the court decided that it was not necessary for the plaintiff to make improvements upon the land, was erroneous. It is true that that section does not refer to homestead entries, but section 3 of the act of June 17, 1902, does refer to homestead entries made after withdrawal of the land, and expressly allows a homestead entry after withdrawal. It is provided by section 3:

"That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act," etc.

"Section 3 of the act of June 17, 1902, and section 5 of the act of June 27, 1906, construed together, work out the proposition stated by the court."

Vol. IX, p. 1387, sec. 5. [First ed.,
1916 Supp., p. 312.]
Contract regarding operation and main-

tenance charges construed in *New York Canal Co. v. Bond*, (C. C. A. 9th Cir. 1920) 265 Fed. 228.

WEST INDIAN ISLANDS

1918 Supp., p. 927, sec. 2.

Applicability of constitutional guaranties.—"The only laws of the United States applicable to the Virgin Islands are the Act of Congress of March 3, 1917, and the fundamental law of the Constitution guaranteeing certain rights to all within its protection. These rights have, by repeated decisions of the Supreme Court, been divided into two classes—artificial or remedial rights, which are peculiar to our own system of jurisprudence; and natural or personal rights, enforced in the Constitution by prohibition against interference with them. Rights of both kinds are embraced within the Fifth and Sixth Amendments to the Constitution. Remedial rights there guaranteed are, for instance, the right of presentment by grand jury and of trial by jury. It has been decided that rights of this character are not among the fundamental rights which Congress in legislating for a territory not incorporated into the United States must secure to its inhabitants. *Talton v. Mayes*, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196; *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016. In harmony with these decisions it has been further held that until Congress shall extend rights of this character to the inhabitants of newly acquired territory, the judicial system prevailing in such territory—not the system contemplated by the Constitution—is applicable and controlling. But in the *Insular Cases*—*De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074; *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; as well as in *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016, and *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697—where the Supreme Court reviewed nearly the whole range of sovereignty of the United States over its possessions, defining what laws, statutory and constitutional, are not applicable to unincorporated territories until Congress shall extend them, it is made very certain that there are constitutional rights of a natural or personal nature of which Congress can not, in legislating for such outlying territories, deprive their inhabitants. In these cases the Supreme Court clearly expressed the opinion, not on the point of the decisions, to be sure, but as a logical corollary, that even if the people of such territories—not being possessed of the

political rights of citizens—are regarded as aliens, they are entitled in the spirit of the Constitution to be protected in life, liberty and property and not to be deprived thereof without due process of law.

"It was, we think, these natural or personal rights, vouchsafed by the Constitution to everyone within its operation, that Congress had in mind when by the Act of March 3, 1917, it provided for retention in the Virgin Islands of local laws and local procedure 'in so far as compatible with the changed sovereignty.' The Congress evidently intended that a man in the Virgin Islands might be, and, indeed, should be tried for his life under local laws of Danish origin, yet only when those laws are not incompatible with principles brought to the Islands by the change of sovereignty, the cardinal one being that of due process of law. . . . But, while it was declared by The Organic Act that proceedings in the local courts of the Virgin Islands shall be as provided by local Danish laws, Congress wrought a change in those laws by also providing that they remain in force only so far as they are compatible with the changed sovereignty. What the change in sovereignty brought to the Islands was, we think, the right, guaranteed by the new sovereign, of 'an accused to be confronted with the witnesses against him' and the right not to be 'deprived of life, liberty, or property, without due process of law.' The essential element of the latter is the right to be heard.

"These are principles which Congress, by the Organic Act, engrafted upon the Danish laws of the Virgin Islands. Without these principles the local laws would not be compatible with the changed sovereignty." *Soto v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 628.

Mandamus for reinstatement of district judge.—In *U. S. v. Malmin*, (C. C. A. 3d Cir. 1921) 272 Fed. 785, it was held that the Circuit Court of Appeals has power to issue mandamus directing a district judge whose appointment has been unlawfully revoked by the Governor of the Islands to resume the duties of his office.

Scope of review.—An appeal to the Circuit Court of Appeals under this section brings the case up for review on both the facts and the law after the manner of appeals to the courts of demands. *Soto v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 628.

Appellate jurisdiction and procedure.—In *Clen v. Jorgensen*, (C. C. A. 3d Cir. 1920) 265 Fed. 120, on an appeal from the District

Court of the Virgin Islands to the Circuit Court of Appeals, the jurisdiction of the latter court to review the judgment on appeal was challenged on the ground that the action below was an action at law and that the jurisdiction of the appellate court to review such an action was by writ of error — and then only as to errors of law — under the distinction between actions in equity and at law and the corresponding distinction between appeals and writs of error. Answering this contention, the court said: "In conferring jurisdiction Congress did not define the process to be employed or the procedure to be followed, otherwise than by stating that 'in all cases arising in the said West Indian Islands and now reviewable by the courts of Denmark, writs of error and appeals shall be to the Circuit Court of Appeals for the Third Circuit.'"

"In using this expression Congress was chiefly concerned in designating the court to which the process of review should be addressed. It rather assumed that the appellate procedure would be by writs of error

and appeals; it did not, however, expressly prescribe that procedure as it did in the act creating Circuit Courts of Appeals. Act of 1891, c. 517, § 6. . . . If, in granting the right of review to litigants in these islands and in conferring appellate jurisdiction upon this court, Congress used words which, having a technical meaning in jurisdictions of English origin, had no meaning at all in Danish jurisprudence, we cannot hold that Congress intended thereby to impose upon their jurisprudence a legal distinction between proceedings in equity and at law to it unknown, and to change their proceeding of review from that which existed to one grounded on that distinction. In other words, we cannot hold that Congress prescribed an appellate procedure based on a distinction which did not exist. Therefore, until Congress shall provide otherwise, we shall regard the appellate jurisdiction conferred by the recited act to be such as to enable this court to review on appeal all matters of fact and of law involved in the judgments brought here for review."

WHITE SLAVE TRAFFIC

Vol. IX, p. 1408, sec. 1. [First ed., 1912 Supp., p. 419.]

"Interstate commerce."—The definition of "interstate commerce" in this section necessarily excludes, by implication, transportation from one point in a state to another point in the same state; the words "from" and "to" as used in the act manifestly referring to two different states or territories as the respective points of origin and final destination of the transportation, and not to a state through which the woman is carried as a mere incident of the through transportation. *U. S. v. Wilson*, (E. D. Tenn. 1920) 266 Fed. 712.

Vol. IX, p. 1409, sec. 2. [First ed., 1912 Supp., p. 419.]

III. Elements of offense.

1. Debauchery.
3. Method of transportation.

IV. Indictment.

1. In general.
- V. Evidence.
 1. Admissibility.
 2. Sufficiency.

III. ELEMENTS OF OFFENSE

1. Debauchery (p. 1410)

Purpose of transportation.—"The interstate transportation denounced by the act must have for its object, or be a means of effecting, or at least of facilitating, the sexual intercourse of the parties. But the mere

fact that a journey from one state to another is followed by such intercourse, when the journey was not for that purpose, but wholly for other reasons, to which intercourse was not related, cannot be regarded as a violation of the statute." *Fisher v. U. S.*, (C. C. A. 4th Cir. 1920) 266 Fed. 667.

3. Method of Transportation (p. 1410)

Transportation by common carrier.—It is not essential in order to constitute the offense that the transportation be by common carrier. *Gowling v. U. S.*, (C. C. A. 9th Cir. 1920) 269 Fed. 215.

IV. INDICTMENT

1. In General (p. 1411)

Sufficiency—*In general*.—An indictment which charges that the defendant transported and aided and assisted in transporting the woman in interstate commerce in and by means of a certain automobile running over the public highways of the United States, the automobile then and there being in such transportation, and operated and controlled by the defendant, is sufficient. *Gowling v. U. S.*, (C. C. A. 9th Cir. 1920) 269 Fed. 215.

An indictment charging that on a certain day the accused transported, caused to be transported and assisted and aided in transporting in interstate commerce for the purpose of prostitution, a certain named woman merely paraphrases the statute and is sufficient. *Freed v. U. S.*, (App. Cas. D. C. 1920) 266 Fed. 1012.

Intent.—An indictment which alleges that the transportation was "for the purposes of

having unlawful sexual intercourse," sufficiently alleges the necessary criminal intent. *Carey v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 515. The court said: "The argument is that these counts are based upon sections 2 and 3 of the act (36 Stat. 825), which require that the transportation shall be 'with the intent and purpose on the part of such person' that the woman shall engage in immoral practice, and that these counts of the indictment merely alleged that the transportation was 'for the purpose of having unlawful sexual intercourse.' While these sections use the words 'intent and purpose,' we are unable to draw any distinction between their use therein. If the transportation was for the purpose of unlawful intercourse, it must have been with the intent to have such intercourse. The indictment is sufficient."

Transportation in interstate commerce.—Where an indictment merely charges transportation of the woman from one point to another in Tennessee, through Alabama, and does not charge that she was transported from Alabama as the point of origin to Tennessee, it necessarily follows that it does not state a case of transportation in interstate commerce, as defined in the White Slave Traffic Act. *U. S. v. Wilson*, (E. D. Tenn. 1920) 266 Fed. 712.

Joinder of offenses.—Offenses against this act growing out of the same transaction may be so connected as to permit of their joinder in one indictment in separate counts under R. S. sec. 1024 (2 Fed. Stat. Ann. (2d ed.) p. 676). *Freed v. U. S.*, (App. Cas. D. C. 1920) 266 Fed. 1012.

V. EVIDENCE

1. Admissibility (p. 1412)

Testimony of accomplices.—"While the Supreme Court recognizes that there is no absolute rule of law preventing convictions upon the testimony of an accomplice, the jury should be instructed and cautioned as to the character of such testimony and the danger of convicting without supporting evidence." *Freed v. U. S.*, (App. Cas. D. C. 1920) 266 Fed. 1012.

Paternity of child born by woman transported.—It has been held that it is competent for the prosecution to prove that the defendant is the father of a child by the woman whom he is accused of having transported in violation of this Act. *Gowling v. U. S.*, (C. C. A. 9th Cir. 1920) 269 Fed. 215.

Determination of prejudice from admitted evidence.—Whether prejudice results from the erroneous admission of evidence at a trial is a question of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded. Thus, where the defendant in a prosecution under this Act, urges that the admission of evidence that he had borrowed a sum of money from the woman in the case and had not repaid it, was prejudicial, but it appears that the evidence of guilt, aside from that challenged was overwhelming and undisputed, a judgment of conviction will be affirmed. *Williams v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 625.

For evidence held admissible to show a violation of this Act, see *Carey v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 515.

2. Sufficiency (p. 1412)

For evidence held to be sufficient to show a violation of this section, see *Elrod v. U. S.*, (C. C. A. 6th Cir. 1920) 266 Fed. 55; *Carey v. U. S.*, (C. C. A. 8th Cir. 1920) 265 Fed. 515; *Francis v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 513.

For evidence held to be insufficient to show a violation of this Act, see *Fisher v. U. S.*, (C. C. A. 4th Cir. 1920) 266 Fed. 667; *England v. U. S.*, (C. C. A. 4th Cir. 1921) 272 Fed. 102. In the latter case it was held, there being no evidence of persuasion or inducement on the part of the defendant, that it was error to instruct the jury that "the mere act of defendant in traveling with the girl from West Virginia to Akron, and there having immoral relations with her, although she went entirely of her own accord and without the slightest persuasion on his part, or even against his advice, constituted a violation of the statute, and rendered him liable to its penalties."

Vol. IX, p. 1416, sec. 4. [First ed., 1912 Supp., p. 420.]

Objections on appeal.—An objection on appeal by one convicted of a violation of this section that the evidence did not justify a conviction cannot be availed of where there was no request by the defendant on the trial for any instructions to the jury and no exception made to the charge given. *Charles v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 203.

WITNESSES

Vol. IX, p. 1421, sec. 858. [First ed., 1909 Supp., p. 708.]

III. CRIMINAL CASES (p. 1422)

To the same effect as the original annotations, see *Jin Fuey Moy v. U. S.*, (1920) 254 U. S. 189, 41 S. Ct. 98, 65 U. S. (L. Ed.) — (affirming (W. D. Pa. 1918) 253 Fed. 213) wherein it was further held that the rule that excludes the wife of an accused from testifying in his behalf in the federal courts applies although her evidence is offered simply to contradict the testimony of particular witnesses for the government, who testified to certain matters as having happened in her presence.

Vol. IX, p. 1428, sec. 848. [First ed., vol. VII, p. 1124.]

III. Necessity that witnesses be sworn.

IV. Mileage.

III. NECESSITY THAT WITNESS BE SWORN (p. 1430)

Taxing as costs the fees of witnesses who do not testify.—There is no abuse of discretion in taxing as costs the mileage and fees of witnesses who did not testify where they were subpoenaed in good faith their testimony being deemed material to the issues involved. *Kirby v. U. S.*, (C. O. A. 9th Cir. 1921) 273 Fed. 391.

IV. MILEAGE (p. 1430)

Extent of allowance.—In actions at law an allowance for travel from the actual place of residence of the witness may be allowed, though in excess of a hundred miles. *Stokely v. Mather*, (D. C. Mass. 1921) 270 Fed. 592.

In *Kirby v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 391, the court said: "Error is assigned to the ruling of the court below in allowing as costs the mileage of witnesses who attended the trial from without the state, and from points more than 100 miles from where the court was held. The question of practice raised by the assignment is one upon which the courts have differed. In the First circuit it is held that a witness is entitled to the whole mileage without limit to the 100 miles, whether or not he resides within the jurisdiction. *United States v. Sanborn* (C. C.) 28 Fed. 302; *The City of Augusta*, 80 Fed. 297, 25 C. C. A. 430; *The Governor Ames*, 187 Fed. 40, 109 C. C. A. 94; *Eastern S. S. Corp. v. Great Lakes Dredge & D. Co.*, 256 Fed. 497, 168 C. C. A. 3. The rule is to the contrary in the Second circuit. *Buffalo Ins. Co. v. Providence &*

S. S. Co. (C. C.) 29 Fed. 237; *The Syracuse* (C. C.) 36 Fed. 830. Also in the Third circuit. *The Progresso* (D. C.) 48 Fed. 239. And in the Fourth circuit. *Sloss Iron & Steel Co. v. South Carolina & G. R. Co.* (C. C.) 75 Fed. 106. Also in the Sixth circuit. *The Vernon* (D. C.) 36 Fed. 113; *Burrow v. Kansas City, etc., R. Co.* (C. C.) 54 Fed. 278. Also in the Seventh circuit. *Eastman v. Sherry* (C. C.) 37 Fed. 844. Also in the Eighth circuit. *Pinson v. Railroad Co.* (C. C.) 54 Fed. 464; *Griggsby Const. Co. v. Louisiana & N. W. R. Co.* (C. C.) 123 Fed. 751; *United States v. Green* (D. C.) 196 Fed. 255. In the Ninth circuit, in *Hunter v. Russell* (C. C.) 59 Fed. 964, Judge Knowles followed the rule of the First circuit, but in *Hanchett v. Humphrey* (C. C.) 93 Fed. 895, Judge Hawley ruled otherwise, and held that mileage is taxable for a witness from any point within the district and for a distance of 100 miles, if the witness came from a point at a greater distance, and without the district. In *United States v. Southern Pac. Co.* (C. C.) 172 Fed. 909, Judge Bean followed the ruling in *Hanchett v. Humphrey*. In *United States v. Southern Pac. Co.* (D. C.) 230 Fed. 270, Judge Trippet held likewise. In neither of the last two cases was mention made of the decision of this court in *Jesse D. Carr Land & Live Stock Co. v. United States*, 118 Fed. 821, 55 C. C. A. 433, in which Judge De Haven, speaking for the court said:

"The appellant's motion to strike from the bill of costs the amount claimed by the appellee for mileage and fees of certain witnesses, who came from without the state and more than 100 miles from the place of trial, was properly denied"—citing *United States v. Sanborn* (C. C.) 28 Fed. 299.

"Upon that decision the plaintiff in the present suit relies. We are of the opinion that the remarks of the court in that case should not be held decisive of the question here involved. The ruling was made, not on a motion to retax the costs, but on a motion to strike out the costs taxed as mileage and for expenses of witnesses. It does not appear that the question whether or not the witnesses were entitled to mileage for more than 100 miles was presented or discussed. Judge Hawley participated in the decision, notwithstanding his prior ruling in *Hanchett v. Humphrey*. We think it should not stand in the way of adopting the rule which is sustained by the weight of authority, as well as by the weight of reason, that mileage is taxable in the federal court only for the distance that could be reached by a subpoena, and we so hold."

SUPPLEMENTAL NOTES
ON THE
CONSTITUTION OF THE UNITED STATES

[817]

SUPPLEMENTAL NOTES

ON THE

CONSTITUTION OF THE UNITED STATES

Vol. X, p. 295, Preamble.

IX. EXPRESS AND IMPLIED POWERS

1. *In General* (p. 308)

"It is elementary that our federal government is one of enumerated, specially defined powers, and powers essential to the execution of those specifically granted, and that our state governments are organized on the exact converse of that theory. The state has all the powers of an absolute, unrestrained sovereign, except so far as the state surrendered certain sovereign powers with which to constitute and create the federal government." *American Coal Min. Co. v. Special Coal, etc., Commission*, (D. C. Ind. 1920) 268 Fed. 563.

Vol. X, p. 352, art. 1, sec. 4.

II. EXERCISE OF POWER BY CONGRESS

1. *In General* (p. 354)

The only source of power which Congress prior to the adoption of the 17th Amendment [see 11 Fed. Stat. Ann. (2d ed.) 1112] possessed over elections for Senators and Representatives was this section which empowers Congress to regulate the manner of holding such elections. *Newberry v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 469, 65 U. S. (L. ed.) —.

Primary elections or conventions.—Under this constitutional grant of power to regulate the "manner of holding elections" of Senators and Representatives, Congress can not fix, as it attempted in the Act of June 25, 1910, § 8, as amended by the Act of August 19, 1911 (see 3 Fed. Stat. Ann. (2d ed.) 120) the maximum sum which a candidate may spend, or advise or cause to be contributed and spent by others, to procure his nomination at a primary election or convention. *Newberry v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 469, 65 U. S. (L. ed.) —.

Vol. X, p. 358, art. 1, sec. 5.

II. EXCLUSIVENESS OF JURISDICTION (p. 358)

Validity of state statute permitting absentee voting.—In *In re Opinion of Justices*, (N. H. 1921) 113 Atl. 293, the court expressed doubt, in view of the provisions of this section, as to the validity of a state statute permitting absentee voting for members of Congress.

Vol. X, p. 389, art. 1, sec. 8.

I. "To lay and collect taxes, duties, imposts and excises."

1. General power to lay taxes.

2. District of Columbia and Territories.

IV. "Shall be uniform throughout the United States."

5. Geographical uniformity.

I. "TO LAY AND COLLECT TAXES, DUTIES, IMPOSTS AND EXCISES"

1. *General Power to Lay Taxes* (p. 390)

"The power of Congress to tax, as given in the Constitution, has only one exception and two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." *Kelly v. Lewellyn*, (W. D. Pa. 1921) 274 Fed. 108.

Not a limitation of power.—"Where the right of taxation exists, if its exercise is within the lawful power of Congress, it is absolutely unlimited in its nature, carrying with it the power to embarrass and even destroy. Courts cannot inquire into the wisdom or justice of such exercise of constitutional power. Courts can put no limitations upon such exercise of power. The right to tax, being a constitutional grant, is limited by that instrument alone, and it is within the authority of Congress to select the objects upon which an excise tax shall be laid." *Kelly v. Lewellyn*, (W. D. Pa. 1921) 274 Fed. 108, wherein it was further said: "The power conferred by the Constitution to levy taxes uniform throughout the United States must necessarily be exercised at the discretion of Congress."

2. *District of Columbia and Territories* (p. 391)

Philippine Islands.—As to the power of Congress to extend the provisions of the revenue law to the Philippine Islands it is said: "The power of Congress, in the imposition of taxes and providing for the collection thereof in the possessions of the United States, is not restricted by constitutional provision (section 8, article 1), which may limit its general power of taxation as to uniformity and apportionment when legis-

lating for the mainland or United States proper, for it acts in the premises under the authority of clause 2, section 3, article 4, of the Constitution, which clothes Congress with power to make all needful rules and regulations respecting the territory or other property belonging to the United States." *Lawrence v. Wardell*, (C. C. A. 9th Cir. 1921) 273 Fed. 405.

IV. "SHALL BE UNIFORM THROUGHOUT THE UNITED STATES."

5. *Geographical Uniformity* (p. 405)

The only rule of uniformity prescribed by the Federal Constitution with respect to duties, imposts, and excises laid by Congress is the territorial uniformity which this section requires. *La Belle Iron Works v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 523, 65 U. S. (L. ed.).

Vol. X, p. 410, art. 1, sec. 8.

II. What constitutes interstate and foreign commerce.

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 - e. Means and appliances necessarily employed.

III. Exclusiveness of power.

2. When states may exercise power.
 - b. Police power of the states.
 - (2) In the absence of legislation by Congress.
 - (5) Indirect or incidental interference with commerce.

IX. Power of states.

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 - a. In general.
 - b. Regulations of intrastate commerce indirectly affecting interstate commerce.
2. State and municipal legislation affecting commerce.
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 - (1) In general.
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 - (b) Tax on instrumentalities of commerce as property.
 - aa. In general.
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 - (aa) In general.
- (8) Taxation of corporation franchises.
 - (a) Domestic corporations.
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- (13) Taxation of goods from other states or abroad as property.
 - (b) Taxation of goods in original packages as property.
- (21) Tax on drummers, canvassers and sample peddlers.
 - (a) In general.

II. WHAT CONSTITUTES INTERSTATE AND FOREIGN COMMERCE

1. *Definition and Nature*

- e. Means and Appliances Necessarily Employed (p. 434)

Condemnation of property outside state by municipality for waterworks.—The condemnation by a municipality of a water works part of the property of which is outside the state does not constitute an interference with interstate commerce. *Superior Water, etc., Co. v. Superior*, (Wis. 1921) 183 N. W. 254.

III. EXCLUSIVENESS OF POWER

2. *When States May Exercise Power*

- b. Police Power of the States
 - (2) In the Absence of Legislation by Congress (p. 452)

"Under this provision of the Constitution, Congress has power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' It will thus be seen that the states have surrendered their power to regulate commerce to the federal government, but until the latter takes possession of the entire field, the states, as to that unoccupied, may exercise limited authority in the aid of commerce. However, the states' power in this respect will be upheld only so long as the exercise thereof does not affect the conduct of a company engaged in interstate commerce in the performance of its duties in other states." *Western Union Tel. Co. v. Sims*, (Ind. 1920) 131 N. E. 520.

(5) Indirect or Incidental Interference
With Commerce (p. 455)

Requiring detour of interstate trains for purpose of serving certain city.—A railway company cannot, consistently with the commerce clause, be required to detour its two through interstate day passenger trains via a city of some 4,000 inhabitants, instead of running such trains over a cutoff forming a part of the main line, where such city is otherwise served by fourteen local daily passenger trains, seven each way, and where to make the detour will require the railway company to maintain 16 more miles of track at the high standard essential for the through trains, and to move the latter 10 miles farther, with consequent delay and inconvenience all along the line. *St. Louis, etc., R. Co. v. Public Service Commission*, (1921) 254 U. S. 535, 41 S. Ct. 192, 65 U. S. (L. ed.) —, (reversing) (1919) 277 Mo. 264, 210 S. W. 92) wherein the court said:

"The applicable general doctrine has been often considered, and in *Chicago, B. & Q. R. Co. v. Railroad Commission*, 237 U. S. 220, 226, 59 L. ed. 926, 930, P. U. R. 1915C, 309, 35 Sup. Ct. Rep. 560, this court said:

"In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing,—that is, the local conditions being adequately met,—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command, through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce by imposing an arbitrary requirement. *Glaeson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 461. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Mississippi R. Commission v. Illinois C. R. Co.*, 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121."

"Considering the facts disclosed, we think it plain that the fourteen local passenger trains meet the reasonable requirements of Caruthersville, and that the Commission's order unduly burdens interstate commerce. Compliance with it would require the rail-

way to maintain 16 more miles of track at the high standard essential for the through trains, and to move the latter 10 miles further, with consequent delay and inconveniences all along the line. The burden certainly would not be less serious than those which were condemned in some, if not all, of the causes above referred to."

IX. POWER OF STATES

1. Commerce Wholly within a State

a. In General (p. 518)

Scope of power.—"The limits of the state's police power are difficult of determination, as is also the extent of the federal power conferred under the commerce clause, which, no doubt, accounts for the fact that the courts have not attempted to exactly define their limits. It is, therefore, not surprising that it is difficult to fix the points at which these jurisdictions touch, or the extent to which they may overlap, and that the courts are far from uniform in their holdings on these questions." *Amos Bird Co. v. Thompson*, (W. D. Wash. 1921) 274 Fed. 702.

b. Regulations of Intrastate Commerce Indirectly Affecting Interstate Commerce (p. 519)

A state statute is not invalid if it only incidentally affects foreign commerce, if such effect was not the object of the Legislature, but resulted from a legitimate attempt on its part to protect the people of the state in their health, or from fraud or deceit, intentional or otherwise. *Amos Bird Co. v. Thompson*, (W. D. Wash. 1921) 274 Fed. 702, so declaring in the case of a statute relating to foreign eggs.

2. State and Municipal Legislation Affecting Commerce

c. Discrimination against Foreign Products
(1) In General (p. 522)

School text books.—A statute imposing conditions including prices at which it will purchase text books to be used in its public school is not as to nonresident publishers an illegal attempt to regulate interstate commerce as a nonresident has no vested right without the consent of the state to sell and ship its books to school officials of a state in interstate commerce. *Macmillan Co. v. Johnson*, (E. D. Mich. 1920) 269 Fed. 28.

License tax imposed on local agents selling foreign automobiles.—The imposition of a state license tax upon local agents to whom automobiles are consigned for sale by their nonresident manufacturers, which discriminates in favor of the product of resident manufacturers, is an unconstitutional attempt by the state to regulate interstate commerce, it being in effect a tax upon the importation of the automobiles into the state. *Bethlehem Motors Corp. v. Flynt*, (1921) 256 U. S. —, 41 S. Ct. 571, 65 U. S. (L. ed.)

d. Inspection Laws

(1) In General (p. 525)

Interference with United States laws.—

The inspection and grading of grain in interstate commerce requires a uniform system throughout the United States, and no state has the authority to interfere with such system established by the United States. *Farmers' Grain Co. v. Langer*, (C. C. A. 8th Cir. 1921) 273 Fed. 635.

(3) Inspection Fees (p. 530)

In excess of expenses of inspection.—An inspection fee which greatly exceeds the cost of inspection cannot be imposed on interstate commerce as a law authorizing such an exaction amounts to a revenue law. *Texas Co. v. Brown*, (N. D. Ga. 1920) 286 Fed. 577. The court said: "The inspection is obviously an exercise, primarily, of the state's police power. Petroleum products may constitutionally be inspected while still in interstate commerce, even at the state line, and an accompanying fee, which does not obviously and largely exceed the cost of inspection, is a part of the inspection and equally allowable under the police power. *Pure Oil Co. v. Minnesota*, 249 U. S. 158, 39 Sup. Ct. 35, 63 L. Ed. 180. A so-called inspection fee, however, which obviously and largely exceeds the cost of inspection, is not so justified and cannot be imposed by a state upon interstate commerce. *Standard Oil Co. v. Graves*, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662; *Foot v. Maryland*, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698. Such a fee, though imposed professedly as an inspection fee, and under the police power, is really a tax, and must be justified as an exercise of the taxing power, if at all. . . . Disregarding names, therefore, and going to the substance, the exaction sub judice, though called a fee, and imposed in connection with an inspection, is found, not only to greatly exceed the cost of inspection, but to have been intended to raise revenue. The charge for inspecting a tank car of petitioner's oil is \$40, but under the law the inspector can keep but \$10 for his services and, when his retentions reach \$100 per month, the whole of it is paid into the state treasury. Actual trial of the law has showed, for many years, an income to the state many times the cost of executing the inspection law. The fees were not reduced by the Legislature, but the law was amended and extended, and the revenue increased, and has been specifically appropriated from year to year to the support of certain public institutions. Both in purpose and in effect, the law is a revenue law."

A state law providing for the inspection of gasoline and imposing a tax out of all proportion to the cost of inspection is void as to gasoline in the course of interstate

commerce. *Shell Co. v. State*, (1921) 113 Wash. 632, 194 Pac. 835, following *Askers v. Continental Oil Co.*, 252 U. S. 444, 40 S. Ct. 355, 64 U. S. (L. ed.) 654, on this point, but holding the act to be revocable and valid as to gasoline in the state and not in interstate commerce.

f. Railroad and Express Companies

(19) Payment of, or Refusal to Pay, Claim Within a Certain Time (p. 571)

Such a statute is superseded by the Carmack amendment. *Hines v. Cabaniss*, (1920) 204 Ala. 527, 86 So. 524.

w. Intoxicating Liquors

(5) Prohibiting Bringing Liquors into the State (p. 626)

Reed amendment nullifies state laws.—By the Reed Amendment (1918 Supp. 394) Congress reassumed the jurisdiction over the interstate transportation of intoxicating liquor relinquished by the Webb Kenyon Act (4 Fed. Stat. Ann. (2d ed.) 585) and accordingly a state statute prohibiting the shipment of liquor into the state from another state is invalid as an infringement on the commerce power of Congress. *People v. Keeley*, (Mich. 1921) 181 N. W. 990.

w1. Foreign Corporations

(1) Right of States to Exclude Foreign Corporations or Impose Conditions (p. 652)

Imposing conditions on transaction of interstate business.—A statute prohibiting foreign corporations from transacting business within a state except on certain conditions which is applicable to interstate as well as intrastate business is void as an infringement on the exclusive power of Congress. *Dahl Implement, etc., Co. v. Campbell*, (N. D. 1920) 178 N. W. 197, construing statute to apply to intrastate business only.

x1. State Taxation

(2) Separation of Interstate from Intrastate Commerce (p. 657)

Tax on net profits earned within state.—State taxation of a foreign manufacturing and trading corporation, measured by the net profits earned within the state, does not offend against the commerce clause of the Federal Constitution, whether deemed a property tax or a franchise tax, even though these profits may have been derived in part, or indeed mainly, from interstate commerce, where payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business, but its enforcement is left to the ordinary means of collecting taxes. *Underwood Typewriter Co. v. Chamberlain*, (1920) 254 U. S. 113, 41 S. Ct. 45, 65 U. S. (L. ed.) —, affirming (1919) 94 Conn. 47, 108 Atl. 154.

Gasolene.—A single excise tax imposed upon the sale and use of gasolene according to the number of gallons sold and used, while invalid so far as the gasolene is sold in the tank cars or other original packages in which the gasolene was brought into the state, is enforceable to the extent that it imposes the tax upon gasolene sold at retail in quantities to suit customers, not in the original package. *Bowman v. Continental Oil Co.*, (1921) 256 U. S. —, 41 S. Ct. 606, 65 U. S. (L. ed.) —, which further held that a state may impose an excise tax upon the use of gasolene by a dealer at his distributing stations in the operation of his automobile, tank wagons, and trucks employed in the business of distributing his wares for sale, although the gasolene is the product of other states. It was still further held however that the invalidity as respected interstate commerce of an annual license tax imposed upon gasolene distributing stations or places of business, with a prohibition against further conduct of the business without making the required payment, rendered the tax unenforceable also as to the domestic commerce of a dealer who conducted his interstate and domestic business indiscriminately at the same stations and by the same agencies.

The above case was before the United States Supreme Court under the name of *Askren v. Continental Oil Co.*, (1920) 252 U. S. 444, 40 S. Ct. 355, 64 L. S. (L. ed.) 654, in 1920 (see 1920 Supp. 827) in review of an order of the district court granting a temporary injunction.

(3) Discrimination against Foreign Products (p. 658)

Taxation of credits and bills receivable resulting from the sale by a resident of goods brought from without the state is not a violation of this section. *Krauss Bros. Lumber Co. v. Board of Assessors*, (1921) 148 La. 1057, 88 So. 397.

(4) Transportation, Telegraph and Telephone Companies

(b) Tax on Instrumentalities of Commerce as Property

aa. In General (p. 667)

While a state may not, in the guise of taxation, constitutionally compel a corporation to pay for the privilege of engaging in interstate commerce, yet this immunity does not prevent the state from imposing an ordinary property tax upon property having a situs within its territory, and employed in interstate commerce, including the franchise of the corporation, if not derived from the United States, although that franchise is the business of interstate commerce. *St. Louis, etc., Electric R. Co. v. Missouri*, (1921) 256 U. S. —, 41 S. Ct. 488, 65 U. S. (L. ed.) — (affirming (1919) 279 Mo. 616, 216 S. W. 763) wherein it is specifically held that a state tax upon the intangible property within the state of a domestic corporation operating a street railway over an interstate bridge could

not be said to have been levied exclusively upon its franchise to do an interstate business, and hence to be a direct tax and burden on the right to engage in interstate commerce, where such corporation had acquired by private contract an exclusive right to operate over such bridge, and had also derived from private contract other rights which made its line of track a part of two street railway systems, and gave it a profitable operating arrangement with them.

(e) Privilege Taxes

dd. Telegraph and Telephone Companies

(aa) In General (p. 685)

A municipal license tax of \$60 a year upon the privilege of doing an intrastate telegraph business in a city having more than five thousand and less than twenty-five thousand inhabitants cannot be said to be in effect a burden upon the telegraph company's interstate business merely because its intrastate business in that city, which the company asserts it is compelled by statute to continue to carry on at the rates therein prescribed, may be insufficient to pay the tax, where any deficit may be obviated by application for an increase of intrastate rates, and where, in addition, the telegraph company, when it entered the city, the ordinance levying the tax being then in existence, did not declare against its legality or complain of its detrimental operation, but subjected itself to further regulation, licensing, and taxing, and paid the tax (by mistake and inadvertence, it asserts) for several years. *Postal Tel-Cable Co. v. Fremont*, (1921) 255 U. S. 124, 41 S. Ct. 279, 65 U. S. (L. ed. —, affirming (1919) 103 Neb. 476, 172 N. W. 525), wherein the court said:

"The only contention that the Postal Company makes here is that the tax 'is in effect an imposition upon its interstate business.' It has this effect, is the assertion, because its 'intrastate business at Fremont is insufficient to pay the tax,' which, if compelled, must be paid from the company's interstate business," because it is required to do an intrastate business by § 7408 of the state statutes, and its charges are prescribed by the section. For the contention and its supporting assertions the company relies on *Postal Teleg.-Cable Co. v. Richmond*, 249 U. S. 252, 63 L. ed. 590, 39 Sup. Ct. Rep. 265.

"We cannot assign to that case the determining force that counsel attribute to it. The case clearly declares that a license tax may be lawfully imposed on a telegraph company for the right to do business within the borders of the municipalities of a state. The power, of course, has its limitations, and must be exercised with due relation to the company's interstate business. That relation is always to be considered, but it is not disposed of by the simple assertion of a loss. The cause of it or the condition of it is to be considered. In this case the tax is \$60 a year. It certainly cannot be said that it is repellent from its amount, and there is no pretense

that its imposition 'is a disguised attempt to tax interstate commerce.' The Postal Company, when it entered the city, the ordinance levying the tax then being in existence, did not declare against its legality, or complain of its detrimental operation. Indeed, for the privilege of entering the city it subjected itself to further regulation, licensing, and taxing. And it paid the tax from that time until 1914. The allegation in its answer that it paid the tax 'through the mistake and inadvertence of' its 'clerical force' we are not disposed to accept, without more, as an explanation.

"The supreme court expressed the view that mere proof of loss for two years, which may have been exceptional, determined nothing in the absence of a showing what business was available to the company, or what facilities it had or used, and also held that, the city being an agent of the state, any deficit arising from the tax imposed on the interstate business of the company can be prevented from becoming a burden upon the company's interstate business by an application to the state railway commission under the provisions of § 7409, for an increase of its intrastate rates. And the suggestion is pertinent. The company, as we have seen, cites § 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement § 7409 provides a mode of relief, and until it is denied, the company cannot complain, under the circumstances presented by this record. In other words, if § 7408 is imperative upon the company to continue intrastate business, § 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to § 7408 results in insufficient revenue and a burden upon interstate commerce, it is made the duty of the railway commission, by § 7409, upon complaint of the Postal Company, to raise the intrastate rate 'fixed' in § 7408. No attempt to secure relief under § 7409 appears to have been made."

(8) Taxation of Corporation Franchises

(a) Domestic Corporations (p. 694)

A state franchise tax upon a domestic railway company does not contravene the commerce clause of the Federal Constitution merely because the value of the franchise taxed is derived partly from the fact that the corporation does interstate business. *St. Louis-San Francisco R. Co. v. Middlekamp*, (1921) 256 U. S. —, 41 S. Ct. 489, 65 U. S. (L. ed.) —, wherein it was held that the franchise tax imposed upon domestic corporations by Mo. Laws 1917, pages 237-242, must, in case of a corporation employing only a part of its capital within the state, be deemed to be intended to be measured by the proportion of capital stock and surplus within the state, although the statute says that "such corporation shall pay an annual franchise tax

equal to $\frac{3}{4}$ of 1 per cent of its capital stock employed in this state," since these words follow words laying the normal tax measured by stock and surplus, and the sentence quoted continues: "And for the purposes of this act, such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bear to all its property and assets, wherever located."

(b) Foreign Corporations (p. 696)

Tax on full value of assets.—Though the assets of a foreign railroad company in a state are used in interstate as well as intrastate commerce, the laying of a franchise tax on the full value of those assets is not a violation of the Commerce Clause of the Constitution. *State v. Williams*, (1920) 284 Mo. 456, 224 S. W. 822.

(13) Taxation of Goods from Other States or Abroad as Property

(b) Taxation of Goods in Original Packages as Property (p. 700)

An inspection fee which is so in excess of the cost of inspection as to amount to a tax is held to be unenforceable as against goods intended to be sold in the original packages and so sold. But importations which are indefinitely stored within the state, or are resold there after breaking the original packages, are subject, not only to inspection, but to the tax imposed, so soon as the interstate transportation of them is ended. *Texas Co. v. Brown*, (N. D. Ga. 1920) 266 Fed. 577, wherein the court said in the case of such a fee imposed on oil: "The fact that such oils must inevitably meet the tax before they can be used otherwise than for sale in the original packages is not material. This is true of all general taxation. If there is no discrimination because of their being imported, they pass under the taxing power of the state, as under its protection, so soon as they pass out of interstate commerce by a sale or breaking of the original packages by the importer, or by indefinite storage."

(21) Tax on Drummers, Canvassers and Sample Peddlers

(a) In General (p. 709)

To the same effect as the third paragraph of the original annotation, see *Chicago Portrait Co. v. Bellingham*, (W. D. Wash. 1920) 270 Fed. 584.

Vol. X, p. 765, art. 1, sec. 8.

I. GENERAL POWER OF CONGRESS OVER COINAGE (p. 765)

Power to punish possession of dies.—Making the conscious and willful possession without lawful authority, of a die in the likeness or similitude of one used or designated for making genuine coin of the United States,

a criminal offense, as was done by Penal Laws, § 169 [7 Fed. Stat. Ann. (2d ed.) 729], was a valid exercise by Congress of the power conferred by this clause, investing Congress with power to coin money and regulate the value thereof, such power being in no wise limited by the following clause relating to the punishment for counterfeiting. *Baender v. Barnett*, (1921) 255 U. S. 224, 41 S. Ct. 271, 65 U. S. (L. ed.) —, wherein the court said: "The other contention is that the clause in the Constitution empowering Congress 'to provide for the punishment of counterfeiting the securities and current coin of the United States,' art. I, § 8, cl. 6, is a limitation as well as a grant of power; that the act which the statute denounces is not counterfeiting, and therefore that Congress cannot provide for its punishment. The contention must be rejected. It rests on a misconception not only of that clause, but also of the clause investing Congress with power 'to coin money' and 'regulate the value thereof,' art. I, § 8, cl. 5. Both have been considered by this court, and the purport of the decisions is (1) that Congress not only may coin money in the literal sense, but also may adopt appropriate measures, including the imposition of criminal penalties, to maintain the coin in its purity, and to safeguard the public against spurious, simulated, and debased coin; and (2) that the power of Congress in that regard is in no wise limited by the clause relating to the punishment of counterfeiting. *United States v. Marigold*, 9 How. 560, 567, 568, 13 L. ed. 257, 260, 261; *Legal Tender Cases*, 12 Wall. 457, 535, 536, 544, 545, 20 L. ed. 287, 307, 310. It hardly needs statement that, in the exertion of this power, the conscious and willing possession, without lawful authority, of a die in the likeness or similitude of one used or designated for making genuine coin of the United States, may be made a criminal offense. If this be not a necessary, it is at least an appropriate, step in effectively suppressing and preventing the making and use of illegitimate coin."

Vol. X, p. 783, art. 1, sec. 8.

IV. EXCLUSIVENESS OF POWER IN CONGRESS (p. 786)

Patent rights as infringing state anti-trust laws.—Private monopolies are contrary to the genius of a commercial people, and contracts in restraint of trade are not looked upon with favor. The Constitution of the United States, however, expressly provides for the creation of monopolies in the matter of patent rights, trade-marks and copyright. Congress has legislated under this provision, and no state can nullify its acts. *Coca-Cola Co. v. State*, (Tex. 1920) 225 S. W. 791, holding that conditions attached to a license to make and sell a patented article did not infringe a state anti-trust law.

Vol. X, p. 807, art. 1, sec. 8.

II. Exclusive power of Congress to declare war or conclude peace.

III. Effect of declaration of war.

1. In general.

XII. Power to establish military tribunals to try civilians.

II. EXCLUSIVE POWER OF CONGRESS TO DECLARE WAR OR CONCLUDE PEACE (p. 808)

As to termination of the "World War" it was said: "The Congress and the President are the constitutional judges of states of war and peace and their decisions should be abided in patience by people and courts." *U. S. v. Oglesby Grocery Co.*, (N. D. Ga. 1920) 264 Fed. 691.

III. EFFECT OF DECLARATION OF WAR

1. In General (p. 808)

The mere existence of a state of war cannot suspend or change the operation upon the power of Congress of the guaranties and limitations of the 5th and 6th Amendments, as to delegating legislative power to courts and juries, penalizing indefinite acts, and depriving citizens of the right to be informed of the nature and cause of accusations against them. *U. S. v. L. Cohen Grocery Co.*, (1921) 255 U. S. 81, 41 S. Ct. 298, 65 U. S. (L. ed.) —, 14 A. L. R. 1045, *affirming* (E. D. Mo. 1920) 264 Fed. 218. See to the same effect, *Tedrow v. A. T. Lewis, etc.*, (1921) 255 U. S. 98, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Kinnane v. Detroit Creamery Co.*, (1921) 255 U. S. 102, 41 S. Ct. 304, 65 U. S. (L. ed.) —; *Weed v. Lockwood*, (1921) 255 U. S. 104, 41 S. Ct. 305, 65 U. S. (L. ed.) —; *G. S. Willard Co. v. Palmer*, (1921) 255 U. S. 106, 41 S. Ct. 305, 65 U. S. (L. ed.) —; *Oglesby Grocery Co. v. U. S.*, (1921) 255 U. S. 108, 41 S. Ct. 306, 65 U. S. (L. ed.) —. See also *Kennington v. Palmer*, (1921) 255 U. S. 100, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Weeds v. U. S.*, (1921) 255 U. S. 109, 41 S. Ct. 306, 65 U. S. (L. ed.) —.

The soldiers and sailors' civil relief act (1918 Supp. p. 810) is a legitimate exercise of the power conferred by this section. *Pierrard v. Hoch*, (1920) 97 Ore. 71, 184 Pac. 494, 191 Pac. 328.

XII. POWER TO ESTABLISH MILITARY TRIBUNALS TO TRY CIVILIANS (p. 813)

See annotation under art. 1, sec. 8, p. 821, immediately following.

Vol. X, p. 821, art. 1, sec. 8.

Power to provide for trials by courts-martial.—To same effect as original annotation, see *U. S. v. McDonald*, (E. D. N. Y. 1920) 265 Fed. 754.

The civil courts, on habeas corpus.—To same effect as original annotation, see *U. S. v. McDonald*, (E. D. N. Y. 1920) 265 Fed. 754.

Vol. X, p. 838, art. 1, sec. 8.

X. STATE JURISDICTION

1. Judicial and Legislative (p. 849)

Jurisdiction of state court over action by employee in federal nitrate plant.—Congress having taken jurisdiction of Muscle Shoals, and having adopted a Workmen's Compensation Act [6 Fed. Stat. Ann. (2d ed) 282] which has been held to apply to employees of companies operating nitrate plants at Muscle Shoals, a state court has no jurisdiction of an action for personal injuries by such an employee. *Webb v. J. G. White Engineering Corp.*, (1920) 204 Ala. 429, 85 So. 729.

Vol. X, p. 852, art. 1, sec. 8.

VI. "To Establish Post Offices and Post Roads" (p. 861)

Requiring government chauffeur to obtain state license.—A state may not require a postoffice employee to cease driving a government motor truck in the transportation of mail over a post road until he shall obtain a license by submitting to examination before a state official and paying a fee. *Johnson v. Maryland*, (1920) 254 U. S. 51, 41 S. Ct. 16, 65 U. S. (L. ed.) —, wherein the court said: "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest, and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law to-day. *Farmers & M. Sav. Bank v. Minnesota*, 232 U. S. 516, 525, 526, 58 L. ed. 706, 711, 34 Sup. Ct. Rep. 354. A little later the scope of the proposition as then understood was indicated in *Osborn v. Bank of the United States*, 9 Wheat. 738, 967, 6 L. ed. 204, 234: "Can a contractor for supplying a military post with provisions be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." In more recent days the principle was ap-

plied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarin, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not "subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by the federal authority." *Ohio v. Thomas*, 173 U. S. 276, 283, 43 L. ed. 699, 701, 19 Sup. Ct. Rep. 453. It seems to us that the foregoing decisions establish the law governing this case.

"Of course, an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States v. Hart*, Pet. C. C. 390, Fed. Cas. No. 15,316; 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment,—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Com. v. Classon*, 229 Mass. 329, L.R.A.1918C, 939, 118 N. E. 653. This might stand on much the same footing as liability under the common law of a state to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States, acting under and in pursuance of the laws of the United States. *Re Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the department to employ persons competent for their work, and that duty it must be presumed has been performed. *Keim v. United States*, 177 U. S. 290, 293, 44 L. ed. 774, 775, 20 Sup. Ct. Rep. 574."

Vol. X, p. 892, art. 1, sec. 9.

Transportation of intoxicating liquor into state.—The want of merit in the contention that the provision of the Reed Amendment of March 3, 1917, § 5 (1918 Supp. p. 394), prohibiting the transportation in interstate commerce of intoxicating liquor into any state whose laws forbid the manufacture or sale therein of such liquor for beverage pur-

poses was repugnant to this section, prohibiting any regulation of commerce which gives a preference to the ports of one state over those of another, was held to be so plainly established by the decisions of the Federal Supreme Court and the authorities which had followed those decisions as to require the affirmance on motion of a conviction for a violation of such statute, brought up directly from a federal district court for review, on the theory that the law was unconstitutional for that reason. *Williams v. U. S.*, (1921) 255 U. S. 336, 41 S. Ct. 364, 65 U. S. (L. ed.) —.

Vol. X, p. 914, art. 1, sec. 10.

II. WHAT CONSTITUTES AN EX POST FACTO LAW

3. *Laws Relating to Crimes and Penalties* (p. 918)

To same effect as original annotation, see *Bankers' Trust Co. v. State*, (Com. 1921) 114 Atl. 104.

Vol. X, p. 944, art. 1, sec. 10.

II. Police powers

1. In general.

V. Contracts protected.

14. *Charters of private corporations as contracts.*

a. In general.

h. Power to amend charters.

(2) Reserved power to amend or repeal charters.

(a) In general.

i. Exemption from or limitation of taxation.

17. Of railroad companies.

d. Regulation of railroad rates.

(2) When subject to legislative or municipal control.

j. Paving part of street occupied by track.

18. Of waterworks companies.

a. Grant of franchise.

f. Condemnation of plant (new).

19. Of lighting companies.

c. Regulation of lighting rates.

21. Of insurance companies.

VIII. What constitutes impairment.

1. In general.

5. Exemption laws.

6. Stay laws.

13. Power to change remedy.

a. In general.

14. Impairment vel non in sundry instances.

IX. Jurisdiction of federal courts.

1. Existence of contract and question of impairment.

II. POLICE POWERS

1. In General (p. 950)

Arbitrary exercise of power.—Property rights cannot be divested by an arbitrary exercise of the police power. *Hirsh v. Block*, (C. A. D. C. 1920) 267 Fed. 614, 11A, L. R. 1238, 631.

V. CONTRACTS PROTECTED

14. *Charters of Private Corporations as Contracts*

a. In General (p. 996)

Religious society.—The incorporation and the granting of a charter by a state to a charitable and religious society constitute a contract between the society and the state. Hence, the legislature may not subsequently enact a statute suspending such charter and all corporate powers of the corporation without impairing the obligation of such contract in violation of this section. *In re Opinion of Justices*, (Mass. 1921) 131 N. E. 29. See also *In re Opinion of Justices*, (Mass. 1921) 131 N. E. 31.

h. Power to Amend Charters

(2) Reserved Power to Amend or Repeal Charters

(a) In General (p. 1005)

International bridge.—Contract obligations of a bridge company, specially incorporated by N. Y. Laws 1857, chap. 753, to build a railroad bridge over the Niagara river, and later consolidated with a similar Canadian corporation, pursuant to New York and Canada statutes, subject to all the duties of each of the consolidated companies, cannot be said to have been impaired unconstitutionally by N. Y. Laws 1915, chap. 666, amending the original charter, in the exercise of the state's reserved power to amend, by requiring the construction of a roadway for vehicles and a pathway for pedestrians on that part of the bridge within the jurisdiction of the state, where the Canadian charter, unlike the New York one, made the arrangements for foot passengers and carriages a duty. *International Bridge Co. v. New York*, (1920) 254 U. S. 126, 41 S. Ct. 56, 65 U. S. (L. ed.) — (*affirming* (1918) 223 N. Y. 137, 119 N. E. 351), wherein it was further held that Congress, by authorizing, as it did in an Act of June 30, 1870, the building of a bridge over the Niagara river, under legislative authority from the state of New York, subject to the approval of the Secretary of War, and by recognizing as a lawful structure, as it did in the Act of June 23, 1874, the bridge as constructed for railroad purposes only, did not assume such control of the bridge as to prevent the state, in the exercise of its reserved right to amend the bridge company's charter, from requiring the addition of a roadway for vehicles and a pathway for pedestrians on

that part of the bridge within the jurisdiction of the state. Also it was held that the conveyance to the United States for a public purpose not connected with the administration of the government of a part of the land under a bridge constructed over the Niagara river, under legislative authority from the state of New York, did not affect the authority of the state to require, in the exercise of its reserved right to amend the bridge company's charter, the addition of a roadway for vehicles and a pathway for pedestrians on that part of the bridge within the jurisdiction of the state.

i. Exemption From or Limitation of Taxation (p. 1017)

A decision of the highest court of New York that the exemption from taxation above a specified sum, granted to the Troy Union Railroad Company by N. Y. Laws 1853, chap. 462, could be repealed without impairing contract obligations, cannot be said to be wrong, in view of the general attitude of the courts toward claims of exemption, adverted to by the state court, and of the fact that a subsequent agreement shows that the parties concerned did not suppose that they had an irrevocable grant, and especially the fact that the state Constitution in force in 1853 provided in art. 8, § 1, that all general laws and special acts passed pursuant to that section might be altered or repealed. *New York v. Mealy*, (1920) 254 U. S. 47, 41 S. Ct. 17, 65 U. S. (L. ed.) 47, *affirming* (1918) 224 N. Y. 187, 120 N. E. 155.

17. Of Railroad Companies

d. Regulation of Railroad Rates

(2) When Subject to Legislative or Municipal Control (p. 1047)

Power of state to change rates.—Where neither the constitution of a state nor any of its statutes has given to a city of the state the authority to make an inviolable contract with any railroad with reference to the rates of fare which it shall charge passengers, such a contract by a city with a railroad company is not binding on the state. Hence, an order of the public utilities commission, as agent of the state, permitting the company to increase its fares does not violate this section. *Hoyne v. Chicago, etc.*, 111 U. S. 559, 4 S. Ct. 480, 29 L. ed. 507, 18 U. S. 587.

j. Paving Part of Street Occupied by Track (p. 1052)

Requiring railroad to maintain highway at crossing does not violate this section. *Chicago, etc., R. Co. v. Taylor*, (1920) 79 Okla. 142, 192 Pac. 349 (rule applied to railroad holding right of way by federal grant).

18. Of Waterworks Companies

a. Grant of Franchise (p. 1054)

To same effect as original annotation, see *Greensburg Water Co. v. Lewis*, (Ind. 1920) 128 N. E. 103, wherein it was held that where the company surrendered its franchise under a statute giving an indeterminate permit to increase its rates, a subsequent amendment of such statute whereby it was sought to impose certain burdensome conditions on the company was void as contravening this section.

f. Condemnation of Plant (new)

Municipal condemnation under the Public Utilities Law of a water plant operating under a state franchise, does not impair the obligation of a contract. *Superior Water, etc., Co. v. Superior*, (Wis. 1921) 183 N. W. 254.

19. Of Lighting Companies

c. Regulation of Lighting Rates (p. 1062)

An act granting a public utility commission power to make rates which public utility corporations may charge is not unconstitutional. And the fact that the effect of an order permitting a public utility corporation to increase its rate would be to nullify a contract theretofore entered into by the parties does not make the order obnoxious to the constitutional provision prohibiting states to enact laws impairing the obligation of contracts. *Public Utilities Commission v. Wichita R., etc., Co.*, (C. C. A. 8th Cir. 1920) 268 Fed. 37.

Regulating rates fixed by a contract is not a violation of this clause, though the public utilities law under which the regulation was made was passed subsequent to the contract. *U. S. Smelting, etc., Co. v. Utah Power, etc., Co.*, (Utah 1921) 197 Pac. 902.

21. Of Insurance Companies (p. 1064)

Incontestable and suicide clauses in policies of life insurance which exclude suicide as a defense when committed, sane or insane, after a period respectively of one and two years from the issuance of the policies, will not be deemed as against public policy unless the state concerned adopts a different view. *Northwestern Mut. L. Ins. Co. v. Johnson*, (1920) 254 U. S. 96, 41 S. Ct. 47, 65 U. S. (L. ed.) —.

Prescribing who shall be agents of insurer. — A state statute providing that any person who acts for an insurance company in the making of a contract of insurance or the adjustment of a loss shall be the agent of the insurer does not violate this section. *Globe, etc., F. Ins. Co. v. Walker*, (1920) 150 Ga. 163, 103 S. E. 407.

VIII. WHAT CONSTITUTES IMPAIRMENT

1. In General (p. 1113)

Provision in Workmen's Compensation Law prohibiting employers making direct payment to injured employees from indemnity.

lying themselves by insurance.—A ruling of a state industrial commission, justified or demanded by a change in the state law, by which the commission, revoking its previous discretionary action, declares that no employers shall be permitted to pay or furnish directly to injured employees or to the dependents of killed employees the compensation and benefits provided for in the State Workmen's Compensation Law if such employers, by contract or otherwise, shall provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, does not unconstitutionally impair the obligations of insurance contracts entered into upon the faith of the previous ruling of the commission. *Thornton v. Duffy*, (1920) 254 U. S. 361, 41 S. Ct. 137, 65 U. S. (L. ed.) —, *affirming* (1918) 99 Ohio St. 120, 124 N. E. 54.

Changing franchise rates.—An act conferring power on a state corporation commission to change the franchise rates for water, power, and electricity existing between municipalities and public utilities, is not repugnant to the provisions of the state and federal Constitutions, prohibiting the passage of any law impairing the obligation of contracts. *Camden v. Arkansas Light, etc., Co.*, (1920) 145 Ark. 205, 224 S. W. 444.

5. Exemption Laws (p. 1118)

Exemption from liability for debts of avails of life insurance.—A state statute exempting from liability for debts of the assured the avails of insurance upon his life, when payable to his estate, violates the contract clause of the Federal Constitution in so far as it undertakes to exempt the proceeds of policies taken out prior to the passage of that act from antecedent debts. *Minden Bank v. Clement*, (1921) 256 U. S. 126, 41 S. Ct. 408, 65 U. S. (L. ed.) —, *reversing* (1920) 146 La. 385, 83 So. 664.

6. Stay Laws (p. 1120)

Legislation suspending right of landlord to recover possession of leased premises.—See annotation under Vol. XI, p. 616, amend. 14, sec. 1, see *infra*, p. 850.

13. Power to Change Remedy

a. In General (p. 1129)

A state statute providing for arbitration of controversies arising between the parties to a contract, when such a stipulation is made therein, and prescribing the procedure for the arbitration proceedings, strengthens rather than impairs the obligations of the contract and does not violate this section. *Berkovitz v. Arbib*, (1921) 230 N. Y. 261, 130 N. E. 288.

14. Impairment Vel Non in Sundry Instances (p. 1137)

Invalidating contract against liability for negligence.—A statute invalidating provi-

sions in leases exempting a railroad company from liability for fire damage to buildings erected on the right of way does not impair the obligation of a contract though it is applicable to leases existing at the time of its enactment, the statute being a police regulation. *Aetna Ins. Co. v. Chicago Great Western R. Co.*, (1a. 1920) 180 N. W. 649.

Forbidding discharge of employee for certain cause.—A statute which forbids the discharge of an employee because such employee has testified before the industrial welfare commission regarding the terms and conditions of his employment does not infringe this section. *Poye v. State*, (Tex. 1921) 230 S. W. 161, wherein the court said:

"It must be borne in mind that every contract entered into between our citizens includes, as a necessary part thereof, the written law of the land; and that such contracts are viewed and construed as embodying not only the expressed will of the parties, but also the provisions of such laws. It must be concluded, therefore, that when appellant employed Beattie Lee he knew that she might be called to testify before the said welfare commission, and that in such event the law had written into their contract that he had no right to discharge her for giving such testimony. This, then, being a part of the contract of employment, no ground appears for holding that a law punishing appellant for his violation of this part of said contract by discharging her impairs or changes the obligation of such contract."

Increasing the liability of stockholders for corporate debts does not impair the obligation of a contract. *Blytheville Bank v. State*, (1921) 148 Ark. 504, 230 S. W. 550.

IX. JURISDICTION OF FEDERAL COURTS

1. Existence of Contract and Question of Impairment (p. 1140)

Lean towards construction by state court in case of doubt.—To the same effect as the original annotation, see *New York v. Mealy*, (1920) 254 U. S. 47, 41 S. Ct. 17, 65 U. S. (L. ed.) —, *affirming* (1918) 224 N. Y. 187, 120 N. E. 155.

Vol. X, p. 1146, art. 1, sec. 10.

II. When goods lose character as imports or domestic character.

III. Power of state to tax.

1. In general.

II. WHEN GOODS LOSE CHARACTER AS IMPORTS OR DOMESTIC CHARACTER (p. 1148)

Sale within the state destroys the status of goods as imports and a tax may be laid on the bills receivable and credits resulting from the sale. *Krauss Bros. Lumber Co. v. Board of Assessors*, (1921) 148 La. 1057, 88 S. 397.

III. POWER OF STATE TO TAX

1. *In General* (p. 1149)

Taxation of credits and bills receivable resulting from the sale by a resident of goods brought from without the state is not a violation of this section. *Krauss Bros. Lumber Co. v. Board of Assessors*, (1921) 148 La. 1057, 88 So. 397.

Vol. X, p. 1158, art. 1, sec. 10.

IV. "AGREEMENT" OR "COMPACT"

2. *As to a Boundary Line* (p. 1167)

Relocating and marking old boundary line.—The consent of Congress under this section is not necessary where no new boundary line between states is established but the old one merely relocated and marked. *Blaine v. Murphy*, (D. C. Mass 1920) 265 Fed. 324.

Vol. XI, p. 1, art. 2, sec. 1.

Power of President to prevent landing of cable.—The President has no power to prevent the landing by a domestic corporation of a cable from a foreign country. *U. S. v. Western Union Tel. Co.*, (S. D. N. Y. 1921) 272 Fed. 311.

Vol. XI, p. 5, art. 2, sec. 1.

Validity of state statute permitting absentee voting.—As the manner of making the appointment of presidential electors is left by this article and R. S. sec. 131 [8 Fed. Stat. Ann. (2d ed.) 258] to the legislature of each state, there can be no constitutional objection to absentee voting in their election. *In re Opinion of Justices*, (N. H. 1921) 113 Atl. 293.

Vol. XI, p. 72, art. 3, sec. 1.

II. JUDICIAL POWER TO BE VESTED IN COURTS ESTABLISHED BY CONGRESS (p. 74)

"The Supreme Court is without jurisdiction to review the judgments or findings of an inferior federal court in a case in which the Supreme Court would have no power to enforce its judgments, because the third article of the Constitution, section 1 provides that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,' and the review by the Supreme Court of findings or judgments in cases in which it could not enforce its judgments is not the exercise of this judicial power granted to it by the Constitution. The Supreme Court, however, is the only court whose jurisdiction is thus fixed, and limited by the Constitution. The other courts of the United States . . . are ordained and established and their jurisdic-

tion is fixed by the acts of Congress, and, as was said in the leading case (117 U. S. 699) by Chief Justice Taney, Congress may undoubtedly establish tribunals with special powers subject to the supervision of the head of an executive department." *Harrison v. Moneravie*, (C. C. A. 8th Cir. 1920) 264 Fed. 776.

Vol. XI, p. 95, art. 3, sec. 2.

II. EXERCISE OF JURISDICTION AS DEPENDENT ON STATUTES

2. *Inferior Courts*a. *In General* (p. 99)

As to the inferior federal courts this 'provision of the Constitution is not self-executing or automatically operative. It was left to Congress to distribute the judicial power among them and to prescribe the extent and the means of its exercise.' *In re Higdon*, (E. D. Mo. 1920) 269 Fed. 150.

Vol. XI, p. 168, art. 3, sec. 2.

VI. Waiver of jury trial.

VII. "Where the said crimes shall have been committed."

2. *Boundary of state a question of fact.*

VI. WAIVER OF JURY TRIAL (p. 172)

Consent to trial by eleven jurors where a juror falls sick during the trial is not invalidated by this provision. *State v. Browman*, (Ia. 1921) 182 N. W. 823.

VII. "WHERE THE SAID CRIMES SHALL HAVE BEEN COMMITTED"

2. *Boundary of State a Question of Fact* (p. 173)

Bringing stolen goods into state.—A state statute making it a criminal offense for persons to bring into the state property feloniously stolen without its limits, does not violate this section by providing for the punishment of a crime committed in a foreign state. *State v. Israel*, (N. J. 1921) 114 Atl. 314.

Vol. XI, p. 175, art. 3, sec. 3.

I. POWER OF CONGRESS LIMITED (p. 176)

Effect on power of states.—The constitutional definition of treason does not deprive the states of the power to enact statutes intended to prevent the teaching of crime, sedition, violence or intimidation as a means of destroying the present social order. *State v. Hennessy*, (Wash. 1921) 195 Pac. 211 (sustaining statute against criminal syndicalism.)

Vol. XI, p. 185, art. 4, sec. 1.

III. To judicial proceedings.

9. Effect of foreign judgment.

e. Conclusive on the merits.

k. No priority, privilege or lien.

7. [10] Defenses that may be set up in suit on foreign judgment.

a. Want of jurisdiction.

(1) In general.

(3) Facts necessary to give jurisdiction.

(4) Record not conclusive.

(5) Must be evidence of want of jurisdiction.

(6) Service of process.

(a) Personal service or voluntary appearance.

(c) Service of process while temporarily in the state.

9. [12] Judgments in particular cases conclusive *vel non*.

e. Relating to marriage and divorce.

(1) In general.

(3) Divorce obtained upon substituted service.

(5) Custody of the children.

f. Confession of judgment.

III. To JUDICIAL PROCEEDINGS

9. Effect of Foreign Judgment

e. Conclusive on the Merits (p. 195)

Foreign probate of will cannot be attacked for irregularities. *Grignon v. Shope*, (Ore. 1921) 197 Pac. 317.

k. No Priority, Privilege or Lien (p. 199)

What status accorded to foreign judgment.

—This provision does "not make the judgments of the states domestic judgment to all intents and purposes, but only gives a general validity, faith and credit to them as evidence.

"No execution can be issued upon such judgments without a new suit in the tribunals of other states, and they enjoy, not the right of priority or privilege or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments." *State v. Dunn* (1921) 148 La. 460, 87 So. 236, following *Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 U. S. (L. ed.) 538.

7. [10] Defenses that May Be Set up in Suit on Foreign Judgment.

a. Want of Jurisdiction.

(1) In General (p. 200.)

To same effect as original annotation see *Gordon v. Hillman*, (Cal. App. 1920) 191 Pac. 62.

(3) Facts Necessary to Give Jurisdiction (p. 202)

Right of inquiry as to jurisdiction of court rendering judgment.—"The fundamental and obvious limitation upon the power of the courts of one state to render a judgment binding upon those of another state is the one that the former shall have jurisdiction of the parties and of the subject-matter upon which they have pronounced an adjudication, and, as a necessary corollary to this, that the courts of the state in which the first judgment is pressed as a controlling adjudication shall have the right to investigate and ascertain whether the court rendering the judgment did have such jurisdiction." *Hanna v. Stedman*, (1921) 230 N. Y. 326, 130 N. E. 566.

(4) Record Not Conclusive (p. 202)

"It is thoroughly settled that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered over the subject-matter, or the parties affected by it, or into the facts necessary to give such jurisdiction." *Mulcahy v. Richman*, (E. D. Pa. 1920) 265 Fed. 733.

(5) Must Be Evidence of Want of Jurisdiction (p. 203)

A foreign judgment appointing a guardian for an insane person will be given full faith and credit, in the absence of a showing of want of jurisdiction. *In re Baxter*, (Ia. 1921) 182 N. W. 217.

(6) Service of Process

(a) Personal Service or Voluntary Appearance (p. 203)

No service or appearance.—This section has no application to a judgment of an action rendered against one of several joint obligors, who was a nonresident of the state and had no notice or knowledge of the pendency of the action, and did not appear therein. *National Surety Co. v. Love*, (Neb. 1920) 178 N. W. 917.

A divorce decree rendered on constructive service is open to attack in another state. *Davis v. Davis*, (Colo. 1921) 197 Pac. 241.

(c) Service of Process While Temporarily in the State (p. 204)

Agent of foreign corporation.—Service on the agent of a foreign corporation while temporarily in the state gives no jurisdiction and full faith and credit need not be given to a judgment against the corporation rendered on that service. *Haas-Phillips Produce Co. v. Lee*, (Ala. 1920) 87 So. 200.

9. [12] *Judgments in Particular Cases Conclusively Vel Non*

e. Relating to Marriage and Divorce

(1) In General (p. 212)

Conclusiveness of foreign divorce decree.—A divorce decree obtained by a husband in Nevada while an action by his wife for a separation is pending in New York, establishes the status of the parties as to the future and, in so far as the issues involved in the two cases are the same, is a bar to the assertion by the wife in the latter action that her living apart from her husband in New York state prior to the Nevada decree was through no fault of hers, and was not due to any acts or conduct on her part that justified a separation at the suit of her husband in New York. *Pearson v. Pearson*, (1920) 230 N. Y. 141, 129 N. E. 349.

(3) Divorce Obtained upon Substituted Service (p. 213)

To same effect as original annotation, see *Parmelee v. Hutchins*, (Mass. 1921) 131 N. E. 443, wherein it was held that where a wife obtained a decree of separation in Massachusetts, a court of Illinois, in which state the husband subsequently acquired a domicile, could not properly have granted him a divorce in view of this section had the Massachusetts decree been pleaded in bar.

(5) Custody of the Children (p. 214)

Decree conclusive.—"If a judgment or decree touching the custody of children is rendered by a court of competent jurisdiction in one state, such court being possessed of jurisdiction of both the subject-matter and the parties, such judgment or decree is res adjudicata as to all matters occurring up to the date of the rendition thereof, and is entitled to full faith and credit in any other state of the Union, unless it be subject to impeachment for fraud in the procuring thereof." *In re Leete*, (1920) 205 Mo. App. 225, 223 S. W. 962.

f. Confession of judgment (p. 215)

Full faith is accorded to a judgment by confession entered on warrant of attorney in another state in accordance with the statutes thereof. *Ashby v. Manley*, (Ia. 1921) 181 N. W. 869.

Vol. XI, p. 220, art. 4, sec. 2.

I. Not applicable to acts of individuals.

II. Nature of privileges and immunities.

6. Of citizens of state whose laws are complained of.

a. In general.

III. Who are citizens.

1. Corporations as citizens.

IV. Legislation affecting privileges and immunities.

7. Regulating use of common property of the state.

c. Prohibiting nonresidents grazing cattle.

8. Right to sue.

a. In general.

I. NOT APPLICABLE TO ACTS OF INDIVIDUALS (p. 222)

Authority of United States to punish infractions by individuals.—The United States is without power to forbid and punish infractions by individuals of the right of citizens to reside peacefully in the several states, and to have free ingress into and egress from such states. Authority to deal with such wrongs is exclusively within the power reserved by the Federal Constitution to the states. *U. S. v. Wheeler*, (1920) 254 U. S. 291, 41 S. Ct. 133, 65 U. S. (L. ed.) —, *affirming* [D. C. Ariz. 1918] 254 Fed. 611) wherein the court said:

"Undoubtedly the right of citizens of the states to reside peacefully in, and to have free ingress into and egress from, the several states, had, prior to the Confederation, a twofold aspect: (1) As possessed in their own states, and (2) as enjoyed in virtue of the comity of other states. But although the Constitution fused these distinct rights into one by providing that one state should not deny to the citizens of other states rights given to its own citizens, no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one state in another of rights possessed in that state by its own citizens was a violation of a right afforded by the Constitution. This is the necessary result of article 4, § 2, which reserves to the several states authority over the subject, limited by the restriction against state discriminatory action, hence excluding Federal authority except where invoked to enforce the limitation, which is not here the case; a conclusion expressly sustained by the ruling in *United States v. Harris*, 106 U. S. 629, 635, 27 L. ed. 290, 292, 1 Sup. Ct. Rep. 601, to the effect that the 2d section of article 4, like the 14th Amendment, is directed alone against state action. And this was but a summary of what had been previously pointed out in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, where, in dealing with the privileges and immunities embraced by article 4, § 2, of the Constitution, it was observed (p. 77):

"It would be the vainest show of learning to attempt to prove by citations of authority that, up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the states,—such, for instance,

as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the Federal government.'

"Nor is the situation changed by assuming that, as a state has the power, by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom, it may, without violating the prohibitions of article 4 against discrimination, apply a like rule to citizens of other states, and hence engender, outside of article 4, a Federal right. This must be so, since the proposition assumes that a state could, without violating the fundamental limitations of the Constitution other than those of article 4, § 2, enact legislation incompatible with its existence as a free government, and destructive of the fundamental rights of its citizens; and furthermore, because the premise upon which the proposition rests is state action, and the existence of Federal power to determine the repugnancy of such action to the Constitution,—matters which, not being here involved, are not disputed.

"This leads us furthermore to point out that the case of *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745, so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions, and also to limit rights of the citizens growing out of such functions; and hence it also follows that the observation made in *Twining v. New Jersey*, 211 U. S. 78, 97, 53 L. ed. 97, 105, 29 Sup. Ct. Rep. 14, to the effect that it had been held in the *Crandall* Case that the privilege of passing from state to state is an attribute of national citizenship, may here be put out of view as inapposite.

"With the object of confining our decision to the case before us, we say that nothing we have stated must be considered as implying a want of power in the United States to restrain acts which, although involving ingress or egress into or from a state, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge, as illustrated in the *Crandall* Case, *supra*."

II. NATURE OF PRIVILEGES AND IMMUNITIES

6. Of Citizens of State Whose Laws Are Complained Of

a. In General (p. 224)

In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the funda-

mental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right. The authority which the several states possessed prior to the adoption of the Articles of Confederation to deal with infractions of the right of free residence, ingress and egress, was reserved to the states by Article 4 of such Confederation, with a limitation inhibiting the power from being used to discriminate. The limitation as to discrimination, imposed upon the several states by Article 4 of the Articles of Confederation when dealing with infractions of the right of free residence, ingress and egress, was preserved and enforced by this article and section of the United States Constitution thus necessarily assuming the continued possession by the states of the reserved power to deal with this subject. *U. S. v. Wheeler*, (1920) 254 U. S. 281, 41 S. Ct. 133, 65 U. S. (L. ed.) —, *affirming* (*D. C. Ariz.* 1918) 254 Fed. 811.

The right to practice law in the state courts is not such a privilege or immunity as is contemplated by this section. *Keeley v. Evans*, (*D. C. Ore.* 1921) 271 Fed. 520.

Act affecting right of nonresident wife to dower.—The legislature having the power to give or withhold dower, it follows that it has the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and, if so, it has the right to provide that it may be barred by the wife's nonresidence in the state, and such an act is not violative of this section. *Ferry v. Spokane, etc., R. Co.*, (*C. C. A. 9th Cir.* 1920) 268 Fed. 117, so holding in the case of a statute providing that "A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seized." To the same effect see *Ferry v. Corbett*, (*C. C. A. 9th Cir.* 1920) 268 Fed. 120.

III. WHO ARE CITIZENS

1. Corporations as Citizens (p. 226)

To the same effect as original annotation, see *Arizona Commercial Min. Co. v. Iron Cap Copper Co.*, (1920) 236 Mass. 185, 128 N. E. 4.

IV. LEGISLATION AFFECTING PRIVILEGES AND IMMUNITIES.

7. Regulating Use of Common Property of the State

c. Prohibiting Nonresidents Grazing Cattle (p. 242)

Requiring a license to graze live stock from every person "who does not have his

principal live stock headquarters" in the state or own in fee simple land in the state is in violation of this section. *Hostettler v. Harris*, (Nev. 1921) 197 Pac. 697.

8. Right to Sue

a. In General (p. 243)

Enjoining suit in another state.—An injunction against a resident restraining him from suing in another state for the purpose of evading the exemption law of the state where he and the debtor both reside does not infringe this provision. *Kansas City Rys. Co. v. McCordle*, (Mo. 1921) 232 S. W. 464.

Vol. XI, p. 256, art. 4, sec. 2.

VIII. Absolute right to demand and correlative duty to surrender.

XIV. Writs of habeas corpus.

VIII. ABSOLUTE RIGHT TO DEMAND AND CORRELATIVE DUTY TO SURRENDER (p. 263)

To same effect as original annotation, see *Graves's Case*, (1920) 236 Mass. 493, 129 N. E. 867.

Fugitive under conviction in asylum state.

—Where a demand is properly made by the Governor of one state upon the Governor of another, for the surrender of a fugitive, the duty so to do is not absolute and unqualified, but depends upon the circumstances of each particular case. If the law of the state in which asylum has been sought has been violated by the fugitive, and he has been convicted there, and is undergoing sentence, the demands of the law thus violated may be first satisfied before obedience to the constitutional provision to surrender him arises. *State v. Saunders*, (Mo. 1921) 232 S. W. 973, holding however that the asylum state may waive its prior right and surrender the fugitive. See this case for a discussion as to the effect of the waiver as a pardon of the offense in the asylum state.

XIV. WRITS OF HABEAS CORPUS (p. 267)

Fairness of trial in demanding state.—The courts will not on habeas corpus review the issuance of a warrant for the rendition of a fugitive on the contention that by reason of local and racial prejudice in the demanding state the fugitive will not receive a fair trial. *Ex p. Ray*, (Mich. 1921) 183 N. W. 774.

Vol. XI, p. 284, art. 4, sec. 3.

I. Sovereign power over acquired territory.
II. Control of public lands.

1. Power of Congress.

- a. Power of Congress exclusive.
- c. Power to prevent unlawful occupation.

I. SOVEREIGN POWER OVER ACQUIRED TERRITORY (p. 285)

Philippine Islands.—As to the power of Congress to extend the provisions of the revenue law to the Philippine Islands it is said: "The power of Congress, in the imposition of taxes and providing for the collection thereof in the possessions of the United States, is not restricted by constitutional provision (section 8, article 1), which may limit its general power of taxation as to uniformity and apportionment when legislating for the mainland or United States proper, for it acts in the premises under the authority of clause 2, section 3, article 4, of the Constitution, which clothes Congress with power to make all needful rules and regulations respecting the territory or other property belonging to the United States." *Lawrence v. Wardell*, (C. C. A. 9th Cir. 1921) 273 Fed. 405.

II. CONTROL OF PUBLIC LANDS

1. Power of Congress

a. Power of Congress Exclusive (p. 286)

Abandonment by government.—It is broadly stated that the government cannot abandon its property without an act of Congress to that effect. However while this is the law in so far as it applies to land the title to which has been acquired or originally vested in the government, it does not apply to property in which the government by virtue of its dominant right appropriates a mere easement for purposes more or less temporary in their nature. *U. S. v. Pennsylvania, etc., Dock Co.*, (C. C. A. 6th Cir. 1921) 272 Fed. 839. In this case it was contended that evidence that the United States failed and neglected to keep a pier in repair was not evidence that would sustain a finding that the government had, in any legal sense, abandoned its property.

The court, however, declared that "in this particular case the appropriation of this submerged strip of land upon which to construct a government pier was not a taking of private property for public use for permanent purposes, but rather the mere lawful exercise of a governmental power for the common good."

e. Power to Prevent Unlawful Occupation (p. 290)

Power to prohibit obstruction of passage.—Congress may exercise the power necessary for the protection of public lands including as an incident the prosecution and punishment of persons who obstruct passage or transit over such lands. *McKelvey v. U. S.*, (C. C. A. 9th Cir. 1921) 273 Fed. 410.

Vol. XI, p. 309, art. 5.

Range of power of Congress in proposing amendments.—"An examination of Article 5 discloses that it is intended to invest Con-

gress with a wide range of power in proposing amendments. Passing a provision long since expired, it subjects this power to only two restrictions: one that the proposal shall have the approval of two thirds of both Houses, and the other excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the Senate. A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two thirds of the states Congress shall call a convention for the purpose. When proposed in either mode amendments, to be effective, must be ratified by the legislatures, or by conventions, in three fourths of the states, ‘as the one or the other mode of ratification may be proposed by the Congress.’ Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three fourths of the states shall be taken as a decisive expression of the people’s will and be binding on all.” *Dillon v. Gloss*, (1921) 256 U. S. —, 41 S. Ct. 510, 65 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1920) 262 Fed. 563.

Ratification of amendments by legislature as permitting referendum to people.—“A recent decision of the Supreme Court of the United States (*Rhode Island v. Palmer*, 253 U. S. 350, 40 S. Ct. 486, 588, 64 U. S. (L. ed.) 946, [see 1920 Supp. p. 847] has foreclosed all discussion of this question in holding that the referendum provisions of state Constitutions and statutes cannot be applied consistently with the Constitution of the United States in the ratification or rejection of amendments to that Constitution, and that the Eighteenth Amendment, prohibiting the manufacture, etc., of intoxicating liquors for beverages, is within the power to amend reserved by article 5 of the United States Constitution; in other words, that the ‘Legislatures of three-fourths of the . . . states,’ as the words are employed in that article (5), has reference to legislative bodies as they were known at the time of the adoption of the Constitution, and not by any other body or the people generally. The action of the respondents, therefore, in attempting to refer the legislative ratification of the Eighteenth Amendment to the people, was without authority, and the trial court was in error in so ruling.” *Carson v. Sullivan*, (1920) 284 Mo. 353, 223 S. W. 571.

Referendum provisions of state constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating

the requirement of this article. *State v. Morris*, (1920) 79 Okla. 89, 191 Pac. 364.

Fixing definite period for ratification by states of proposed amendment.—Congress, in proposing an amendment to the Federal Constitution, may, keeping within reasonable limits, fix a definite period for ratification by the states, and could, therefore, validly, declare, in the resolution proposing the 18th Amendment, that it should be inoperative unless ratified within seven years. *Dillon v. Gloss*, (1921) 256 U. S. —, 41 S. Ct. 510, 65 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1920) 262 Fed. 563, wherein the court said:

“Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.”

Date of consummation of ratification of amendment.—The date of the consummation of the ratification of an amendment to the Federal Constitution, which is, by its own terms, to go into effect one year after being ratified, and not the date of the proclamation of the Secretary of State, is controlling upon the question when such amendment becomes operative. *Dillon v. Gloss*, (1921) 256 U. S. —, 41 S. Ct. 510, 65 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1920) 262 Fed. 563.

Judicial notice of consummation of ratification of amendment.—The federal Supreme Court will take judicial notice of the consummation of the ratification of an amendment to the Federal Constitution. *Dillon v. Gloss*, (1921) 256 U. S. —, 41 S. Ct. 510, 65 U. S. (L. ed.) —, *affirming* (N. D. Cal. 1920) 262 Fed. 563.

Proclamation as essential to validity.—See annotation under such catch-line to Vol. IX, p. 376, sec. 205, *supra*, p. 781.

Vol. XI, p. 310, art. 6.

I. Supremacy of Federal Constitution.

1. In general.

II. Supremacy of acts of Congress and treaties.

2. Supremacy of Acts of Congress over State Laws.

a. In general.

b. Repugnancy must be direct and positive.

4. Treaties binding on the states.

a. In general.

IV. State taxation.

2. Of federal agencies.
 - a. In general.

I. SUPREMACY OF FEDERAL CONSTITUTION

1. In General (p. 312)

Modified by Eighteenth Amendment.—"The rule of statutory construction that a general provision must give way to, or be considered as controlled by the adoption of, a special one, would lead to the conclusion that the amendment, being special in its nature, would be controlling over article 6 in instances to which the provisions of the amendment are applicable." *State v. District Ct.*, (1920) 58 Mont. 684, 194 Pac. 308.

II. SUPREMACY OF ACTS OF CONGRESS AND TREATIES

2. Supremacy of Acts of Congress over State Laws

a. In General (p. 314)

The Soldiers and Sailors' Civil Relief Act (1918 Supp. p. 810) is by virtue of this provision paramount to a state moratorium act containing inconsistent provisions. *Pierrard v. Hoch*, (1920) 97 Ore. 71, 184 Pac. 494, 191 Pac. 328.

The Soldiers and Sailors' Civil Relief Act became, by virtue of this article, the law of the various states. Hence, a state statute of limitation requiring the commencement of actions on contracts within six years must be regarded as amended by such act by excluding from the period of limitation the time spent in military service. Hence, a court of such state may not acquire jurisdiction over a defendant in military service under a statute authorizing service by publication where the defendant is a resident, and the limitation period would have expired within sixty days next preceding the application for publication if the time had not been extended by the attempt to commence the action. *Erickson v. Macy*, (1921) 231 N. Y. 86, 131 N. E. 744.

b. Repugnancy Must Be Direct and Positive (p. 316)

Treaty right to hold realty; State prohibition of alien ownership.—A treaty giving the right to hold realty in states "in which foreigners shall be entitled to hold or inherit real estate" does not invalidate a state constitutional provision against the holding of real estate by aliens. *State v. Staeheli*, (1920) 112 Wash. 344, 192 Pac. 991.

4. Treaties Binding on the States

a. In General (p. 321)

To same effect as original annotation, see *Techt v. Hughes*, (1920) 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166.

Prohibiting Japanese leasing agricultural lands.—The right of Japanese to own or lease agricultural lands is declared to be withheld by the following provision of a treaty with Japan:

"The citizens or subjects of each of the

high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established." *Terrace v. Thompson*, (W. D. Wash. 1921) 274 Fed. 841, wherein it was said:

"Aliens may only come to the United States upon such conditions and terms as our government sees fit to impose. By the treaty, the right to lease real estate in the United States for agricultural purposes is withheld. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628. It might have been, by Congressional enactment, prohibited (*U. S. v. De Repentigny*, 72 U. S. [5 Wall.] 211, 18 L. Ed. 627); but, by the treaty, it was neither granted nor prohibited. It was merely withheld, which left the state free to prohibit it. The United States might have excluded all of the subjects of Japan; but rather chose to admit them, withholding the right to lease agricultural lands, thereby recognizing the right of the state to prohibit it, or regulate it. That purpose is not to be defeated by allowing the citizen landowner the broad construction of his rights under the Fourteenth Amendment for which contention is made. The citizen landowner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy."

IV. STATE TAXATION

2. Of Federal Agencies

a. In General (p. 328)

States cannot tax or otherwise impose burdens on the exclusive powers of the federal government or its instrumentalities to carry such powers into execution. *United States v. McIntosh County*, (E. D. Okla. 1921) 271 Fed. 747.

Vol. XI, p. 341, amend. 1.

Not a limitation on the states.—To same effect as original annotation, see *State v. Gastano*, (Conn. 1921) 114 Atl. 82; *State v. Mockus*, (Me. 1921) 113 Atl. 39, 14 A. L. R. 871; *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9; *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

Vol. XI, p. 345, amend. 1.

Exclusion of seditious newspapers from mail.—The constitutional freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to the protection of him who counsels and encourages the violation of the law as it exists. *U. S. v. Burleson*, (1921) 255 U. S. 407, 41 S. Ct. 352, 65 U. S. (L.

ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 26, 258 Fed. 282, holding to be valid the provisions of the Espionage Act (Fed. St. Ann. 1918 Supp. p. 132) for the exclusion of certain publications.

State statute prohibiting language discouraging enlistments, etc.—Freedom of speech or press is not denied by a state statute making it unlawful to advocate or teach that men should not enlist in the military or naval forces of the United States or of the state, or that citizens of the state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States. *Gilbert v. State*, (1920) 254 U. S. 325, 41 S. Ct. 125, 65 U. S. (L. ed.) —, *affirming* (1918) 141 Minn. 263, 169 N. W. 790.

Vol. XI, p. 349, amend. 2.

Not a limitation on the states.—To the same effect as the original annotation, see *State v. Kerner*, (1921) 181 N. C. 574, 107 S. E. 222.

Vol. XI, p. 351, amend. 4.

I. Not a limitation on the states.

III. Applicable to criminal cases only.

V. Protection of resident aliens.

VI. "Unreasonable searches and seizures."

1. Reasonableness of search a judicial question.

2. Necessity for warrant.

5. Compulsory production of books and papers.

6. Compelling an officer of a corporation to produce corporate books and papers.

11. Use of papers or property illegally obtained as evidence.

VIII. "Upon probable cause, supported by oath or affirmation."

1. Necessity of showing probable cause.

2. Affidavit must be made upon knowledge of affiant.

I. NOT A LIMITATION ON THE STATES (p. 351)

To same effect as original annotation, see *State v. District Ct.*, (1921) 59 Mont. 600, 198 Pac. 362; *Smith v. Tate*, (1921) 143 Tenn. 268, 227 S. W. 1026; *State v. Hennessy*, (Wash. 1921) 195 Pac. 211; *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9; *State v. Peterson*, (Wyo. 1920) 194 Pac. 342, 13 A. L. R. 1284.

Limitation on official acts only.—The security afforded by this amendment against unreasonable search and seizure applies solely to governmental action. It is not invaded by the unlawful acts of individuals in which the government has no part. *Burdeau v. McDowell*, (1921) 256 U. S. —, 41 S. Ct. 574, 65 U. S. (L. ed.) —, 13 A. L. R. 1159, wherein the court said:

"The 4th Amendment gives protection against unlawful searches and seizures, and, as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the 4th Amendment to secure the citizen in the right of unmolesated occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

"In the present case the record clearly shows that no official of the Federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the 4th Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned."

III. APPLICABLE TO CRIMINAL CASES ONLY (p. 353)

Prosecution by information as affected by unlawful search.—See annotation under title "Intoxicating Liquors," 1919 Supplement, p. 215, sec. 29, *supra*, p. 556.

V. PROTECTION OF RESIDENT ALIENS (p. 353)

To same effect as original annotation, see *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

VI. "UNREASONABLE SEARCHES AND SEIZURES"

1. Reasonableness of Search a Judicial Question (p. 354)

Search for purpose of obtaining evidence.—Search warrants may not be used as a means of gaining access to a man's house or office and papers, solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. *Gould v. U. S.*, (1921) 255

U. S. 298, 41 S. Ct. 261, 65 U. S. (L. ed.) —, wherein the court further held that private papers of no pecuniary value, in which the sole interest of the federal government is their value as evidence against the owner in a contemplated criminal prosecution, may not, consistently with the constitutional guaranty against unreasonable searches and seizures, be taken from the owner's house or office under a search warrant.

Secret taking.—The secret taking, without force, from the house or office of one suspected of crime, and in his absence, of a paper belonging to him, having evidential value only, by a representative of any branch or subdivision of the federal government, violates the constitutional guaranty against unreasonable searches and seizures, whether entrance to such house or office be obtained by stealth or through social acquaintance, or in the guise of a business call, and whether the owner be present or not at the time of entry. *Gould v. U. S.*, (1921) 255 U. S. 298, 41 S. Ct. 261, 65 U. S. (L. ed.) —, wherein the court said: "The prohibition of the 4th Amendment is against all unreasonable searches and seizures; and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights.

"Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment."

Unlawful search as justified by results.—An unlawful search cannot be justified by what is found. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people. *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818; *U. S. v. Bush*, (W. D. N. Y. 1920) 269 Fed. 455.

Right to search person as incident of arrest.—Officers who have properly arrested a person have a right to search his person

as an incident of the arrest. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

Where a person has been arrested for intoxication, whisky obtained on a search of his person is not obtained by "unreasonable search." *U. S. v. Murphy*, (E. D. N. Y. 1920) 264 Fed. 842, wherein the court said: "The right of an arresting officer to search a defendant under ordinary circumstances, when the defendant is under arrest, charged with a violation of law, cannot be questioned. *Wharton, Crim. Proc.* (10th Ed.) 97, 98; *Corpus Juris*, 'Arrest,' par. 74; *Weeks v. U. S.*, 232 U. S. 383, 392, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834 Ann. Cas. 1915C, 1177. This applies with peculiar force to the case of a man arrested for intoxication, who might have in his possession dangerous weapons with which he might do incalculable harm, either to himself or to others. The court is of the opinion that evidence of the character here involved, obtained in this manner, which is a part of the proof of the commission of a crime, and the possession of which is necessarily involved in the prohibited act itself, has not been obtained by 'unreasonable' search."

Where a person was arrested charged with a violation of the Trading with the Enemy Act, it was held that it was proper to seize a letter found on his person although there was no search warrant and that such seizure was not violative of his constitutional rights. *Welsh v. U. S.*, (C. C. A. 2d Cir. 1920) 267 Fed. 819.

Garage as within protection of section.—The right of the people to be secure in their houses and effects against unreasonable searches and seizures is not limited to dwelling houses but extends to a garage used personally for hire. *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818.

2. Necessity for Warrant (p. 354)

Discretion of officer as substitute for warrant.—The discretion of the officer, however good and well-intentioned; is not "a substitute in law for a search warrant issued by a proper magistrate. It is to the latter that the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked." *U. S. v. Slusser*, (S. D. 1921) 270 Fed. 818.

Taken by permission.—It is said that the protection afforded by this amendment rests on the use of force and does not cover a case where a person was cheated into giving up books. *U. S. v. Maresca*, (S. D. N. Y. 1920) 266 Fed. 713.

But a search permitted by a person after declaration by the prohibition officer, with a display of his badge, that they were there to search the premises, was not by such consent as will amount to a waiver of con-

stitutional rights, but, on the contrary, is to be attributed to a peaceful submission to officers of the law. *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818.

5. Compulsory Production of Books and Papers (p. 355)

Seizure of partnership books and papers. — Where books and papers belonging to a partnership were seized on a subpoena duces tecum served on one of the partners only, it was held that the production of such books and papers as evidence before the grand jury in a criminal prosecution against the partners was illegal as being in contravention of their rights as fixed by the Fourth and Fifth Amendments. It was further held that the petitioners, having been illegally deprived of their books and papers, were entitled to have them returned to their possession, and not only that, but to have every memorandum taken therefrom, every photographic or other copy made thereof, returned to them, so that none of the documents should be available to the United States in the prosecution of the defendants under the indictment, to the extent of furnishing evidence of their guilt. *U. S. v. Brasley*, (W. D. Pa. 1920) 268 Fed. 59.

Seizure by state officer. — The object and purpose of the Fourth Amendment is limited to federal agencies, and was designed to prevent autocratic and despotic action under color of national authority. The object and purpose thus declared does not require the extension of the rule to the acts of state officials or private persons. *U. S. v. O'Dowd*, (N. D. Ohio 1921) 273 Fed. 600, holding that evidence is not inadmissible in a federal court because seized by state officers without a search warrant.

While the court may not compel parties charged with the violation of a penal law of the United States to produce books and documents before the grand jury to be used in regard to alleged violations of the statutes of the United States by them, it has been held that the rule does not apply where the evidence was obtained by a search and seizure by a state officer before the indictment in the federal court had been returned and there is nothing to show that the sheriff acted under the authority of a federal official. *Youngblood v. U. S.*, (C. C. A. 8th Cir. 1920) 266 Fed. 795.

Extension of rule. — The principle relating to the seizure of private books and papers applies generally to search and seizure of one's house, property, and effects, and is not limited to the seizure of a man's private papers to be used as evidence against him. *U. S. v. Bush*, (W. D. N. Y. 1920) 269 Fed. 455.

6. Compelling an Officer of a Corporation to Produce Corporate Books and Papers (p. 357)

A subpoena to produce "all and sundry the invoices received by Watson, Parker &

Reese Company, a corporation, covering shipments of shoes of all grades and kinds to said corporation since July 1, 1919, including all books of account and invoices covering stocks of shoes now on hand," is not so general and sweeping as to be tantamount to an unreasonable search and seizure of the company's records. *U. S. v. Watson*, (N. D. Fla. 1920) 266 Fed. 736.

11. Use of Papers or Property Illegally Obtained as Evidence (p. 359)

Rule stated. — Papers or property illegally obtained from a person are inadmissible as evidence against him if proper objection is raised to their admission. *U. S. v. Bush*, (W. D. N. Y. 1920) 269 Fed. 455; *U. S. v. Slusser*, (S. D. Ohio 1921) 270 Fed. 818; *In re Kosopud*, (N. D. Ohio 1920) 272 Fed. 330; *U. S. v. O'Dowd*, (N. D. Ohio 1921) 273 Fed. 600; *State v. Hennessy*, (Wash. 1921) 195 Pac. 211.

To permit the government to use evidence gained upon an illegal search would be to compel defendant to give evidence against himself within the meaning of the Fifth Amendment. *U. S. v. Kelih*, (S. D. Ill. 1921) 272 Fed. 484, wherein the court said: "It is further contended, because the Volstead Act provides that there shall be no property rights in illicit liquors, or apparatus for their manufacture, that therefore the property in question does not come within the Fourth and Fifth Amendments. The reason for a return of property in all cases of this character is not based upon property rights so much as the personal security afforded by the Fifth Amendment, which relieves a man from being compelled to be a witness against himself in a criminal case. To permit the government in this case to retain possession of the property described in the motion, and use it in the trial of the case before the jury, would be in legal effect to require this defendant to be a witness against himself in a criminal case, which is clearly prohibited by the Constitution."

But in the case of an automobile in which whisky was being transported the court in *U. S. v. Fenton*, (D. C. Mont. 1920) 268 Fed. 221, said: "The auto and whisky, by virtue of the National Prohibition Act (1919 Supp. 197), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have."

Where the affidavit and search warrant are insufficient, acquiescence in the search by the

wife of the accused cannot be regarded as binding on him, so that evidence obtained on such search may be used against him, in the absence of proof that he authorized her to consent. *U. S. v. Rykowiak*, (S. D. Ohio 1920) 267 Fed. 866.

Use of papers unlawfully seized by individual.—Constitutional guaranties against unreasonable searches and seizures and self-incrimination will not be violated if the Federal prosecuting authorities to whom incriminating papers stolen by private persons have been delivered, retain them with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned, the government having had no part in the wrongful taking. *Burdeau v. McDowell*, (1921) 256 U. S. —, 41 S. Ct. 574, 65 U. S. (L. ed.) —, 13 A. L. R. 1159, wherein the court said:

"The exact question to be decided here is: May the government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a grand jury, where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?

"We know of no constitutional principle which requires the government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of Federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.

"The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."

Use of property legally obtained as evidence of another crime.—Property seized under a valid search warrant may be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit for the warrant as having been committed by him. *Gould v. U. S.*, (1921) 255 U. S. 298, 41 S. Ct. 261, 65 U. S. (L. ed.) —, wherein the court said: "It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is

made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawfully obtained by the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law; and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence."

Property seized on warrant based on insufficient affidavits.—Where search warrants were not based on sufficient affidavits the property seized may be used as evidence. *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

Plenary power of federal courts.—The federal courts are not clothed with plenary power to investigate on motion all unconstitutional searches and seizures without regard to whether or not they bear any relation to proceedings pending in such courts. Accordingly it has been held that it was proper to refuse an application for an order to government officials to return books and papers alleged to have been unlawfully taken, so as to prevent their use as evidence in deportation proceedings, when none of the officers named were concerned in or affected by any suit, action or proceeding in the federal court. *Weinstein v. Atty.-Gen.*, (C. C. A. 2d Cir. 1921) 271 Fed. 673.

Timeliness of objection to use of illegally obtained property.—If, in the progress of a criminal trial, it becomes probable that there has been an unconstitutional seizure of the papers of the accused, of evidential value only, it is the duty of the trial court to entertain an objection to the admission of such papers in evidence, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. *Gould v. U. S.*, (1921) 255 U. S. 298, 41 S. Ct. 261, 65 U. S. (L. ed.) —, wherein it was held that an objection to the introduction in evidence in a criminal case of a paper surreptitiously taken from the office of the accused by a representative of the federal government is in time, though not made before trial, where such objection was made promptly upon the first notice the accused had that the government was in possession of the paper. The court said: "It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and

therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. In the case we are considering, the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied; and that, on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendants."

The rule that courts will not stop the progress of the trial of a criminal case to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained, has no application where it becomes apparent during the trial that there has been an unconstitutional seizure of property of the accused, and the court should exclude such property and any testimony relating thereto, given by the government agents who made the unlawful seizure, on motion of the accused, made after both property and testimony were introduced in evidence against him. *Amos v. U. S.*, (1921) 255 U. S. 313, 41 S. Ct. 266, 65 U. S. (L. ed.) —. In that case the facts were stated as follows: "Coleman and Rector were called as witnesses by the government and testified: that, as deputy collectors of internal revenue, they went to defendant's home, and not finding him there, but finding a woman who said she was his wife, told her that they were revenue officers, and had come to search the premises 'for violations of the revenue law;' that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not quite a half-pint of illicitly distilled whisky, which they called 'blockade whisky;' and that they then went into the home of defendant, and, on searching, found two bottles under the quilt on the bed, one of which contained a full quart and the other a little over a quart of illicitly distilled whisky. The government introduced in evidence a pint bottle containing whisky, which the witness Coleman stated 'was not one of the bottles found by him, but that the whisky contained

in the same was poured out of one of the two bottles that had been found in defendant's house on the bed under the quilt, as stated.' On cross-examination both witnesses testified that they did not have any warrant for the arrest of the defendant, nor any search warrant to search his house, and that the search was made during the daytime, in the absence of the defendant, who did not appear on the scene until after the search had been made." The court said: "The answer of the government to the claim that the trial court erred in the two rulings we have described is, that the petition for the return of defendant's property was properly denied because it came too late when presented after the jury was impaneled, and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of defendant's home had been described, was justified by the rule that, in the progress of the trial of criminal cases, courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained."

"Plainly, the questions thus presented for decision are ruled by the conclusions this day announced in *No. 250, Gouled v. United States*.

"There is nothing in the record to indicate that the allegations of the petition for the return of the property, sworn to by the defendant, were in any respect questioned or denied, and the report of the examination and appropriate cross-examination of the government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon the attention of the court by the government itself. The petition should have been granted; but, it having been denied, the motion should have been sustained."

Return of papers and property.—When documents or papers are unlawfully seized, they must be returned, and with them all copies taken while the officers retained their illegal possession. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578, wherein it appeared that the papers were seized under a warrant based on information obtained at the time of making an unlawful search.

Although the government may not be able to avail itself of information acquired by a search and seizure under the National Prohibition Act, because the search and seizure was unwarranted, yet some of the property seized being illicit and other parts of it having been used in the illicit trade or manufacture, and therefore being contraband, will not be returned to the owner. *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

Where in the case of a petition for the return of papers claimed to have been ille-

gally seized the issue of consent to the seizures is raised the trial of such issue should precede any order of the court for a return. *U. S. v. Kraus*, (S. D. N. Y. 1921) 270 Fed. 578.

Where the members of a voluntary organization are on trial and not the organization, unlawful seizure of the outlaw property of the organization does not infringe any rights of the individual defendants and there is no error in impounding the property and overruling a motion for its return. *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795; *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

Impounding property seized on warrant afterwards vacated.—When books and papers have been seized on a search warrant which was afterwards vacated by the commissioner who issued it a motion to impound them will be denied. *U. S. v. Porazzo*, (E. D. N. Y. 1921) 272 Fed. 276.

VIII. "UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION"

1. *Necessity of Showing Probable Cause* (p. 360)

"A search warrant may issue only upon probable cause, supported by oath or affirmation. The question of probable cause must be submitted to the committing magistrate, so that he may exercise his judgment as to the sufficiency of the ground for believing the accused person guilty." *U. S. v. Borkowski*, (S. D. Ohio 1920) 268 Fed. 408.

"No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises, but facts—which, when the law is properly applied to them, tend to establish the necessary legal conclusions, or facts which, when the law is properly applied to them, tend to establish probable cause for belief that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser." *U. S. v. Kelih*, (S. D. Ill. 1921) 272 Fed. 484.

2. *Affidavit Must be Made upon Knowledge of Affiant* (p. 361)

To same effect as original annotation, see *U. S. v. Michalski*, (W. D. Pa. 1919) 265 Fed. 839.

Affidavit by officer upon information.—In construing section 3462 of the Revised Statutes [4 Fed. Stat. Ann. (2d ed.) p. 323] it has been said: "The requirements of section 3462 relating to the showing to be made as a basis for issuing the warrant do not meet the mandatory provisions of the Constitution. In the language of Attorney General Knox, the section 'does not state all of that which must be stated in the application' for the search warrant. 24 Op. Attys. Gen. 685, 688. In other words, the constitutional provision is paramount. The showing under oath essential upon which to predicate the issuance of the warrant should state pertinent facts from which the magistrate may determine the existence of probable cause, or there should be a hearing by him with that purpose in view. Probable cause is a legal conclusion, which is for the magistrate to deduce from the facts stated, and the mere assertion under oath that the affiant believed and does believe that a fraud upon the revenue has been or is being committed is entirely insufficient upon which to predicate the finding of probable cause." *U. S. v. Pitotto*, (D. C. Ore. 1920) 267 Fed. 603.

Vol. XI, p. 363, amend. 5.

I. Not a limitation on the states.

IV. Application to aliens.

1. In general.

XIII. Courts-martial.

1. In general.

I. NOT A LIMITATION ON THE STATES (p. 363)

To same effect as first paragraph of original annotation see *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

IV. APPLICATION TO ALIENS

1. In General (p. 365)

To same effect as original annotation, see *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

XIII. COURTS-MARTIAL

1. In General (p. 371)

Trial of military prisoners.—Trial by court-martial for murder committed by persons subject to military law does not infringe the constitutional guaranties as to jury trial and presentment or indictment by grand jury. *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —.

Vol. XI, p. 374, amend. 5.

I. Not a limitation on the states.

IV. What constitutes jeopardy.

1. In general.

V. Application of clause to offenses.

3. Identical offense.

4. Criterion of identity of crimes.

I. NOT A LIMITATION ON THE STATES (p. 375)

To same effect as original annotation, see *Com. v. Leventhal*, (1920) 236 Mass. 516, 128 N. E. 864; *Chelsea v. Treasurer*, (Mass. 1921) 130 N. E. 397; *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

IV. WHAT CONSTITUTES JEOPARDY

1. In General (p. 378)

A person is twice put in jeopardy if he is put on trial a second time for an offense of which he has once been acquitted or convicted. *Bens v. U. S.*, (C. C. A. 2d Cir. 1920) 266 Fed. 152.

V. APPLICATION OF CLAUSE TO OFFENSES

3. Identical Offense (p. 380)

The offenses must be identical in order to sustain a plea of former conviction or acquittal. *U. S. v. Bostow*, (S. D. Ala. 1921) 273 Fed. 535.

4. Criterion of Identity of Crimes (p. 380)

"The test of identity of offenses, when double jeopardy is claimed, is whether the same evidence is required to sustain them. If not, then the fact that both charges relate to and grow out of one transaction does not make a single offense, where two are defined by the statutes." *U. S. v. Sacein Rouhana Farhat*, (S. D. Ohio 1920) 269 Fed. 33.

Vol. XI, p. 390, amend. 5.

IV. Who entitled to protection.

1. All persons summoned as witnesses.

2. Corporations.

XII. Absolute immunity must be given.

4. Grant of immunity in particular statutes.

- b. Bankruptcy Act of 1898.

XIII. When may not be compelled to testify.

3. Requiring production of private books and papers.

- a. In general.

IV. WHO ENTITLED TO PROTECTION

1. All Persons Summoned as Witnesses (p. 391)

Confession obtained by compulsion.—A confession may be regarded as obtained by compulsion and therefore in violation of this amendment though the accused was warned as to his rights. *U. S. v. Kallas*, (W. D. Wash. 1921) 272 Fed. 742.

2. Corporations (p. 392)

To same effect as original annotation, see *Nekoosa-Edwards Paper Co. v. News Pub. Co.*, (Wis. 1921) 182 N. W. 919.

XII. ABSOLUTE IMMUNITY MUST BE GIVEN

4. Grant of Immunity in Particular Statutes
 - b. Bankruptcy Act of 1898 (p. 400)

To same effect as original annotation, see *Arndstein v. McCarthy*, (1920) 254 U. S. 71, 379, 41 S. Ct. 26, 136, 65 U. S. (L. ed.) —.

XIII. WHEN MAY NOT BE COMPELLED TO TESTIFY

3. Requiring Production of Private Books and Papers

- a. In General (p. 402)

Use of papers unlawfully seized by individual.—The use in evidence against an accused of papers unlawfully seized by an individual and turned over to the government officer does not violate this provision: *Burdeau v. McDowell*, (1921) 256 U. S. —, 41 S. Ct. 574, 65 U. S. (L. ed.) —, 13 A. L. R. 1159. See further on the subject of the use of books and papers unlawfully seized as evidence, *supra*, annotation under the Fourth Amendment, at p. 837.

Vol. XI, p. 408, amend. 5.

- I. Not a limitation on the states.

- II. Comparison with Fourteenth Amendment.

- IV. Restraint on executive, legislative and judicial departments.

- V. Application to District of Columbia.

- VI. Operation in acquired territory.

- IX. What constitutes due process of law.

1. In general.

11. Under military law.

- X. Deprivation of life and liberty.

10. Right of appeal.

- XI. Deprivation of property.

2. Power of taxation.

- a. In general.

I. NOT A LIMITATION ON THE STATES (p. 411)

To same effect as first paragraph of original annotation, see *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

II. COMPARISON WITH FOURTEENTH AMENDMENT (p. 411)

"Due process of law."—By the simplest and plainest rules of construction, the words "due process of law" must have the same meaning in the Fifth and the Fourteenth Amendments. *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683.

It seems reasonably clear that the "due process of law" provision of the Fifth Amendment is broad enough in its scope and purpose to include the "equal protection of the laws," which no state may deny to any person under the provisions of the Fourteenth Amendment. *U. S. v. Yount*, (W. D. Pa. 1920) 267 Fed. 861.

IV. RESTRAINT ON EXECUTIVE, LEGISLATIVE AND JUDICIAL DEPARTMENTS (p. 412)

Effect of state of war.—The mere existence of a state of war does not suspend or change the operation upon the power of Congress of the guaranties and limitations of U. S. Const., 5th and 6th Amendments, as to delegating legislative power to courts and juries, penalizing indefinite acts, and depriving citizens of the right to be informed of the nature and cause of accusations against them. *U. S. v. L. Cohen Grocery Co.*, (1921) 255 U. S. 81, 41 S. Ct. 298, 65 U. S. (L. ed.) —, 14 A. L. R. 1045, *affirming* (E. D. Mo. 1920) 264 Fed. 218. See to the same effect *Tedrow v. A. T. Lewis, etc., Co.*, (1921) 255 U. S. 98, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Kinnane v. Detroit Creamery Co.*, (1921) 255 U. S. 102, 41 S. Ct. 304, 65 U. S. (L. ed.) —; *Weed v. Lockwood*, (1921) 255 U. S. 104, 41 S. Ct. 305, 65 U. S. (L. ed.) —; *G. S. Willard Co. v. Palmer*, (1921) 255 U. S. 106, 41 S. Ct. 305, 65 U. S. (L. ed.) —; *Oglesby Grocery Co. v. U. S.*, (1921) 255 U. S. 108, 41 S. Ct. 306, 65 U. S. (L. ed.) —. See also *Kennington v. Palmer*, (1921) 255 U. S. 100, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Weeds v. U. S.*, (1921) 255 U. S. 109, 41 S. Ct. 306, 65 U. S. (L. ed.) —.

V. APPLICATION TO DISTRICT OF COLUMBIA (p. 412)

To same effect as original annotation; see *Willson v. McDonnell*, (App. Cas. D. C. 1919) 265 Fed. 432; *Groot v. Reilly*, (App. Cas. D. C. 1919) 266 Fed. 1008.

Rent legislation.—The emergency growing out of the World War clothed the letting of buildings in the District of Columbia with a public interest so great as to justify, despite this amendment, such temporary regulation as was made by the Act of October 22, 1919, tit. 2, § 109 (to remain in force two years unless sooner repealed), giving a tenant the privilege of holding over after the expiration of the lease, subject to regulation by the commission appointed by that act, so long as he pays the rent and performs the conditions as fixed by the lease, or as modified by the commission. *Block v. Hirsh*, (1921) 256 U. S. —, 41 S. Ct. 458, 65 U. S. (L. ed.) — (*reversing* (1920) 50 App. Cas. (D. C.) 56, 267 Fed. 614, 11 A. L. R. 1238; (1920) 50 App. Cas. (D. C.) 73, 267 Fed. 631), wherein it was further held that temporary emergency legislation like the above act was not invalid merely because landlords and tenants were deprived by it of a trial by jury on the right to possession of the land.

VI. OPERATION IN ACQUIRED TERRITORY (p. 412)

Applicable to Virgin Islands.—The right not to be "deprived of life, liberty or property, without due process of law" was engrafted by the Organic Act of Congress on the Danish laws of the Virgin Islands. *Soto v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 628.

IX. WHAT CONSTITUTES DUE PROCESS OF LAW

1. In General (p. 414)

The words "due process of law."—The "due process of law," by which Congress is limited in the Fifth Amendment, and the states by the Fourteenth Amendment, is equivalent to the "law of the land," and is intended to protect the citizen against arbitrary action, and secure to all persons equal and impartial justice under the law. *U. S. v. Yount*, (W. D. Pa. 1920) 267 Fed. 861.

Arbitrary classification in criminal statute.—Whenever the government undertakes to deprive a person of his liberty, as a punishment for crime, it must do it by virtue of a valid, constitutional statute defining the crime, and such a statute is required by the "due process" clause of this amendment. The statute upon which a person is deprived of his liberty is a part of the process of law which is used against him, and it must be "due process of law." Hence, an arbitrary classification in such a statute by Congress is repugnant to the "due process" clause of this amendment. *U. S. v. Armstrong*, (D. C. Ind. 1920) 265 Fed. 683.

11. Under Military Law (p. 418)

Trial of military prisoners.—To subject military prisoners, confined in a military prison under previous court-martial sentences which involved their discharge as soldiers, to trial by court-martial for offenses committed during such imprisonment, does not involve a violation of the guaranty of this amendment. *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —.

X. DEPRIVATION OF LIFE AND LIBERTY

10. Right of Appeal (p. 428)

A review by an appellate court of a judgment of conviction is not a requirement in affording a defendant the due process of law that is secured to him by the constitution. *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795. The court further said: "In England writs of error in criminal cases are of comparatively recent origin. In our country, though writs of error within certain limitations have been allowed from the beginning, the grant has been of grace or expediency, not of constitutional demand. In the court of first instance the defendant is given his day in court, his trial by jury, his opportunity to confront opposing witnesses, and all other elements of due process of law. And if Congress might have withheld entirely the privilege of review, it is self-evident that Congress may at any time reduce the previously granted privilege. From recent legislation (40 Stat. pt. 1, p. 1181) we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from

other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial." See also *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

XI. DEPRIVATION OF PROPERTY

2. Power of Taxation

a. In General (p. 433)

War taxation.—As to the power to tax for war purposes it has been said: "In critical periods of a nation's life the power to tax may be necessary to preserve it, and perhaps there is no limit beyond which it may not subject the property within its reach to contribution. I need not go so far as that in this case; it is enough that the powers of Congress are to be interpreted, not by dialectical ingenuity, but by current practices of nations in the exercise of similar powers. It is true that these powers are limited, and that those limits must be observed, however little they circumscribe the analogous powers of other Legislatures. Yet when the question is of the interpretation of those broad counsels of moderation contained in the Fifth Amendment, we must interpret the limitations themselves with an eye to the practices which have become tolerated elsewhere among civilized nations. Were it not so, we should be limited forever to the political usages of 1789, and those amendments which were intended to protect the individual against extravagant or invidious discrimination would become a strait-jacket upon the nation's freedom." *Towne v. McElligott*, (S. D. N. Y. 1921) 274 Fed. 960.

Vol. XI, p. 447, amend. 5.

I. Not a limitation on the states.

IV. What constitutes a taking.

1. In general.

6. Acts not directly encroaching on private property.

21. Removal or alteration of bridge as an obstruction to navigation.

36. Consequential injury.

a. In general.

I. NOT A LIMITATION ON THE STATES (p. 449)

To same effect as original annotation, see *Joslin Mfg. Co. v. Clarke*, (R. I. 1921) 114 Atl. 185; *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

IV. WHAT CONSTITUTES A TAKING

1. In General (p. 452)

No distinction between "requisition" and "condemnation."—In a case where it was claimed by the government that there was a distinction between "requisition" and "condemnation," the court said: "The language of the Fifth Amendment to the Constitution of the United States is:

"Nor shall private property be taken for public use without just compensation."

"Nothing is said about 'requisition' or 'condemnation'; the word used is 'taken.' The result of either condemnation or requisition is a taking, and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition or by condemnation; and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called 'eminent domain,' which allows the interest of the individual to be subordinated to that of the public and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a 'requisition' and a 'condemnation,' so far as the obligation of the United States is concerned, to award to the owner just compensation." *Filbin Corp. v. U. S.*, (E. D. S. C. 1920) 266 Fed. 911.

Price fixing under war legislation.—Where a coal company has contracted to furnish coal at an agreed price per ton to certain steamship companies, and the government, under its war power, has required the said coal company to furnish such coal to other parties at a lower price per ton fixed by the Fuel Administration, it is not a taking under this amendment, and the United States is not liable for the difference in price. *Morrisdale Coal Co. v. U. S.*, (1920) 55 Ct. Cl. 310. To same effect, see *Pine Hill Coal Co. v. U. S.*, (1920) 55 Ct. Cl. 433.

Where the government makes a proposal to a company to furnish a stated amount of copper before a certain date, at a specified price per pound, and the proposal is voluntarily accepted, the company cannot recover for a taking under eminent domain for a part of said copper delivered after the expiration of the contract period, although the President has fixed a higher price for copper subsequent thereto while the copper for which claim is made was being delivered. *American Smelting, etc., Co. v. U. S.*, (1920) 55 Ct. Cl. 466.

6. Acts Not Directly Encroaching on Private Property (p. 453)

Requiring railroad to maintain highway at crossing for full width of highway does not take private property without compensation. *Chicago, etc., R. Co. v. Taylor*, (1920) 79 Okla. 142, 192 Pac. 349.

21. Removal or Alteration of Bridge as an Obstruction to Navigation (p. 459)

Injury to pier in improving river.—Where the United States in improving a navigable river incidentally damages a pier protecting a bridge so as to require considerable repair or rebuilding, there is no taking under the Constitution, and the United States is not liable for such damage. *Keokuk, etc., Bridge Co. v. U. S.*, (1920) 55 Ct. Cl. 480.

36. Consequential Injury

a. In General (p. 464)

To same effect as original annotation, see *Sanguinetti v. U. S.*, (1920) 55 Ct. Cl. 107, holding that where government works for the improvement of waterways have caused deposits of debris on private lands, requiring labor to remove; where trees have been washed out and other damage done; and a house rendered inaccessible during flood periods, the injury amounts to a depreciation or consequential damages, and not to an appropriation of the property by the United States under this amendment; but that where the facts clearly show a damage to private property equivalent to a taking under eminent domain, but without an expressed intention on the part of the Government to appropriate such property, it is a taking within this amendment.

Vol. XI, p. 474, amend. 6.

II. Limited to trials in federal courts.

1. In general.

2. Applicable to District of Columbia and territories.

III. "In all criminal prosecutions."

3. Limited to subjects of indictment under Fifth Amendment.

IV. Right to a speedy trial.

VI. "District wherein the crime shall have been committed."

1. In general.

VII. Right to be informed of nature of accusation.

VIII. Right to be confronted with witnesses.

1. The right is without exception.

X. Assistance of counsel.

II. LIMITED TO TRIALS IN FEDERAL COURTS

1. In General (p. 475)

To same effect as original annotation, see *State v. Gaetano*, (Conn. 1921) 114 Atl. 82; *Raine v. State*, (1920) 143 Tenn. 163, 226 S. W. 189; *U. S. v. Wolters*, (S. D. Tex. 1920) 268 Fed. 69; *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

Trial by court-martial.—Trial by court-martial for murder committed by persons subject to military law does not infringe the constitutional guaranties as to jury trial and presentment or indictment by grand jury. *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 S. Ct. 224, 65 U. S. (L. ed.) —.

The guaranties provided by amendment 5 and this amendment do not apply to the trial of a person before a court-martial on the charge of being a spy. *U. S. v. McDonald*, (E. D. N. Y. 1920) 265 Fed. 754. The court said: "While it is true that, in the case at bar, the relator was charged with a criminal offense by indictments of the federal courts, this arrest is not in pursuance of any intention seeking to bring the

defendant to justice on any of the charges for which he has been indicted. He is now being charged with the offense of being a spy. The guaranties of the Constitution apply only where a crime is charged. Crime means offense against the government, as understood when the Constitution was adopted. There was no such crime known to the law as that of a spy then. In the *Matter of Martin*, 45 Barb. (N. Y.) 142, where a military prisoner, charged with being a spy, was released on a writ of habeas corpus by reason of the fact that after the offense he had returned to the enemy lines, the court said:

"The offense of being a spy is not known to the civil or statutory law, and is one of a purely military character, cognizable only in time of war, and before a tribunal having its life, existence, and authority created, continued, and defined by purely military power."

2. Applicable to District of Columbia and Territories (p. 476)

Virgin Islands.—The right of "an accused to be confronted with the witnesses against him" was engrafted by the Organic Act of Congress on the Danish laws of the Virgin Islands. *Soto v. U. S.*, (C. C. A. 3d Cir. 1921) 273 Fed. 628.

III. "IN ALL CRIMINAL PROSECUTIONS"

3. Limited to Subjects of Indictment Under Fifth Amendment (p. 478)

This amendment is not limited in its application to citizens, but applies generally to all persons within the jurisdiction of the United States. *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

IV. RIGHT TO A SPEEDY TRIAL (p. 479)

Insufficient time for preparation.—Allowing but one day for preparation on a rule to vacate the suspension of a sentence and refusing a continuance to obtain an absent witness do not violate this provision. *State v. Stauss*, (1920) 114 S. C. 445, 103 S. E. 769.

VI. "DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED"

1. In General (p. 482)

Indictment and proof.—Under this amendment which guarantees to an accused the right of trial by a jury "of the state and district wherein the crime shall have been committed" the venue is as material as any other allegation in the indictment, and the burden to prove it rests on the government. *Moran v. U. S.*, (C. C. A. 6th Cir. 1920) 264 Fed. 768.

State statute providing for prosecution of bigamy committed without the state.—A state statute providing that a married person who goes out of the state and contracts a

second marriage with the intention to return to the state, shall be liable to prosecution for bigamy upon his return to the state in the same manner as if the second marriage were solemnized within the state, does not violate the provisions of this amendment. *State v. Bacon*, (Del. 1920) 112 Atl. 682.

VII. RIGHT TO BE INFORMED OF NATURE OF ACCUSATION (p. 485)

Statute indefinite as to acts constituting crime.—Congress, in attempting, as it did in the Lever Act of August 10, 1917, § 4, as re-enacted in the Act of October 22, 1919, § 2, [1919 Supp. 60] to punish criminally any person who wilfully made "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," violated this and the Fifth Amendments, which require an ascertainable standard of guilt, fixed by Congress rather than by courts and juries, and secure to accused persons the right to be informed of the nature and cause of accusations against them. *U. S. v. L. Cohen Grocery Co.*, (1921) 255 U. S. 81, 41 S. Ct. 298, 65 U. S. (L. ed.) —, 14 A. L. R. 1045, *affirming* (E. D. Mo. 1920) 264 Fed. 218. See to the same effect *Tedrow v. A. T. Lewis, etc., Co.*, (1921) 255 U. S. 98, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Kinnane v. Detroit Creamery Co.*, (1921) 255 U. S. 102, 41 S. Ct. 304, 65 U. S. (L. ed.) —; *Weed v. Lockwood*, (1921) 255 U. S. 104, 41 S. Ct. 305, 65 U. S. (L. ed.) —; *G. S. Willard Co. v. Palmer*, (1921) 255 U. S. 106, 41 S. Ct. 305, 65 U. S. (L. ed.) —; *Ogleby Grocery Co. v. U. S.*, (1921) 255 U. S. 108, 41 S. Ct. 306, 65 U. S. (L. ed.) —. See also *Kennington v. Palmer*, (1921) 255 U. S. 100, 41 S. Ct. 303, 65 U. S. (L. ed.) —; *Weeds v. U. S.*, (1921) 255 U. S. 109, 41 S. Ct. 306, 65 U. S. (L. ed.) —.

VIII. RIGHT TO BE CONFRONTED WITH WITNESSES

1. *The Right Is Without Exception* (p. 488)

Purpose of provision.—This constitutional provision was designed to incorporate in a way not subject to legislative change the common-law principles in reference to criminal evidence to the effect that primarily such evidence—"consists in facts within the personal knowledge of the witness, to be testified to in open court in the presence of the accused." *State v. Gaetano*, (Conn. 1921) 114 Atl. 82.

X. ASSISTANCE OF COUNSEL (p. 492)

Where the defendant attempted to put in an appearance, and presented a praecipe, signed by its counsel, for this purpose, which paper the clerk refused to file without the payment of the required fee, such refusal was not a denial of the constitutional right of a person "to have the assistance of counsel for his defense." *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1916) 268 Fed. 697.

Vol. XI, p. 494, amend. 7.

I. To what courts applicable.

1. Not applicable to actions in state courts.

IV. In suits at common law.

3. Matters of fact in equity proceedings.

a. In general.

4. Adequate remedy at law.

12. Condemnation proceedings.

VI. Right of trial by jury.

5. Adoption of state remedies.

a. In general.

I. TO WHAT COURTS APPLICABLE

1. *Not Applicable to Actions in State Courts* (p. 495)

To same effect as first paragraph of original annotation see *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

IV. IN SUITS AT COMMON LAW

3. *Matters of Fact in Equity Proceedings*

a. In General (p. 499)

Section 492 of the Revised Statutes [7 Fed. Stat. Ann. (2d ed.) 326] giving the court power to assess damages in patent infringement cases is not violative of this amendment. *Filer, etc., Co. v. Diamond Iron Works*, (C. C. A. 7th Cir. 1921) 270 Fed. 489.

4. *Adequate Remedy at Law* (p. 500)

Compelling pleading of counterclaim in equity.—The court has no power, to compel a defendant to plead a purely legal cause of action as a counterclaim to a suit in equity, and rule 30 was never so intended. To do so would be in conflict with this amendment. *American Surety Co. v. American Mills Co.*, (C. C. A. 2d Cir. 1921) 273 Fed. 67.

12. *Condemnation Proceedings* (p. 503)

A proceeding to ascertain just compensation to be made for property taken for public purposes is a proceeding at common law to which the right of trial by jury necessarily adheres. *Filbin Corp. v. U. S.*, (E. D. S. C. 1920) 266 Fed. 911.

VI. RIGHT OF TRIAL BY JURY

5. *Adoption of State Remedies*

a. In General (p. 506)

A restricted new trial where the whole case is not resubmitted to the jury is beyond the power of a federal court to order. *McKeon v. Central Stamping Co.*, (C. C. A. 3d Cir. 1920) 264 Fed. 385.

Vol. XI, p. 518, amend. 8.

I. Limitation on powers of federal government only.

IV. Excessive fines, cruel and unusual punishment.

I. LIMITATION ON POWERS OF FEDERAL GOVERNMENT ONLY (p. 518)

To same effect as first paragraph of original annotation see *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

IV. EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENT (p. 519)

Statute not limiting penalty.—A statute making criminal syndicalism a felony but not fixing the penalty does not violate the prohibition of cruel and unusual punishment, where another statute provides that in such cases the penalty shall be not more than ten years' imprisonment and a fine of not more than five thousand dollars. *State v. Hennessy*, (Wash. 1921) 195 Pac. 211.

Making bootlegging a felony while other forms of unlawful sale of liquor are punishable as misdemeanors only does not violate this section. *State v. Hessel*, (1920) 112 Wash. 53, 191 Pac. 637.

Vol. XI, p. 522, amend. 9.

Not a limitation on the states.—To same effect as first paragraph of original annotation see *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

Vol. XI, p. 523, amend. 10.

I. General reserved powers.

III. Police power.

1. In general.

I. GENERAL RESERVED POWERS (p. 523)

"Except as limited by the Constitution of the United States and the laws made in response thereto, it is within the power of the state to determine the rights to be recognized or conferred by the state constitution, and to determine how and when and under what circumstances these rights may be asserted." *Wight v. Police Jury*, (C. C. A. 5th Cir. 1919) 264 Fed. 705.

"This amendment must be construed to mean that, in framing the Constitution, the sovereign people of the several states ceded to the general government certain designated powers, leaving all other rights and powers, such as are necessary to maintain our dual system of government, to the states respectively and to the people." *George v. Bailey*, (W. D. N. C. 1921) 274 Fed. 639.

III. POLICE POWER

1. In General (p. 525)

State statute making illegal teachings tending to hamper enlistments and prosecution of war.—Congressional power is not usurped nor encroached upon by the enactment by a state of a statute making it unlawful to advocate or teach that men should not enlist in the military or naval forces of the United States or of the state, or that

citizens of the state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States. Such statute renders a service to the people of the state, and may even be supported as a simple exercise of the police power to preserve the peace of the state. *Gilbert v. Minnesota*, (1920) 254 U. S. 325, 41 S. Ct. 125, 65 U. S. (L. ed.) —, *affirming* (1918) 141 Minn. 263, 169 N. W. 790.

Vol. XI, p. 530, amend. 11.

IV. Suit in admiralty.

XI. State as a nominal or real party.

XII. Suits against state officers.

10. Injunctions against state officers.

IV. SUIT IN ADMIRALTY (p. 533)

The admiralty and maritime jurisdiction is not exempt from the operation of the rule that a state may not be sued in personam without its consent by individuals, whether its own citizens or not. *Matter of New York*, (1921) 256 U. S. —, 41 S. Ct. 588, 65 U. S. (L. ed.), wherein it was held that the immunity of a state from suit without its consent prevents a court of admiralty, in which libels have been filed against certain tugs for damages received by their tows upon the Erie canal, from proceeding against the superintendent of public works of the state of New York, who was operating the tugs when the disaster occurred, under charter parties authorized by the state laws, where, the charters having since expired, at no time has any res belonging to the state or to such officer, or in which they claim any interest, been attached or brought under the jurisdiction of the court, nor is any relief asked against such officer individually, the proceedings against him being strictly in his capacity as a public officer. The court said: "Nor is the admiralty and marine jurisdiction exempt from the operation of the rule. It is true the Amendment speaks only of suits in law or equity; but this is because, as was pointed out in *Hans v. Louisiana*, 134 U. S. 1, 10-17, 33 L. ed. 842, 845-848, 10 Sup. Ct. Rep. 504, the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440, which happened to be a suit at law, brought against the state by a citizen of another state, the decision turning upon the construction of that clause of § 2 of art. 3 of the Constitution, establishing the judicial power in cases in law and equity between a state and citizens of another state; from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case. In *Hans v. Louisiana*, supra (p. 15), the court demonstrated the impropriety of construing the Amendment so as to leave it open for citizens to sue their own state in the Federal courts; and it seems to us equally clear that it cannot with propriety be

construed to leave open a suit against a state in the admiralty jurisdiction by individuals, whether its own citizens or not.

"Among the authorities to which we are referred is Mr. Justice Story, who, in his *Commentaries on the Constitution* (1st ed. § 1683; 5th ed. § 1639), stated that it had been doubted whether the Amendment extended to cases of admiralty and maritime jurisdiction where the proceeding was in rem, and not in personam; and whose doubt was supported by a declaration proceeding from Mr. Justice Washington at the circuit. *United States v. Bright*, (1809) *Brightly N. P.* 19, 25, note; *Fed. Cas. No. 14,647*; 3 *Am. L. J.* 197, 225. But the doubt was based upon considerations that were set aside in the reasoning adopted by this court in *Hans v. Louisiana*."

To the same effect as the above case see *Matter of New York*, (1921) 256 U. S. —, 41 S. Ct. 592, 65 U. S. (L. ed.).

XI. STATE AS A NOMINAL OR REAL PARTY (p. 535)

Rule stated.—To the same effect as the original annotation see *Matter of New York*, (1921) 256 U. S. —, 41 S. Ct. 588, 65 U. S. (L. ed.) —.

XII. SUITS AGAINST STATE OFFICERS

10. *Injunction Against State Officers*

The federal courts have no power to enjoin a suit by the state in its sovereign capacity under the Eleventh Amendment to the Constitution of the United States. The state can only act through officers and agents, and where such officers and agents are authorized by a valid law to institute suits in the name of the state, and such suit is brought, the suit to enjoin such officers from proceeding with such suits is a suit against the state which is prohibited by this amendment, and a writ of injunction issued in such case is void for want of jurisdiction in the federal court to entertain the suit. *Robertson v. H. Weston Lumber Co.*, (1921) 124 *Miss.* 606, 87 *So.* 120.

To restrain impairment of contract.—Where coal mining companies had contracts to deliver coal outside the state and an order of a state commission requiring them to deliver their coal to parties within the state was made, it was held that an order for an interlocutory injunction should be issued on the ground that the action of the commission impaired the obligation of pre-existing contracts. *Vandalia Coal Co. v. Special Coal, etc., Commission*, (D. C. Ind. 1920) 268 *Fed.* 572.

Vol. XI, p. 554, amend. 13, sec. 1.

III. SLAVERY AND INVOLUNTARY SERVITUDE

1. *Involuntary Servitude*

a. In General (p. 556)

Penalizing lessors for failure to furnish water, heat, light, etc., to lessees.—An in-

voluntary servitude forbidden by this amendment is not created by the provisions of N. Y. Laws 1920, chaps. 131 and 951, which make it a misdemeanor for a lessor, or any agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease, and necessary to the proper and customary use of the building. *Marcus Brown Holding Co. v. Feldman*, (1921) 256 U. S. —, 41 S. Ct. 465, 65 U. S. (L. ed.) — (*affirming* (S. D. N. Y. 1920) 269 *Fed.* 306), wherein the court said: "It is objected finally that chapter 951, above stated, in so far as it required active services to be rendered to the tenants, is void on the rather singular ground that it infringes the 13th Amendment. It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will, even when he has contracted to render them. But the services in question, although involving some activities, are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that, in the old law, might issue out of or be attached to land."

Requiring labor irrespective of financial ability.—This section renders invalid a statute providing that every able bodied male resident of this state between the ages of sixteen and sixty years, except bona fide students during school term, who shall fail or refuse to regularly and steadily engage for at least thirty-six hours per week in some lawful and recognized business, profession, occupation or employment, shall be held to be a vagrant and be guilty of a misdemeanor, and punished as therein provided, regardless of the financial ability of such person to maintain himself and his dependents without performing such labor, and regardless of his ability to obtain such employment except as therein provided. *Ex p. Hudgins*, (1920) 86 *W. Va.* 526, 103 *S. E.* 327, 9 *A. L. R.* 1361.

Vol. XI, p. 567, amend. 14, sec. 1.

State regulation of proof of citizenship.—In *State v. Superior Ct.*, (1920) 113 *Wash.* 54, 193 *Pac.* 226, in sustaining a statute prescribing the manner in which a naturalized citizen must prove his citizenship, it was said: "According to the Fourteenth Amendment of the Constitution of the United States there are two methods by which a person may become a citizen: (a) By birth in the United States; and (b) by naturalization therein. A natural-born citizen's right to vote depends upon his place of birth, and this is the fact to be established. A naturalized citizen's right to vote depends, not upon his place of birth, but on a judgment or decree of a court of competent jurisdiction, declaring either him or his ancestor a naturalized citizen. Evidence which would be

reasonable and satisfactory in determining a natural-born citizen's right to vote would not necessarily be such evidence when applied to a naturalized citizen. The Legislature has a discretion in determining the character of proof that may be required to establish the fact of citizenship in each case. There is no reason why a law passed by the Legislature which does not require the same character of proof as applied to each class should be held to be unconstitutional."

Vol. XI, p. 577, amend. 14, sec. 1.

III. Privileges and immunities of citizens of the United States.

5. State control over court procedure.
 - c. Attachments against non-residents.
6. Recognition of racial distinctions.
7. Regulating manufacture and sale of goods.
8. Relation of employer and employee.
10. Regulating pursuit of occupations.
13. Elections.
25. Regulating public speaking on public grounds.

III. PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

5. *State Control Over Court Procedure*
 - c. *Attachments Against Nonresidents* (p. 590)

Special security required as prerequisite to appearing and defending.—Privileges and immunities of citizens of the United States are not unconstitutionally impaired by a state foreign attachment statute which debars a nonresident individual defendant from appearing and defending unless he first gives special security. *Owney v. Morgan*, (1921) 256 U. S. 94, 41 S. Ct. 433, 65 U. S. (L. ed.) —, *affirming* (1917) 7 Boyce (Del.) 297, 105 Atl. 838.

6. *Recognition of Racial Distinctions* (p. 592)

Prohibiting use of foreign language in schools.—A statute that in all schools, public and private, the use of any language other than English in the teaching of secular subjects is prohibited, does not abridge the privileges and immunities of citizens. *State v. Bartels*, (Iowa 1921) 181 N. W. 508.

7. *Regulating Manufacture and Sale of Goods* (p. 595)

Requiring a license from itinerant vendors of drugs does not violate this section. *Anderson v. Farr*, (1920) 97 Ore. 137, 191 Pac. 346.

8. *Relation of Employer and Employee* (p. 600)

A workman's compensation act which gives to residents of the state but not to nonresidents a right to compensation for injuries received outside the state while working

under a contract of hiring made in the state is in violation of this provision of the Constitution. *Quong Ham Wah Co. v. Industrial Acc. Commission*, (Cal. 1920) 192 Pac. 1021, 12 A. L. R. 1190.

10. *Regulating Pursuit of Occupations* (p. 604)

Prohibiting dancing near residence.—An ordinance prohibiting dancing or dance music in any room or hall within 25 feet of a building used as a residence between 10 p. m. and 8 a. m. is unreasonable, not a legitimate exercise of the police power and violates the 14th Amendment. *Es p. Hall*, (Cal. App. 1920) 195 Pac. 975.

An arbitrary discretion to revoke the license of any place of amusement given to a city council is discriminatory and violates the 14th Amendment. *Vincent v. Seattle*, (Wash. 1921) 197 Pac. 618.

Insurance.—A state statute prohibiting, under penalty of a fine, any person, firm or company from engaging in the insurance business in the state without first obtaining authority to do so as provided in the laws of the state, is not unconstitutional as violating this amendment. *State v. New Jersey Indemnity Co.*, (N. J. 1921) 113 Atl. 491.

13. *Elections* (p. 609)

Differences in established manner of holding primary elections in different counties does not impair the privileges and immunities of the citizens of any county. *State v. Buer*, (Wis. 1921) 182 N. W. 855.

25. *Regulating Public Speaking on Public Grounds* (p. 612)

To same effect as original annotation, see *Duquesne v. Fincke*, (1920) 269 Pa. St. 112, 112 Atl. 130.

Vol. XI, p. 616, amend. 14, sec. 1.

V. "Person."

2. Corporations.

3. Aliens.

VII. Nature and incidents of due process of law.

1. In general.

2. Synonymous with "law of the land."

4. Not necessarily judicial process.

X. State action affecting life, liberty, or property.

1. Exercise of police power.

3. Degree of judicial power.

7. State control over court procedure.

- a. In general.

- r. Grand jury.

- (2) Number of grand jurors.

- u. Necessity for arraignment and plea.

- v. Trial by jury.

- (1) In general.

- a1. Judgment.
 - (7) Indeterminate sentence and parole.
- e1. Appellate jurisdiction and procedure.
 - (1) Right of appeal.
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- 8. Notice and opportunity.
 - a. In general.
- i1. Abatement of nuisance.
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- 17. Summary destruction of property.
 - a. In general.
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- 20. Relation of employer and employee.
 - h. Workmen's Compensation Law.
 - q. Regulating discharge of employees.
- 23. Railroad companies.
 - c. Regulating rates.
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 - (c) Regulating street railway fare.
 - (7) Must admit of earning just compensation.
 - (10) Whether compensatory as to entire line.
 - a. Requiring construction of side track or switch.
- m1. Requiring alterations in crossings at expense of company.
- p1. Erection and alteration of bridges.
- x1. Street railways.
 - (1) In general.
 - (7) Effect of expiration of franchise.
- 25. Telegraph and telephone companies.
- 27. Gas and electric companies.
 - b. Regulating rates.
- 32. Banks and banking.
 - a. In general.
- 33. Insurance companies.
 - a. In general.
 - c. Licensing insurance agents.
- 35. Regulating production, use and rates of natural gas.
- 37. Control of municipal corporations.
 - d. County printing.
- 38. Regulating manufacture and sale of goods.
 - j. Of cigarettes.
- 41. Eminent domain.
 - k. Question of necessity.
- 42. Regulating pursuit of occupations.
 - a. Practice of medicine.
 - (1) In general.
 - b. Practice of dentistry.
 - c. Practice of osteopathy.
 - f. Practice of law.
- 43. As affecting conveyance of or title to land.

- 44. Health laws.
 - a. In general.
- 107. Taxation.
 - a. In general.
 - b. For public purposes.
 - p. As to whether property within or outside the state.
 - (1) In general.
 - z. Succession or inheritance tax.
 - a1. Income tax.
 - c1. On wholesale dealers in oil.
 - e1. Assessments for public improvements.
 - (1) In general.
 - (9). Arbitrary determination of taxing district.
 - m1. Notice and opportunity to be heard.
 - (1) In general.
 - (2) In assessments for public improvements.
 - (a) In general.
 - (4) Opportunity to be heard at some stage of proceedings.

XI. Who may invoke constitutional right.

- 1. In general.

V. "PERSON"

2. Corporations (p. 636)

To same effect as original annotation, see *Crom v. Frahm*, (1920) 33 Idaho 314, 193 Pac. 1013.

3. Aliens (p. 639)

To same effect as original annotation, see *Colyer v. Skeffington*, (D. C. Mass. 1920) 265 Fed. 17.

VII. NATURE AND INCIDENTS OF DUE PROCESS OF LAW

1. In General (p. 639)

Special legislation.—"The Fourteenth Amendment does not prohibit legislation special in character. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294 [18 Sup. Ct. 594, 42 L. Ed. 1037]. It does not prohibit a state from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal law." *Bankers' Trust Co. v. State*, (Conn. 1921) 114 Atl. 104.

2. *Synonymous with "Law of the Land."* (p. 642)

"Due process of law" and "law of the land."—The "due process of law," by which Congress is limited in the Fifth Amendment, and the states by the Fourteenth Amendment, is equivalent to the "law of the land," and is intended to protect the citizen against arbitrary action, and secure to all persons equal and impartial justice under the law. *U. S. v. Yount*, (W. D. Pa. 1920) 267 Fed. 861.

4. *Not Necessarily Judicial Process* (p. 643)

Under ordinary circumstances, due process of law implies a formal judicial proceeding; but such a proceeding is not invariably required. *Gas, etc., Securities Co. v. Manhattan, etc., Traction Corp.*, (C. C. A. 2d Cir. 1920) 266 Fed. 625.

X. STATE ACTION AFFECTING LIFE, LIBERTY OR PROPERTY

1. *Exercise of Police Power* (p. 647)

To same effect as original annotation, see *State v. Hall*, (Wyo. 1921) 194 Pac. 476.

"Neither the 'contract' clause of the Constitution nor the 'due process' clause thereof 'has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community'; and 'all contract and property rights are held subject to its fair exercise.'" *Corvallis Creamery Co. v. Van Winkle*, (D. C. Ore. 1921) 274 Fed. 454.

Legislation suspending right of landlord to recover possession of leased premises.—The suspension until November 1, 1922, in cities having a population of one million or more, and in cities in a county adjoining such city, of the right to recover possession of real property occupied for dwelling purposes, except where the person holding over is objectionable, or where the landlord seeks to occupy the premises as a dwelling for himself and his family, or intends to demolish the building and construct a new one (providing the tenant or occupant is ready, willing, and able to pay a reasonable rent), as was done by N. Y. Laws 1920, chaps. 942 and 947, was a valid exercise of the police power in the emergency growing out of the World War, and is not repugnant to the contract or due process of law clauses of the Federal Constitution, even as applied to a case where, before the passage of such statute, another lease of the premises had been made, to go into effect on the day following that when the existing lease by its terms expired, and when the lessees had contracted to surrender the premises. *Marcus Brown Holding Co. v. Feldman*, (1921) 256 U. S. —, 41 S. Ct. 465, 65 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1920) 269 Fed. 306. See also *People v. La Fetra*, (1921) 230 N. Y. 429, 130 N. E. 601; *Gutttag v. Shatzkin*, (1921) 230 N. Y. 647, 130 N. E. 929.

Licensing dogs.—A statute licensing dogs and providing for the destruction of dogs killing domestic animals and for compensation to the owners of such animals does not violate this section. *McQueen v. Kittitas County*, (Wash. 1921) 198 Pac. 394.

3. *Degree of Judicial Power* (p. 652)

Taking jurisdiction of action between non-resident parties, the cause of action being transitory and the defendant being found

and served in the state does not violate this section. *Stewart v. Litchenberg*, (1920) 148 La. 195, 86 So. 734.

7. *State Control Over Court Procedure* a. In General (p. 654)

Writ of prohibition forbidding confirmation of sale of railroad at foreclosure with privilege of dismantling road.—The purchaser of a railroad under a decree of foreclosure is not deprived of property without due process of law by a writ of prohibition which excludes from such decree words which purport to authorize the purchaser to dismantle the road, since the purchaser, whatever the words of the decree, acquires all the rights that the mortgagor had to stop operations when unprofitable, and the prohibition, not compelling further operation at a loss, did not cut down the purchaser's rights any more than did the presence of the excluded words enlarge them. *Bullock v. Florida*, (1921) 254 U. S. 513, 41 S. Ct. 193, 65 U. S. (L. ed.) —, *affirming* (1919) 78 Fla. 321, 82 So. 866, 8 A. L. R. 232.

Joinder of insurer as party defendant.—A statute providing that every policy thereafter written insuring against liability for personal injuries shall contain provisions to the effect that the insurer shall be directly liable to the injured party and providing further that the insurer may be joined as a party defendant in a suit by the injured person, does not violate this amendment. *Morrell v. Lalonde*, (R. I. 1921) 114 Atl. 178.

r. Grand Jury

(2) Number of Grand Jurors (p. 660)

Louisiana constitution and statutes providing for a grand jury of 12 of whom 9 shall be a quorum in the parish of Orleans does not violate this section. *State v. Birbiglia*, (La. 1921) 88 So. 533.

u. Necessity for Arraignment and Plea (p. 663)

To same effect as original annotation, see *State v. Prouty*, (Vt. 1920) 111 Atl. 559.

v. Trial by Jury

(1) In General (p. 664)

Denial of jury trial in statutory proceeding.—That a statute providing for a proceeding to compel the destruction of trees infected with "cedar rust" does not provide for a trial by jury "does not render it invalid as in conflict with the guaranty of due process of law contained in the Fourteenth Amendment of the federal Constitution and in section 11 of the state Constitution.

"It has been long well settled that neither the state nor federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these Constitutions were adopted." *Bowman v.*

Virginia State Entomologist, (1920) 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1121.

a7. Judgment

(7) Indeterminate Sentence and Parole (p. 673)

Statute permitting imposition of indeterminate sentence.—A state statute providing the minimum and maximum penalty for a crime and permitting the court to impose an indeterminate sentence upon a person convicted of a violation thereof, does not contravene this amendment although it may confer judicial powers upon nonjudicial officers. *People v. Prochowski*, (1920) 294 Ill. 482, 128 N. E. 474; *People v. Banks*, (1920) 294 Ill. 256, 128 N. E. 462; *People v. King*, (1920) 295 Ill. 428, 129 N. E. 174; *People v. Schwartz*, (1921) 298 Ill. 218, 131 N. E. 806.

e1. Appellate Jurisdiction and Procedure

(1) Right of Appeal (p. 676)

A review by an appellate court of a judgment of conviction is not a requirement in affording a defendant the due process of law that is secured to him by the Constitution. *Haywood v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 795. The court further said: "In England writs of error in criminal cases are of comparatively recent origin. In our country, though writs of error within certain limitations have been allowed from the beginning, the grant has been of grace or expediency, not of constitutional demand. In the court of first instance the defendant is given his day in court, his trial by jury, his opportunity to confront opposing witnesses, and all other elements of due process of law. And if Congress might have withheld entirely the privilege of review, it is self-evident that Congress may at any time reduce the previously granted privilege. From recent legislation (40 Stat. pt. 1, p. 1181) we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial." See also *St. John v. U. S.*, (C. C. A. 7th Cir. 1920) 268 Fed. 808.

f1. Liability for Costs (p. 679)

Costs on vexatious appeal.—Due process of law is not denied to an insurance company by a state statute under which, as construed by the state courts, a recovery of damages and attorneys' fees as for a vexatious refusal to pay a loss is permitted on the second trial of an action on the policy,

following a reversal by the federal Supreme Court of a judgment against the company on the first trial, although there may have been no evidence of vexatious refusal except delay in payment of the claim. *Hartford L. Ins. Co. v. Blincoe*, (1921) 255 U. S. 129, 41 S. Ct. 276, 65 U. S. (L. ed.) —, *affirming* (1919) 279 Mo. 316, 214 S. W. 207, 12 A. L. R. 758.

8. Notice and Opportunity

a. In General (p. 679)

Restriction on right of nonresident to appear and defend.—A statute which affords a nonresident individual defendant in a suit begun by foreign attachment an opportunity to appear and defend only in case he gives bail or security for the discharge of the property seized to the value of such property and costs does not deny due process of law, even though defendant may have no resources or credit aside from the property attached. *Ownbey v. Morgan*, (1921) 256 U. S. 94, 41 S. Ct. 433, 65 U. S. (L. ed.) —, *affirming* (1917) 7 Boyce (Del.) 297, 105 Atl. 838.

Acceptance by state tax commission of corporation's own figures as waiver of hearing.—A state statute imposing a franchise tax upon domestic corporations cannot be assailed on the ground that the taxing statute did not in terms provide for a hearing, where the state tax commission accepted the corporation's own figures, and the contest is wholly upon matters of law. *St. Louis-San Francisco R. Co. v. Middlekamp*, (1921) 256 U. S. —, 41 S. Ct. 489, 65 U. S. (L. ed.) —.

Construction of highways.—The constitution and laws of Louisiana, relative to the creation of road districts and the imposition of special taxes for the construction and maintenance of roads therein, in and of themselves, are not in violation of the Fourteenth Amendment of the Constitution in that they deny due process of law because no provision is made for notice to taxpayers of contemplated action by the police jury in the formation of districts. *Wight v. Police Jury*, (C. C. A. 5th Cir. 1919) 264 Fed. 705.

Adoption—notice to parents of abandoned child.—A state statute which permits the adoption of an abandoned child without notice to its parents does not violate this amendment. *Fischer v. Meader*, (N. J. 1920) 111 Atl. 503, wherein it was said: "The more radical attack, however, is made upon the act itself, in that as alleged it deprives the mother of the constitutional right of possessing her child, thus contravening the inhibition of the fourteenth amendment to the federal Constitution, requiring 'due process' as a condition precedent to the deprivation of a vested right. It may be said in limine that it is difficult to apprehend an existing legal right where such right has been abandoned by the party possessing it. The assertion of the right assumes its existence

when in fact the decree of the court is proof of its abandonment. When this petitioner abandoned her child it became a public charge, and it became the duty of the state as *parens patriæ* to claim it, not only in the interest of the child, but also in the interest of the state itself, representing the people whose future morals and prosperity depend essentially upon the character and quality of the citizenship it develops.

"The claim of the petitioner is based upon the theory of a chattel ownership of the child, but no such right is capable of legal recognition. The right of the parent to the custody of the child subsists so long, and so long only, as the parent performs the duty of care and maintenance imposed upon her by law. . . . Where the performance of those duties is consistently neglected, the public safety becomes *pro tanto* endangered by the creation of a public burden which, as the same learned chancellor truly observes, may eventuate 'in such children becoming a public nuisance.' *Id.* 196. *Salus populi suprema lex*, is the controlling maxim of all civilized governments in such a situation, and no government can be said to be secure in its future development, which fails in its duty to its human derelicts and its prospective citizens by failing to properly maintain, develop and educate them."

Minimum wage law of Washington sustained despite want of provision therein for notice to the employer to be affected by the order of the proceedings of the Industrial Welfare Commission. *Spokane Hotel Co. v. Younger*, (1920) 113 Wash. 359, 194 Pac. 595.

11. Abatement of Nuisance (p. 692)

The word "nuisance" has a well-defined meaning in the law, and a thing cannot be declared a nuisance by statute, and abated as such, when in fact it is obviously not a nuisance. The rule laid down by the Supreme Court of the United States upon this point is that—

"While the Legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed." *Lawton v. Steele*, 152 U. S. loc. cit. 140, 14 Sup. Ct. 502, 38 L. ed. 385.

This is clearly the farthest limits of the rule, so far as concerns the extent to which the Legislature may encroach on private rights, in the destruction, abatement, or damage of private property as a public nuisance. Further encroachment is forbidden by those provisions of the organic law having reference to the constitutional guaranty of due process of law and forbidding the taking of private property for public use without just compensation. *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

12. Public Office and Officers (p. 713)

Officers of conservancy district.—The Fourteenth Amendment does not deprive the state of the power of determining whether the officers of a conservancy district shall be appointed or be elected by the people, or the duties to be performed by them; nor does it invalidate a tax levy or an assessment lawfully made by such officers for a duly authorized improvement, or deprive the district as a political subdivision of the power to levy and collect taxes or assessments to pay the amount charged against property or political subdivisions, such as municipalities, counties, or townships, within such district. *Silvey v. Montgomery County*, (S. D. Ohio 1921) 273 Fed. 202.

Failure of officer to pay over funds to successor.—A statute making punishable as embezzlement the failure of a public officer to pay over to his successor in office the money in his hands as such officer at the end of his term, does not violate this amendment. *Collins v. State*, (Ind. 1921) 131 N. E. 390.

17. Summary Destruction of Property

a. In General (p. 716)

Wooden buildings within fire limits.—The demolition and removal of a wooden building which the state courts find to have been erected in a municipality within the fire limits theretofore prescribed, contrary to valid local regulations duly enacted under the municipal charter, may be ordered by the municipality without violation of the federal Constitution. *Maguire v. Reardon*, (1921) 255 U. S. 271, 41 S. Ct. 255, 65 U. S. (L. ed.) —, affirming (1919) 41 Cal. App. 596, 183 Pac. 303.

c. Property Illegally Used (p. 717)

Forfeiture of an automobile used in violation of liquor law though the rights of an innocent mortgagee are not protected, does not deny due process of law. *State v. Peterson*, (1920) 107 Kan. 641, 193 Pac. 342.

20. Relation of Employer and Employee

h. Workmen's Compensation Law (p. 726)

To same effect as original annotation, see *Scott v. Nashville Bridge Co.*, (1920) 143 Tenn. 86, 223 S. W. 844.

Provision prohibiting employers making direct payments from indemnifying themselves by insurance.—A ruling of a state industrial commission, justified or demanded by a change in the state law, by which the commission, revoking its previous discretionary action, declares that no employers shall be permitted to pay or furnish directly to injured employees or to the dependents of killed employees the compensation and benefits provided for in the State Workmen's Compensation Law if such employers, by contract or otherwise, shall provide for the insurance of the payment by them of such

compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, does not amount to a denial of due process of law or of the equal protection of the laws. *Thornton v. Duffy*, (1920) 254 U. S. 361, 41 S. Ct. 137, 65 U. S. (L. ed.) —, *affirming* (1918) 99 Ohio St. 120, 124 N. E. 54.

Act compulsory as to one employment and elective as to others.—A state may, consistently with the due process of law and equal protection of the laws clauses of the federal Constitution, enact a general workmen's compensation law applicable to all employees, and make it compulsory as to one hazardous employment (coal mining) and elective as to all others except railway employees engaged in train service, who are excluded. The inclusion within the terms of a state workmen's compensation act of all employees of coal mining companies, whether engaged in the hazardous part of the business or not, does not render repugnant to the due process of law and equal protection of the laws clauses of the federal Constitution the classification made by that act, which makes it compulsory as to all coal mining companies, while as to all other private business enterprises within the state, except railway employees in train service, who are excluded, it is purely optional. *Lower Vein Coal Co. v. Industrial Board*, (1921) 255 U. S. 144, 41 S. Ct. 252, 65 U. S. (L. ed.) —.

Classifying employees for purposes of liability act.—“A classification in a state employers' liability act of objects, based on a distinction between employers engaged in a particular business within the state (certainly where the business is that of operating a railroad, even where the railroad is not used in the business of a common carrier), as, for example, between employees of corporations engaged in such business and employees of partnerships or private persons engaged in the same or a similar business, is within the legitimate exercise of legislative discretion in classification of the objects of such legislation, and is valid in the purview of the equal protection clause aforesaid of the federal Constitution.” *Karabalis v. Du Pont De Nemours*, (Va. 1921) 105 S. E. 755.

q. Regulating Discharge of Employees (p. 729)

Forbidding discharge of employee for certain cause.—A statute which forbids the discharge of an employee because such employee has testified before the industrial welfare commission regarding the terms and conditions of his employment does not infringe this section. *Poye v. State*, (Tex. 1921) 230 S. W. 161.

23. Railroad Companies

c. Regulating Rates

(5) Regulating Passenger Fares

(c) Regulating Street Railway Fare (p. 741)

Municipal regulation.—A federal District Court has jurisdiction to enjoin a municipal

corporation from enforcing a 5 cents fare provision of a street railway franchise ordinance, on the ground that the right to enforce such rate was not secured to the municipality by contract, and that such enforcement was beyond the power of the municipality because, the rate being admittedly confiscatory, to enforce it would violate this amendment. *San Antonio v. San Antonio Public Service Co.*, (1921) 255 U. S. 547, 41 S. Ct. 428, 65 U. S. (L. ed.) —, wherein it was held that a municipal corporation in Texas could not, after the adoption of Tex. Const. 1876, § 17, which provides that no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but that all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof, contract with a public service corporation as to street railway fares, so as to permit their enforcement if they were so low as to be confiscatory. The court said: “But it is urged that as by the amendment to the state Constitution of 1912 the city was endowed with authority broad enough to enable it to contract in granting a street railway franchise concerning the rate of fare to be charged, disenthralled from the limitation of § 17, article 1, of the state Constitution, it follows that the franchise ordinance must, after that date, be viewed as such a contract and treated accordingly. But as no contract between the city and the Traction Company, made after the constitutional amendment in 1912 concerning the fare in question, is referred to, it is plain that even if the proposition as to power of the city after 1912 be, for the sake of the argument, conceded, it is irrelevant to the case we are considering.

“And this is true also of the suggestion made in argument, that although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate, since again there is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public on the one hand, and the private owner on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Where, therefore, as in the case supposed in the argument, the regulating power of government being wholly uncontrolled by

contract, it would follow that that power would be required to be exerted, and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power."

Determination of what constitutes reasonable rate.—The fact that the board of public utility commissioners of a state, in determining what is a just and reasonable rate of fare to be charged by a street railway, take into consideration the safety, sufficiency, and adequacy of the service being rendered by the company, does not deprive it of its property without due process of law nor take its property for public use without just compensation. *New Jersey Cent. Traction Co. v. Public Utility Commissioners*, (N. J. 1921) 113 Atl. 692.

(7) Must Admit of Earning Just Compensation (p. 744)

To same effect as original annotation, see *Houston Electric Co. v. Houston*, (S. D. Tex. 1920) 265 Fed. 360.

(10) Whether Compensatory as to Entire Line (p. 749)

A state may not segregate a class of traffic and compel a carrier to transport it in intrastate commerce at less than cost, or without a substantial compensation, although the return by the carrier from its entire intrastate operations may be adequate. *Vandalia R. Co. v. Schnull*, (1921) 255 U. S. 113, 41 S. Ct. 324, 65 U. S. (L. ed. —, (reversing) (1919) 188 Ind. 87, 122 N. E. 225) wherein it was further held as to the pleading of the invalidity of the regulation that averments in the answer, in a suit to compel a railway company to keep in force certain intrastate freight rates prescribed by the order of a state commission, which assert that the order of the commission will not yield revenue sufficient to reimburse the railway company for handling and carrying the classes of property specified in the order and provide a fair return on the property used in the service, and that, therefore, if the order be enforced, the railway company will be deprived of its property without due process of law, are sufficient to present the issue whether the order of the commission was invalid because it required a service that the rates did not compensate, although the answer does not allege that the rates are not compensatory of the cost of the service between the stations to which they apply, and fails to specify upon what part of the carrier's property the rates will not yield a fair return.

a. Requiring Construction of Side Track or Switch (p. 760)

Dislocation of sidings by abolishing of grade crossings as entitling owners to complain on constitutional grounds.—Owners of

private railway sidings have no constitutional ground for complaint because such sidings will be dislocated and their owners be put to further expense by the lawful compulsory abolition of certain highway grade crossings of a steam railway. *Erie R. Co. v. Public Utility Com'rs*, (1921) 254 U. S. 394, 41 S. Ct. 169, 65 U. S. (L. ed. —, affirming) (1916) 89 N. J. L. 57, 24, 98 Atl. 13, 28; (1917) 90 N. J. L. 672, 673, 714, 729, 677, 694, 715, 103 Atl. 1052, 1053, 1055, 1051.

m1. Requiring Alterations in Crossings at Expense of Company (p. 766)

A state may, consistently with the due process of law, commerce, and contract clauses of the Federal Constitution, require a railway corporation engaged in interstate commerce to abolish at its own expense, whatever the cost, and without regard to financial ability, highway grade crossings, including those at streets laid out after the railway was built, if it can reasonably be said that the public safety requires the change. It follows that a railway company which might constitutionally have been charged under the state laws with the whole expense of abolishing certain highway grade crossings and may not complain that not more than 10 per cent of the cost of abolishing three crossings used by a street railway is thrown upon the latter company. *Erie R. Co. v. Public Utility Com'rs*, (1921) 254 U. S. 394, 41 S. Ct. 169, 65 U. S. (L. ed. —, affirming) (1916) 89 N. J. L. 57, 24, 98 Atl. 13, 28; (1917) 90 N. J. L. 672, 673, 714, 729, 677, 694, 715, 103 Atl. 1052, 1053, 1055, 1051.

p1. Erection and Alteration of Bridges (p. 767)

The property of a bridge company, specially incorporated by N. Y. Laws 1857, chap. 753, to build a railroad bridge over the Niagara river, and later consolidated with a similar Canadian corporation, pursuant to New York and Canadian statutes, subject to all the duties of each of the consolidated companies, cannot be said to have been taken without due process of law by N. Y. Laws 1915, chap. 666, amending the original charter, in the exercise of the state's reserved power to amend, by requiring the construction of a roadway for vehicles and a pathway for pedestrians on that part of the bridge within the jurisdiction of the state, where there is nothing to show that the addition to the structure will not yield a reasonable return. *International Bridge Co. v. New York*, (1920) 254 U. S. 126, 41 S. Ct. 56, 65 U. S. (L. ed. —, affirming) (1918) 223 N. Y. 137, 119 N. E. 351.

(1) In General (p. 768)

Abolishment of grade crossings.—A street railway company crossing the tracks of a

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steam road at grade in a public street may, consistently with the Federal Constitution, be required to bear a part of the expense of abolishing the grade crossing, and the payment of the amount charged, if not excessive, may be made a condition of the street railway company's continued right to use the streets. *Erie R. Co. v. Public Utility Com'rs*, (1921) 254 U. S. 394, 41 S. Ct. 169, 65 U. S. (L. ed.) —, *affirming* (1916) 89 N. J. L. 57, 24, 98 Atl. 13, 28; (1917) 90 N. J. L. 672, 673, 714, 729, 677, 694, 715, 103 Atl. 1052, 1053, 1055, 1051.

(7) Effect of Expiration of Franchise (p. 770)

Requiring removal of tracks.—Where a street railway company operating in the streets of a city under a franchise granted for a definite period has enjoyed the full term of the grant, the municipality may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets without impairing any contractual obligations protected by the Federal Constitution, or depriving the street railway company of its property without due process of law. *Detroit United Ry. v. Detroit*, (1921) 255 U. S. 171, 41 S. Ct. 285, 65 U. S. (L. ed.) wherein it was further held that subjecting a street railway company whose franchises have expired, to the alternative of accepting an inadequate price for its property, or of ceasing to operate in the city streets, and removing its property therefrom, does not take property without due process of law, where the city has the right to require such cessation and removal, and no purchase can be effected without approval by the city electors.

25. *Telegraph and Telephone Companies* (p. 771)

Moving of poles and wires necessitated by abolition of grade crossing of railroad.—An interstate telegraph company may, consistently with the Federal Constitution, be required to bear the expense of the changes in its poles and wires made necessary by the compulsory abolition of certain highway grade crossings of a steam railroad. *Erie R. Co. v. Public Utility Com'rs*, (1921) 254 U. S. 394, 41 S. Ct. 169, 65 U. S. (L. ed.) —, *affirming* (1916) 89 N. J. L. 57, 24, 98 Atl. 13, 28; (1917) 90 N. J. L. 672, 673, 714, 729, 677, 694, 715, 103 Atl. 1052, 1053, 1055, 1051.

27. *Gas and Electric Companies*

b. Regulating Rates (p. 776)

Compelling corporation to devote property to public use without reasonable compensation.—Where a public service corporation is compelled by an order of a state public utilities commission to furnish heat to the inhabitants of a city at a rate which causes it a loss, without reasonable compensation, it is

deprived of its property without due process of law. *Mt. Carmel Public Utility, etc., Co. v. Public Utilities Commission*, (1921) 297 Ill. 303, 130 N. E. 693.

In *Landon v. Court of Industrial Relations*, (D. C. Kan. 1920) 269 Fed. 411, a rate established by the state for supplying natural gas by distributing companies was held to be "noncompensatory, unreasonably low, confiscatory and violative of the Constitution of the United States." See also *Landon v. Court of Industrial Relations*, (D. C. Kan. 1920) 269 Fed. 433.

Enforcement of confiscatory rates fixed by contract.—Confiscatory rates for services to be performed by public service corporations, fixed by governmental agencies, cannot be enforced unless they are secured by contract obligation. If, however, public service corporations and governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and the question as to whether such rates are confiscatory becomes immaterial. But municipal corporations in Iowa have no power, under the rate regulation provisions of Iowa Code, 1897, § 725, to contract with public service corporations as to rates in franchise ordinances so as to permit the enforcement of such rates if they are so low as to be confiscatory. *Southern Iowa Electric Co. v. Chariton*, (1921) 255 U. S. 539, 41 S. Ct. 400, 65 U. S. (L. ed.), *reversing* (S. D. Ia. 1919) 256 Fed. 929.

Items considered in determining whether rate confiscatory, see *New York, etc., Gas Co. v. Newton*, (S. D. N. Y. 1920) 269 Fed. 277.

Length of test of alleged confiscatory rate.

—See *Consolidated Gas Co. v. Newton*, (S. D. N. Y. 1920) 267 Fed. 231.

An injunction should be granted against the enforcement of a statute fixing gas rates where it is shown that the cost of production and distribution is in excess of the rate fixed by statute. *New York, etc., Gas Co. v. Newton*, (S. D. N. Y. 1920) 269 Fed. 277.

Injunctive relief will not be granted against the enforcement of rates fixed by a state for a public utility on the ground that they are confiscatory until there has been a finality of action in the state tribunal. Thus where a proceeding is pending before a state commission in which the complainant before the federal court has asked for an increase of rates, the federal court has refused to act. *Wisconsin-Minnesota Light, etc., Co. v. Railroad Commission*, (W. D. Wis. 1920) 267 Fed. 711.

32. *Banks and Banking*

a. In General (p. 784)

Prohibiting use of words "bank," etc.—A statute prohibiting the use of the words "bank," "banker," "banking" or "trust"

as a designation or part of a name under which business may be conducted by any person, firm or corporation other than a bank, is valid as an exercise of the police power of the state and does not contravene this amendment. *Inglis v. Pontius*, (Ohio 1921) 131 N. E. 509.

33. Insurance Companies

a. In General (p. 785)

Prescribing who shall be agents of insurer.—A state statute providing that any person who acts for an insurance company in the making of a contract of insurance or the adjustment of a loss shall be the agent of the insurer does not violate this section. *Globe, etc., F. Ins. Co. v. Walker*, (1920) 150 Ga. 163, 103 S. E. 407.

c. Licensing Insurance Agents (p. 786)

Revocation of license of insurance agent.—So much of section 7 of the act of the General Assembly entitled "An act to provide for the establishment of a department of insurance," etc., approved August 19, 1912 (Acts 1912, pp. 119, 124), as provides that "the license of any soliciting agent may be revoked at any time by the insurance commissioner in his discretion," is violative of the due process clause contained in section 1 of the Fourteenth Amendment to the Constitution of the United States. *Riley v. Wright*, (Ga. 1921) 107 S. E. 857.

35. Regulating Production, Use and Rates of Natural Gas (p. 790)

Statute prohibiting wasteful use of natural gas.—Neither the manufacturer of carbon black from natural gas nor the owner of the land on which are the gas wells and the pipe line, and of mineral leases covering proved gas territory, is deprived of his property without due process of law, or denied the equal protection of the laws, nor are the obligations of pre-existing contracts unconstitutionally impaired, by a state statute which prohibits the use of natural gas for products where such gas is burned or consumed without fully and actually applying and utilizing the heat therein contained for other manufacturing or domestic uses (but only when the gas well or source of supply is located within 10 miles of an incorporated town or industrial plant), and forbids the owner or lessee of natural gas wells within the 10-mile limit to sell or dispose of the gas for the purpose of manufacturing or producing carbon or other resultant products from the burning or consumption of such gas unless the heat therein contained is fully and actually applied and utilized for other manufacturing or domestic purposes, since, there being great disproportion between the volume of gas and the product, the state could exert its police power in this way to conserve the gas supply for less wasteful uses. *Walls v. Midland Carbon Co.*, (1920) 254 U. S. 300, 41 S. Ct. 118, 65 U. S. (L. ed.) —.

37. Control of Municipal Corporation

d. County Printing (p. 794)

State Printing Commission.—An act giving to a State Publication and Printing Commission power to designate official newspapers in which alone county publications shall be made does not deny due process of law. *Daly v. Beery*, (N. D. 1920) 178 N. W. 104. This case was decided by a divided court under a provision of the state Constitution that no statute shall be held unconstitutional except by the concurrence of four judges, but apparently there was no dissent as to the point above stated.

38. Regulating Manufacture and Sale of Goods

j. Of Cigarettes (p. 804)

Anti-Cigarette Law sustained.—The act (chapter 166, Laws 1917) prohibiting and prescribing penalties for bartering, selling, or the giving away of cigarettes or cigarette papers and the keeping of them for barter, sale, or free distribution is within the police power of the state, and does not violate any of the principles of the Fourteenth Amendment to the Constitution of the United States.

The provision making the possession of cigarettes and cigarette papers *prima facie* evidence of the selling and keeping for sale of the prohibited articles is not a denial of due process of law. *State v. Nossaman*, (1920) 107 Kan. 715, 193 Pac. 347.

41. Eminent Domain

k. Question of Necessity (p. 822)

In a case involving the taking of property by the United States for river improvements under Act of May 16, 1906, (9 Fed. Stat. Ann. 2nd ed. p. 33), the rule is stated that a hearing on the question of necessity is not essential to due process of law in the sense of the Fourteenth Amendment. *In re Condemnations, etc.*, (E. D. Mich. 1920) 266 Fed. 105.

42. Regulating Pursuit of Occupations (p. 830)

License tax on dealers in firearms is not discriminatory so as to infringe this section because it excepts rifles of 22 and 25 caliber. *State v. Winehill*, (1920) 147 La. 781, 86 So. 181.

Requiring reports of furniture movers.—An ordinance requiring furniture movers to report to the city register the name of such person, firm or corporation owning, or having the custody, possession and control of such property, the street address or location from and to which such property was removed, a brief, general description of the property removed, the date of such removal, and the name and address of the person, firm or corporation, owning or operating vehicles used in such transportation does not take property without due process of

law. *Wagner v. St. Louis*, (1920) 284 Mo. 410, 224 S. W. 413, 12 A. L. R. 495.

a. Practice of Medicine

(1) In General (p. 830)

Regulating furnishing of habit-forming narcotic drugs.—A state, in the exercise of its police power, may, consistently with this amendment, regulate the administration, sale, prescription, and use of dangerous and habit-forming narcotic drugs, and in so doing may make it unlawful for a physician to furnish such drugs to habitual users out of stocks kept on hand by himself. *Minnesota v. Martinson*, (1921) 256 U. S. 41, 41 S. Ct. 425, 65 U. S. (L. ed.) —, *affirming* (1919) 144 Minn. 206, 174 N. W. 823.

b. Practice of Dentistry (p. 831)

In *Noble v. Douglas*, (W. D. Wash. 1921) 274 Fed. 672, a statute relating to admission to the practice of dentistry and creating a board of examiners was held to be unconstitutional as vesting the board with arbitrary powers.

c. Practice of Osteopathy (p. 832)

Discrimination as to qualifications for practice.—A statute is unconstitutional as discriminating against osteopaths and chiropractors, where it provides that the minimum standard of professional education for the practice of medicine and surgery in all its branches shall be the graduation from a medical school of good standing and completion of the course of study in such college, but that for the practice of any system of treating human ailments without the use of drugs, the applicant must be a graduate of a professional school or college teaching such system, which requires as a prerequisite to graduation four years' course of instruction. *People v. Love*, (1921) 298 Ill. 304, 131 N. E. 809.

f. Practice of Law (p. 833)

The refusal of a state to grant a license to practice law after due notice and opportunity to be heard is not a violation of this section. *Keeley v. Evans*, (D. C. Ore. 1921) 271 Fed. 520, wherein it was said: "Without doubt, the right of an attorney to practice law is a property right, which can be taken from him only after judicial hearing and a fair opportunity to be heard in his own defense. *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *State ex rel. McElhinney*, 241 Mo. 592, 606, 145 S. W. 1139; *Smith v. Medical Examiners*, 140 Iowa, 66, 117 N. W. 1116. As we have seen, the proceedings against complainant were not for his disbarment, but, notwithstanding, it is without question that he not only had ample notice and a fair opportunity to be heard, but he actually appeared before both the board and the court, and was afforded full and adequate opportunity to present his

case in all of its angles. Due process of law does not embrace nor control mere forms of procedure in state courts, or regulate practice therein. All of its requirements are complied with, provided, in the proceedings which are claimed not to have been due process, the person proceeded against has had sufficient notice and an adequate opportunity has been afforded him to defend."

43. As Affecting Conveyance of or Title to Land (p. 837)

Fixing maximum rent of farm lands.—

A statute invalidating farm land leases which stipulate for more than one-third of the grain or one-fourth of the cotton as rental violates this section. *Rumbo v. Winterrowd*, (Tex. 1921) 228 S. W. 258.

44. Health Laws

a. In General (p. 840)

Regulating establishment of hospitals in cities.—An ordinance requiring a permit to be granted only on the hearing of objection by adjacent property owners, for the erection of a building to be used as a sanatorium, private hospital or the like does not infringe this section. *Blackman Health Resort v. Atlanta*, (Ga. 1921) 107 S. E. 525.

Requirement of dipping of sheep is not a violation of this section. *State v. Hall*, (Wyo. 1921) 194 Pac. 476.

107. Taxation

a. In General (p. 860)

A state tax law, where conflict with Federal power is not involved, will be held to conflict with the 14th Amendment only where it proposes or clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation. *Dane v. Jackson*, (1921) 256 U. S. —, 41 S. Ct. 566, 65 U. S. (L. ed.) —.

Power to tax business out of existence.—Even though a license tax should destroy a business, it would not be invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. There is no constitutional objection to exacting a discouraging rate of taxation as the alternative to giving up a business when the legislature has the full power of taxation. *Alaska Fish Salting, etc., Co. v. Smith*, (1921) 255 U. S. 44, 41 S. Ct. 219, 65 U. S. (L. ed.) —.

If a tax law is invalid, it follows that to enforce collection of the tax is to take a person's property without due process. *J. & A. Frieberg Co. v. Dawson*, (W. D. Ky. 1920) 274 Fed. 420.

b. For Public Purposes (p. 861)

Taxation and confiscation of dogs.—Dog owners are not deprived of their property

nor of their liberty without due process of law by a state statute under which those desiring to keep dogs must secure licenses from, and pay fees to, a private corporation created by the state to enforce the laws enacted to prevent cruelty to animals, such fees to be used by it for the payment of expenses fairly incurred, and any excess to be retained as compensation for its services in law enforcement. *Nichia v. New York*, (1920) 254 U. S. 228, 41 S. Ct. 103, 65 U. S., (L. ed.) —, 13 A. L. R. 826 (*affirming* (1918) 224 N. Y. 637, 121 N. E. 884) wherein the court said: "The validity of the act was questioned upon the ground that it violates the 14th Amendment, § 1, by 'depriving a citizen of his liberty without due process of law; to wit, the liberty of owning and harboring a dog without procuring a license from and paying a fee therefor to the Society, a private corporation.' In *Fox v. Mohawk & H. River Humane Soc.* (1901) 165 N. Y. 517, 51 L. R. A. 681, 80 Am. St. Rep. 767, 59 N. E. 353, the court of appeals declared a statute essentially the same as chapter 115 before the amendment of 1902 invalid under the state Constitution, because it appropriated public funds for the use of a private corporation, and also because it conferred an exclusive privilege. But the court repudiated the suggestion that the statute deprived dog owners of property without due process, or delegated governmental power to a private corporation. Thereafter (1902) the legislature amended chapter 115, with the evident purpose of meeting objections pointed out in the *Fox* Case. Thus amended, the law has been upheld. Our only concern is with the suggested Federal question.

"The American Society for the Prevention of Cruelty to Animals was incorporated by chapter 489, Laws of New York 1866. 'The purpose of the corporation was to enforce the laws enacted to prevent cruelty to animals.' *David v. American Soc.* 75 N. C. 362, 366. It has long been recognized by the legislature as a valuable and efficient aid toward the enforcement of those laws. New York Penal Laws, article 16, § 196. The payment of public funds to a similar corporation for assistance in enforcing penal statutes has been declared unobjectionable. *People ex rel. State Charities v. New York Soc.* 161 N. Y. 232, 239, 250, 55 N. E. 1063.

"Property in dogs is of an imperfect or qualified nature, and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any Federal right. *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773; *Fox v. Mohawk & H. River Humane Soc.* supra. Its power to require those who wish to keep dogs to secure licenses from and pay fees to a public officer is also clear. And when the state, in the reasonable conduct of its own affairs, chooses to intrust the work incident to such licenses and collection of

fees to a corporation created by it for the express purpose of aiding in law enforcement, and in good faith appropriates the funds so collected for payment of expenses fairly incurred and just compensation for the valuable services rendered, there is no infringement of any right guaranteed to the individual by the Federal Constitution. Such action does not amount to the taking of one man's property and giving it to another, nor does it deprive dog owners of liberty without due process of law."

To permit state to engage in private business.—An act providing that the state shall engage in the business of manufacturing and selling cement, issuing bonds for the expense of entering into that business does not take property without due process. *In re Opinion of Judges*, (1920) 43 S. D. 648, 180 N. W. 957.

p. As to Whether Property Within or Outside the State

(1) In General (p. 866)

Tax on profit of foreign corporation earned in state.—Measuring for tax purposes the net profits earned by a foreign manufacturing and trading corporation within the state by taking such proportion of the whole net income as the fair cash value of the corporation's real and tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of such corporation cannot be said to be so inherently arbitrary, nor, as applied to a corporation whose profits were largely earned in a series of transactions, beginning with manufacture in the state, and ending with sale in other states, to produce so unreasonable a result, as to render invalid the state law prescribing such rule, as taxing business outside the state, and hence denying due process of law, where the only showing made in support of this constitutional objection is that but a very small part of the corporation's net receipts was received within the state, while, under the statutory method of apportionment, nearly one half of the corporation's net income is attributable to operations within the state, since the percentage of net profits earned within the state may, none the less, have been even larger than the percentage arrived at by the statutory method. *Underwood Typewriter Co. v. Chamberlain*, (1920) 254 U. S. 113, 41 S. Ct. 45, 65 U. S., (L. ed.) —, *affirming* (1919) 94 Conn. 47, 108 Atl. 154) wherein it was further held that a foreign corporation may not successfully attack as invalid, a state tax applicable alike to all foreign and domestic corporations, measured by the net profits of the corporation earned within the state, on the ground that such corporation had made large permanent investments in the state before the state tax law was enacted.

Computation of proportion of property in state.—Due process of law is not denied by a franchise tax law on the property of a

foreign corporation employed in the state providing that for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. *State v. Williams*, (1920) 284 Mo. 456, 224 S. W. 822.

z. Succession or Inheritance Tax (p. 875)

Construing a state inheritance tax law as operative when a trust deed for the benefit of the grantor for life, with remainder over at his death, was executed after the statute was passed, but before it was to take effect, infringes no rights under the federal Constitution. *Nickel v. Cole*, (1921) 256 U. S. —, 41 S. Ct. 467, 65 U. S. (L. ed.) —.

A state statute imposing an estate tax on all property of the decedent upon which no town or city tax has been assessed or upon which no state tax has been paid during the year preceding the decedent's death, does not violate this amendment by depriving the creditors and distributees of the estate of their property without due process of law. *Bankers' Trust Co. v. State*, (Conn. 1921) 114 Atl. 104.

a1. Income Tax (p. 875)

Distribution of proceeds.—The distribution of the proceeds of a state income tax, conformably to Mass. Gen. Act 1919, chap. 314, among the various towns, cities, and taxing districts of the state to the extent thought by the legislature necessary to supply the loss which such taxing subdivisions would sustain by the withdrawal from their taxing power of the intangible property, the income of which was taxed by the state, such payments to continue until 1928, prior to which date any excess of the income tax fund over these required payments, and beginning with that year and continuing thereafter the whole of that fund, is to be distributed to such subdivisions in proportion to the amount of the state tax imposed upon each for such year, does not violate the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., —conceding that such payments may be used by the local subdivisions receiving them, if they so elect, for local proprietary purposes, which may not confer any certain benefit upon taxpayers in other taxing subdivisions, there being nothing to justify the assumption that the several municipalities intend to devote to other than public use any portion of the income tax thus distributed to them, and the tax being uniform in its application to all income within the description of the act of all inhabitants of the state, without regard to the taxing subdivisions in which they may reside. *Dane v. Jackson*, (1921) 256 U. S. —, 41 S. Ct. 566, 65 U. S. (L. ed.) —.

c1. On Wholesale Dealers in Oil (p. 877)

The excise tax imposed by N. M. Laws 1919, chap. 93, upon the sale and use of

gasolene according to the number of gallons sold and used, does not, as applied to domestic sales and use, infringe rights of dealers in such product under the due process of law and equal protection of the laws clauses. *Bowman v. Continental Oil Co.*, (1921) 256 U. S. —, 41 S. Ct. 606, 65 U. S. (L. ed.) —.

e1. Assessment for Public Improvement

(1) In General (p. 879)

Drainage districts.—In the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements, and none of such lands may escape liability solely because they will not receive direct benefits. *Miller v. Sacramento, etc., Drainage Dist.*, (1921) 256 U. S. 129, 41 S. Ct. 404, 65 U. S. (L. ed.) —, dismissing writ of error to review (1920) 182 Cal. 252, 187 Pac. 1041, and denying writ of certiorari.

Assessment according to value.—An assessment of land for drainage according to value rather than according to benefits does not violate this section. *In re Bonds of Drainage Dist. No. 4*, (Ariz. 1920) 193 Pac. 833.

The Nevada Irrigation District Law does not deny due process of law. *In re Walker River Irr. Dist.*, (Nev. 1921) 195 Pac. 327, following *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 S. Ct. 56, 41 U. S. (L. ed.) 369.

Taxing district.—A state legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without violating U. S. Const. 14th Amend., unless its action is palpably arbitrary or plain abuse; but if the statute providing for the tax is of such a character that there is no reasonable presumption that substantial justice generally will be done, the probability being that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact. *Kansas City Southern R. Co. v. Road Imp. Dist. No. 6*, (1921) 256 U. S. —, 41 S. Ct. 604, 65 U. S. (L. ed.) —, reversing (1919) 139 Ark. 424, 215 S. W. 656, 217 S. W. 773.

Assessment of railroad right of way for benefits from a street improvement does not deny due process. *Grand Rapids v. Grand Trunk R. System*, (Mich. 1921) 182 N. W. 424, following *Louisville, etc., R. Co. v. Barber Asphalt Co.*, 197 U. S. 430, 25 S. Ct. 466, 49 U. S. (L. ed.) 819.

(9) Arbitrary Determination of Taxing District (p. 886)

Arbitrary method of determining area assessed.—A charter which directs "that where tracts of land to be taxed for improvements are divided into lots and blocks the line of the taxation or benefit district shall extend back to the middle line of the block, and that where the tracts are not

divided into lots or blocks the line shall extend back 150 feet from the near line of the street" does not deny due process, at least in the absence of any showing of inequality. *Dickey v. Seasted*, (1920) 283 Mo. 167, 223 S. W. 57.

m1. Notice and Opportunity to Be Heard

(1) In General (p. 889)

Notice with opportunity to contest assessment.—Where a state in levying an assessment on a portion of an interstate bridge within its borders provides a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with notice to the person assessed, such assessment is not without due process. *People v. St. Louis*, (1921) 297 Ill. 199, 130 N. E. 366.

Hearing as to amount.—A statute which, while not affording notice and hearing to all property owners as to the initiation of the proposed improvement, gives them an opportunity to be heard as to the validity and amount of the tax is valid. *Gillum v. Rife*, (Colo. 1921) 197 Pac. 1017.

(2) In Assessments for Public Improvements

(a) In General (p. 890)

Operation of railroad by state; notice of assessment for deficiency.—Where a statute provides for the operation by the state of certain street railways and for an assessment against certain cities and towns for any deficiency arising from such operation, it is not essential to its validity that it provide for notice and a hearing by the trustees in charge of such railroad before they levy such assessment. *Chelsea v. Treasurer*, (Mass. 1921) 130 N. E. 397.

(4) Opportunity to Be Heard at Some Stage of Proceedings (p. 894)

Hearing before arbitrators required to agree within limited time.—Due process of law is not afforded a taxpayer where the county board of assessors, conformably to the state tax law, increased the valuation of his property as returned for taxation without notice or hearing, other than notice given after the assessment was made and a hearing in the arbitration provided for in case of the taxpayer's dissatisfaction, and such arbitration failed because the arbitrators could not agree within the ten-day period fixed by law, and hence no majority award could be made, though all believed the assessment was too high. *Turner v. Wade*, (1920) 254 U. S. 64, 41 S. Ct. 27, 65 U. S. (L. ed.) —, reversing (1918) 147 Ga. 666, 95 S. E. 220.

XI. WHO MAY INVOKE CONSTITUTIONAL RIGHT

1. In General (p. 903)

Witnesses before grand jury.—A witness duly subpoenaed to testify before a grand

jury is not entitled to be heard upon an exception to the jurisdiction of the court, and is not entitled to raise any question about the constitutionality of the act authorizing the investigation or the authority of the grand jury to call before it a witness to ascertain any infraction of such statute. *U. S. v. Watson*, (N. D. Fla. 1920) 266 Fed. 736.

Nonresident publisher of school books.—Although in order to comply with conditions attached by statute to the purchase and sale of school books by the school officials, it is claimed by a nonresident publisher that it would suffer financial loss, it is not for that reason deprived of any right without due process of law as such plaintiff is not compelled to sell its books to the school authorities and has no right to make a contract of sale to such authorities without the consent of the state. *Macmillan Co. v. Johnson*, (E. D. Mich. 1920) 269 Fed. 28.

Vol. XI, p. 904, amend. 14, sec. 1.

IV. The equal protection of the laws.

4. As affected by state action.

a. Power to classify subjects of legislation.

(1) In general.

(2) Applicable to all persons similarly situated.

(3) Individuals not to be subject to discriminating legislation.

b. Law unfairly administered.

d. Exercise of police power.

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(1) In general.

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- (1) Equality.
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of state funds to settlers on state lands and giving a preference to settlers who have been in the military service in time of war, admitting other persons to share in the loans only where there are no such preferred applicant does not deny equal protection of the laws. *Wheeler v. South Dakota Land Settlement Board*, (1921) 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145.

(3) Individuals Not to be Subject to Discriminating Legislation (p. 925)

Discrimination between nonresident individual defendant and foreign corporate defendant as to giving security.—No denial of the equal protection of the laws results from the provisions of the Delaware foreign attachment laws, under which a nonresident individual defendant is debarred from appearing and defending without first giving special security, while a foreign corporate defendant may appear and answer without giving any security except for the lien of the process upon the property attached. *Ownbey v. Morgan*, (1921) 256 U. S. 94, 41 S. Ct. 433, 65 U. S. (L. ed.) —, *affirming* (1917) 7 Boyce (Del.) 297, 105 Atl. 838.

b. Law Unfairly Administered (p. 926)

To same effect as original annotation, see *Park Hill Development Co. v. Evansville*, (Ind. 1921) 130 N. E. 645.

IV. THE EQUAL PROTECTION OF THE LAWS

4. As Affected by State Action

a. Power to Classify Subjects of Legislation

(1) In General (p. 922)

Limiting use of natural gas taken within certain distance of town or industrial plant.—The equal protection of the laws is not denied by a state statute which makes the location of a well or other source of supply of natural gas within 10 miles of an incorporated town or industrial plant essential to render applicable the prohibition of the statute against the use of natural gas for products where such gas is burned or consumed without fully and actually applying and utilizing the heat therein contained for other manufacturing or domestic uses, and against the sale or disposition of such gas by the owner or lessee of the wells for the purpose of manufacturing or producing carbon or other resultant products from the burning or consumption of such gas unless the heat therein contained is fully and actually applied and utilized for other manufacturing or domestic purposes. *Walls v. Midland Carbon Co.*, (1920) 254 U. S. 300, 41 S. Ct. 118, 65 U. S. (L. ed.) —.

(2) Applicable to All Persons Similarly Situated (p. 924)

Loan of state funds—Preference to war veterans.—A statute providing for the loan

d. Exercise of Police Power

(1) In General (p. 927)

Limitation of rights generally.—A state may, when exercising its police power, consider the relation of rights, and accommodate their coexistence, and, in the interest of the community, limit one right that others may be enjoyed. *Walls v. Midland Carbon Co.*, (1920) 254 U. S. 300, 41 S. Ct. 118, 65 U. S. (L. ed.) —.

Legislation suspending right of landlord to recover possession of certain leased premises in certain localities.—There is no unconstitutional discrimination in respect of the cities affected or the character of the buildings, in N. Y. Laws 1920, chaps. 942 and 944, passed in the exercise of the police power in the emergency growing out of the World War, which suspended until November 1, 1922, the right to recover possession of real property occupied for dwelling purposes, although such laws are operative only in a city having a population of one million or more, and in cities in a county adjoining such a city, and do not extend to buildings occupied for business purposes, hotel property, or buildings in course of erection. *Marcus Brown Holding Co. v. Feldman*, (1921) 256 U. S. —, 41 S. Ct. 465, 65 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1290) 269 Fed. 306.

e. State Control Over Court Procedure

(1) In General (p. 931)

Equal protection defined.—Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection and without discrimination. *Arizona Commercial Min. Co. v. Iron Cap Copper Co.*, (1920) 236 Mass. 185, 128 N. E. 4, also holding that the dismissal because of lack of jurisdiction of a suit between mining corporations organized under the laws of another state and conducting mining operations in a third state, did not deny the plaintiff equal protection of the laws where the suit involved a decision as to the title of mining claims in the third state.

l. Corporations, Officers and Stockholders

(1) Individuals and Corporations (p. 968)

Discrimination as to amendment of by-laws.—A statute permitting the amendment of by-laws by a smaller proportion of the stockholders to corporations organized for the operation of irrigation systems under the Carey Act [8 Fed. Stat. Ann. (2d ed.) 698 et seq.] than is permitted in the case of corporations engaged in similar enterprises but which have procured their canal systems from sources other than Carey Act construction companies, is invalid. *Crom v. Frahm*, (1920) 33 Idaho 314, 193 Pac. 1013.

Requiring examination of officer under penalty of dismissal.—A state statute authorizing dismissal of an action by a foreign corporation for the refusal of an officer thereof to appear within the state for examination and produce the books and papers of the corporation, does not deny equal protection of the law. *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, (1920) 171 Wis. 586, 178 N. W. 9.

o. Water Companies (p. 995)

Moving of pipes necessitated by abolition of grade crossing of railroad.—A water company required to bear the entire expense of moving its pipes, as necessitated by the abolition of certain highway grade crossings of a steam railroad, is not denied the equal protection of the laws merely because a street railway company occupying such streets, instead of being charged with the expense of moving its tracks, is charged 10 per cent of the total expense at its crossings. *Erie R. Co. v. Public Utility Com'rs*, (1921) 254 U. S. 394, 41 S. Ct. 169, 65 U. S. (L. ed.) —, *affirming* (1916) 89 N. J. L. 57, 24, 98 Atl. 13, 28, (1917) 90 N. J. L. 672, 673, 714, 729, 677, 694, 715, 103 Atl. 1052, 1053, 1055, 1051.

(3) Condemnation of Plant (new)

Municipal condemnation under a state public utilities law of a water plant operated under a franchise does not deny the equal protection of the law. *Superior Water, etc., Co. v. Superior*, (Wis. 1921) 183 N. W. 254.

w. Banking and Trust Companies

(1) Licensing Banking Business (p. 1000)

Prohibiting certain classes from transmitting moneys to foreign countries.—A statute which prohibits natural persons, firms or partnerships from transacting the business of banking or of transmitting money to foreign countries, buying and selling foreign money and receiving money on deposit to be transmitted to foreign countries, but which provides that express, steamship and telegraph companies may continue the business of transmitting money and receiving money to be transmitted, is unconstitutional as depriving of the equal protection of the laws persons engaging in such business. *Wedesweiler v. Brundage*, (1921) 297 Ill. 228, 130 N. E. 520.

a1. Manufacture and Sale of Goods

(1) Anti-trust Laws

(a) In General (p. 1006)

Enforcement of Act which is partially suspended.—That a state anti-trust act is suspended as to some kinds of business by the Lever Act (1918 Supp. Fed. Stat. Ann. p. 181), does not make its enforcement, as to a business with respect to which it is not thus suspended, a denial of the equal protection of the laws. *Nugent v. Robertson*, (Miss. 1921) 88 So. 895.

c1. Relating to Local Government

(7) Classification of Cities

(e) Restricting Use of Automobiles (p. 1023)

Ordinance requiring fenders on certain motor trucks.—An ordinance requiring motor vehicles designed for carrying freight and merchandise, of 1,500 pounds' capacity or more, to be equipped with a fender at the front end in such manner and of such design as to prevent injury to pedestrians, unreasonably discriminates between persons similarly situated and is in violation of this constitutional provision. *Consumers' Co. v. Chicago*, (1921) 298 Ill. 339, 131 N. E. 628.

e1. Relation of Employer and Employee

(2) Regulating Payment of Wages

(a) In General (p. 1031)

Penalty for failure to pay wages promptly.—A statute imposing 10% per day as liquidated damages for the failure of certain kinds of corporations to pay wages promptly is invalid as class legislation. *Davidow v. Wadsworth Mfg. Co.*, (1920) 211 Mich. 90, 178 N. W. 776, 12 A. L. R. 605.

(4) Workmen's Compensation Act

(a) In General (p. 1033)

Act compulsory as to one employment and elective as to others.—A state may consistently with the due process of law and equal protection of the laws clauses of the federal Constitution, enact a general workmen's com-

pensation law applicable to all employees, and make it compulsory as to one hazardous employment (coal mining) and elective as to all others, except railway employees engaged in train service, who are excluded.

The inclusion within the terms of a state workmen's compensation act of all employees of coal mining companies, whether engaged in the hazardous part of the business or not, does not render repugnant to the due process of law and equal protection of the laws clauses of the federal Constitution the classification made by that act, which makes it compulsory as to all coal mining companies while as to all other private business enterprises within the state, except railway employees in train service, who are excluded, it is purely optional. *Lower Vein Coal Co. v. Industrial Board*, (1921) 255 U. S. 144, 41 S. Ct. 252, 65 U. S. (L. ed.) —.

ff. Regulating Pursuit of Occupations

(5) Barbering (p. 1040)

"In so far as the practice of barbering is concerned, the public welfare and comfort—outside of, and beyond what is included in its health and safety—are so insignificant as not to lend color to any right claimed under the police power of the state." *Timmons v. Morris*, (W. D. Wash. 1921) 271 Fed. 721, wherein it was held a system of grading on examinations for licenses under which "it is possible, . . . for a man to pass and be licensed, though he has only got 4 points out of the 24 in those subjects affecting the public health, provided he is excellent in the nonessentials. in so far as health is concerned; while the applicant who is perfect in so far as matters affecting health are concerned, and yet 'poor' in deportment, razor honing, and time taken in the work—matters that can in no sense be held to touch the public health or safety—would be deprived of the right to practice barbering," clearly had no substantial relation to the public health and, therefore, was not a valid exercise of the police power.

x2. State Taxation

(1) Equality

(a) In General (p. 1057)

To same effect as original annotation, see *People v. St. Louis*, (1921) 297 Ill. 199, 130 N. E. 366.

(b) Power of Classification

aa. In General (p. 1058)

Additional transfer tax on investments escaping fair share of tax burden.—The additional transfer tax of 5 per cent imposed by § 221b of the New York Tax Law, upon certain bonds and other obligations held by a resident decedent at his death, upon which neither the general property tax nor an optional stamp tax had been paid for a fixed period, does not deny the equal protection of the laws. *Watson v. State Comptroller*, (1920) 254 U. S. 122, 41 S. Ct. 43, 65 U. S.

(L. ed.) —, (*affirming* (1919) 226 N. Y. 384, 123 N. E. 758) wherein it was further held that a property tax cannot be said to be imposed by a state statute exacting an additional transfer tax upon certain bonds and other obligations held by a resident decedent at his death, upon which neither the general property tax nor an optional stamp tax has been paid for a fixed period, merely because the existence of the statute may induce the owners of such property to present it for taxation, nor can the law be deemed to impose a penalty merely because the decedent's estate may, under it, be required to pay more for taxes than the deceased would have paid if he had presented his property for taxation. The court in the course of its opinion said: "The occasion and the purpose of the statute are shown by the court of appeals. An owner of investments is not required either to list them for assessment locally under the General Property Tax Law, or to present them for stamping under the Investment Tax Law. Whether the investments of a resident are taxed during his life depends either upon his own will or upon the vigilance and discretion of the local assessors. This condition led to loss of revenue by the state, and to inequality in taxation among its citizens. To remedy both evils this additional transfer tax was imposed upon investments of a decedent which had wholly escaped taxation. It is insisted that the tax is discriminatory because under it other property of the same kind, bequeathed to persons standing in the same relationship to the decedent, will not be taxed. But the power to classify for purposes of taxation is fully established. The executors admit, as they must, that a classification is reasonable if made with respect to the kind of property transferred; or, to the amount or value of property transferred; or, to the relationship of the transferees; or, to the character of the transferee,—for instance, as engaged in charity. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 300. 42 L. ed. 1037, 1045, 18 Sup. Ct. Rep. 594; *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Campbell v. California*, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182. But their list does not exhaust the possibilities of legal classification. See *Beers v. Glynn*, 211 U. S. 477, 484, 53 L. ed. 290, 293, 29 Sup. Ct. Rep. 186; *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 38 L. R. A. (N. S.) 1139, 32 Sup. Ct. Rep. 105; *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2. Compare *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736. Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from the nature of the things classified,—here the right to receive property by devolution."

Classifying pipe line companies.—The classification, for the purpose of taxation, of pipe line companies engaged in the business of transporting oil and gas into those whose systems are under 10 miles in length and those whose systems are over 10 miles in length, is founded upon a substantial distinction, and is not violative of that clause of the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws. *Eureka Pipe Line Co. v. Hallanan*, (W. Va. 1921) 105 S. E. 506.

Discriminating between manufacturers of oil from different kinds of fish.—There is nothing in the federal Constitution that prevents a territorial license tax upon the manufacture of fish oil, fertilizer, and fish meal, in whole or in part, from herring, even though the tax be greater than that imposed upon similar use of other fish, or upon the offal of salmon. *Alaska Fish Salting, etc., Co. v. Smith*, (1921) 255 U. S. 44, 41 S. Ct. 219, 65 U. S. (L. ed.) —, wherein the court said: "The complainant alleges that the tax will prohibit and confiscate the plaintiff's business, which is that of manufacturing fish oil, fertilizer, fish meal, and by-products from herring, either in whole or in part; that the tax unreasonably discriminates against the plaintiff, as it levies no tax upon the producers of fish oil, etc., from other fish, and is otherwise extortionate; and that it contravenes the act of Congress in lack of uniformity and in exceeding 1 per centum of the actual value of the plaintiff's property. The prophecies of destruction and the allegations of discrimination as compared with similar manufactures from salmon are denied by the attorney general for Alaska, the latter denial being based upon a comparison of the statutes, which, of course, is open. We are content, however, to assume for the purposes of decision that, not to speak of other licenses, the questioned acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years."

bb. Systematic Undervaluation of Other Property (p. 1059)

Railroad property.—Where tangibles, including the tangibles of railway companies, in a county, are, as a result of a settled practice or custom systematically assessed below their true value, and the intangibles of the railway companies assessed at their true value, the railway company against

which such actual value is assessed is entitled to enjoin the collection of so much of the tax against it as was based upon the assessment of its intangibles at a higher proportionate value than that of other property within the state, upon the ground such assessment is in violation of section 1 of the Fourteenth Amendment to the federal Constitution, guaranteeing equal protection of the law. *Druesdow v. Baker*, (Tex. 1921) 229 S. W. 493. In that case however the court added: "It is equally well settled that if the intangible assets of a railway company are assessed at their full value and its tangible assets at less than their true value and below the value of the tangible property generally of the county, and such overvaluation of intangibles is equalized by the undervaluation of tangibles, as a result of which it is called upon to pay no more than others, it is not entitled to equitable relief because one class of its property is valued above another."

(3) Discriminating Between Residents and Nonresidents

(c) Discriminating Between Domestic and Foreign Corporations (p. 1061)

License tax for sale of automobiles.—A state act imposing a license tax upon all manufacturers or persons or corporations engaged in selling automobiles in the state unconstitutionally discriminates against non-resident manufacturers doing business in the state through local sales agents, where it reduces the tax to one fifth of its normal amount if the manufacturer of the automobiles has three fourths of his assets invested in the bonds of the state or of some of its municipalities, or in other property situated therein and returned for taxation. *Bethlehem Motor Corp. v. Flynt*, (1921) 256 U. S. —, 41 S. Ct. 571, 65 U. S. (L. ed.) —.

Excise tax on capital stock of foreign corporations.—A state statute imposing an excise tax on foreign corporations and providing that for the purpose of assessing such tax upon corporations whose stock was issued without a par value of one hundred dollars shall be considered par, does not contravene this amendment. *American Uniform Co. v. Com.*, (Mass. 1921) 129 N. E. 622, wherein the court said: "We are of the opinion that there is nothing in the statute here assailed in conflict with the Fourteenth Amendment to the Constitution of the United States. It was said in *District of Columbia v. Brooks*, 214 U. S. 138, 150, 29 Sup. Ct. 560, 563 (53 L. ed. 941) that—

"The Fourteenth Amendment is unqualified in its declaration that a state shall not deny to any person within its jurisdiction the equal protection of the laws. Passing on that amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the states the power of classification. And also that such classification need not be either

logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws.

"The principle thus stated seems to us to govern the case at bar. The present statute is not a property tax and is not regulative of interstate commerce. *Baltic Mining Co. v. Commonwealth of Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. ed. 127. It is not discriminatory or unequal in the sense of denying to the petitioner the protection of equal laws. Absolute equality is impossible even in the operation of laws for the taxation of property. It is even more difficult to arrive at exact uniformity in the operation of excise laws. That is not required by the Constitution. It is enough if they are not unreasonable in the light of all the conditions to which they are likely to apply. The present statute applies evenly to all foreign corporations seeking to avail themselves of the privilege of doing a domestic business within the borders of Massachusetts and having capital stock without par value. Its design is to put the corporations having capital stock without par value as nearly as may be on the same footing touching excises as those having a capital stock with a par value. The petitioner is not singled out as a special object for hostile or discriminating legislation. It is not easy to perceive any more equitable way of dealing with a somewhat puzzling and difficult question than that adopted by the legislatures. In any event we think it cannot be said that this statute is unequal in its operation, or that it deprives the plaintiff of its property without due process of law."

(7) Exemptions from Taxation

(a) In General (p. 1065)

Waiver of invalidity of statute.—A taxpayer by writing "none" in his income tax return in the blank appropriate for claim of exemption waives the right to urge that a state income tax law is invalid because it discriminates in the matter of exemptions between residents and nonresidents. *State v. Phelps*, (1920) 172 Wis. 147, 178 N. W. 471.

(10) Assessments for Local Improvements

(a) In General (p. 1069)

Discrimination against railroad in assessments for highway improvement.—A state statute which sanctions assessing a railway company for benefits from a highway improvement upon a theory which, disregarding

area and distance from the highway, assumes that 9.7 miles of railway in a purely farming section, treated as an aliquot part of the railway system, will receive benefits amounting to \$67,900 from the construction of 11.2 miles of gravel road, while farm lands and town lots are assessed according to area and position, and wholly without regard to their value, the improvements thereon, or their present or prospective use, is invalid as producing a discrimination against the railway company so palpable and arbitrary as to amount to a denial of the equal protection of the laws. *Kansas City Southern R. Co. v. Road Imp. Dist. No. 6*, (1921) 256 U. S. —, 41 S. Ct. 604, 65 U. S. (L. ed.) —, reversing (1919) 139 Ark. 424, 215 S. W. 656, 217 S. W. 773.

(11) Railroad Companies

(a) In General (p. 1071)

Company taxed upon its own figures.—A railway company taxed upon its own figures, in accordance with the statute, cannot complain that it was taxed disproportionately, as compared with other railways. *St. Louis-San Francisco R. Co. v. Middlekamp*, (1921) 256 U. S. —, 41 S. Ct. 489, 65 U. S. (L. ed.) —.

(16) Of Franchises

(a) In General (p. 1074)

Until the highest court of the state decides otherwise, the Federal Supreme Court will assume that there is no such unconstitutional inequality of treatment in the taxation of franchises of domestic corporations between corporations with stock having a stated par value and those having no stated par value for their stock as is asserted to exist on the theory that the state court having decided that corporations with stock having no stated par value can be admitted to do business in the state all such corporations fall within the statutory provision imposing a tax of only \$25 upon foreign corporations without a capital stock. *St. Louis-San Francisco R. Co. v. Middlekamp*, (1921) 256 U. S. —, 41 S. Ct. 489, 65 U. S. (L. ed.) —.

(21) Of Property of Domestic Corporations Situated Outside State (p. 1075)

A franchise tax whereby a domestic corporation is assessed on the entire amount of its capital stock does not infringe this section, even as applied to a corporation which has property outside the state and which is therefore placed at a disadvantage as compared to foreign corporations which are taxed only on the basis of their property within the state. *Atlantic Coast Line R. Co. v. State*, (1920) 204 Ala. 80, 85 So. 424.

(24) Graduated Income Tax (p. 1076)

Distribution of proceeds.—The distribution of the proceeds of a state income tax, conformably to *Mass. Gen. Act 1919*, chap.

314, among the various towns, cities, and taxing districts of the state to the extent thought by the legislature necessary to supply the loss which such taxing would sustain by the withdrawal from their taxing power of the intangible property, the income of which was taxed by the state, such payments to continue until 1928, prior to which date any excess of the income tax fund over these required payments, and beginning with that year and continuing thereafter the whole of that fund, is to be distributed to such subdivisions in proportion to the amount of the state tax imposed upon each for such year, does not violate the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., conceding that such payments may be used by the local subdivisions receiving them, if they so elect, for local proprietary purposes, which may not confer any certain benefit upon taxpayers in other taxing subdivisions, there being nothing to justify the assumption that the several municipalities intend to devote to other than public use any portion of the income tax thus distributed to them, and the tax being uniform in its application to all income within the description of the act of all inhabitants of the state, without regard to the taxing subdivisions in which they may reside. *Dane v. Jackson*, (1921) 256 U. S. —, 41 S. Ct. 566, 65 U. S. (L. ed.) —.

Vol. XI, p. 1110, amend. 16.

"Income" as including gain from isolated sale of personal property.—The gain derived from a single, isolated sale of personal property which has appreciated in value during a series of years is income within the meaning of this Amendment. *Merchants' Loan, etc., Co. v. Smietanka*, (1921) 255 U. S. 509, 41 S. Ct. 386, 65 U. S. (L. ed.) —; *Eldorado Coal, etc., Co. v. Mager*, (1921) 255 U. S. 522, 41 S. Ct. 390, 65 U. S. (L. ed.) —; *Goodrich v. Edwards*, (1921) 255 U. S. 527, 41 S. Ct. 390, 65 U. S. (L. ed.) —; *Walsh v. Brewster*, (1921) 255 U. S. 536, 41 S. Ct. 392, 65 U. S. (L. ed.) —.

"Income" as including stock dividend.—To the same effect as the annotation under this catchline in 1920 Supp. 882 see *Walsh v. Brewster*, (1921) 255 U. S. 536, 41 S. Ct. 392, 65 U. S. (L. ed.) —, reversing in part and affirming in part (*D. C. Conn.* 1920) 268 Fed. 207.

Vol. XI, p. 1112, amend. 17.

Application to Federal Corrupt Practices Act.—The validity of the Federal Corrupt Practices Act (see 3 Fed. Stat. Ann. (2d ed.) 120), antedating the 17th Amendment, must be tested by powers possessed by Congress at the time of its enactment. An after-acquired power cannot ex proprio vigore, validate a statute void when enacted. *Newberry v. U. S.*, (1921) 256 U. S. —, 41 S. Ct. 469, 65 U. S. (L. ed.) —.

1919 Supp., p. 839, amend. 18.

- I. Constitutionality.
- II. Scope and effect of Amendment.
 1. In general.
 2. Effect on state statutes.
- III. "Concurrent power" of congress and states to enforce Amendment by "appropriate legislation."
 1. Power of congress.
 2. Power of states.
 3. Power of municipalities.
 4. "Concurrent power."
 5. "Appropriate legislation."

For National Prohibition Act enacted to enforce this Amendment, see 1919 Supp. 202; and for annotations to such Act see 1920 Supp. 590 and this Supplement, *supra*, p. 535.

I. CONSTITUTIONALITY

Constitutionality—As affected by resolution proposing Amendment.—This Amendment is not invalid for the reason that the congressional resolution proposing it declared that it should be inoperative unless ratified within seven years. *Dillon v. Gloss*, (1921) 256 U. S. —, 41 S. Ct. 510, 65 U. S. (L. ed.) —, affirming (*N. D. Cal.* 1920) 262 Fed. 563.

Adoption of Amendment.—"A recent decision of the Supreme Court of the United States [see National Prohibition Cases, (1920) 253 U. S. 350, 1920 Supp. Fed. Stat. Ann. 848] has foreclosed all discussion of this question in holding that the referendum provisions of state Constitutions and statutes cannot be applied consistently with the Constitution of the United States in the ratification or rejection of amendments to that Constitution, and that the Eighteenth Amendment, prohibiting the manufacture, etc., of intoxicating liquors for beverages, is within the power to amend reserved by article 5 of the United States Constitution; in other words, that the 'Legislatures of three-fourths of the . . . states,' as the words are employed in that article (5), has reference to legislative bodies as they were known at the time of the adoption of the Constitution, and not by any other body or the people generally. The action of the respondents, therefore, in attempting to refer the legislative ratification of the Eighteenth Amendment to the people, was without authority, and the trial court was in error in so ruling." *Carson v. Sullivan*, (1920) 284 Mo. 353, 223 S. W. 571.

Due process of law is not abrogated by the Eighteenth Amendment. *U. S. v. Crossen*, (*E. D. Pa.* 1920) 264 Fed. 459.

II. SCOPE AND EFFECT OF AMENDMENT

1. In General

Date of ratification.—This amendment was ratified January 28, 1919, and took effect January 29, 1920. *Regal Drug Corp. v. Wardell*, (*C. C. A. 9th Cir.* 1921) 273 Fed. 182.

Amendment as in harmony with Fourth and Fifth Amendments.—The Eighteenth

Amendment to the federal Constitution is as sacred as the Fourth and Fifth Amendments, but no more so. They stand on an equality. There is no inconsistency between them. *U. S. v. Rykowski*, (S. D. Ohio 1920) 267 Fed. 866.

Effect of Amendment — In general.—The Amendment "rendered obsolete or repealed all earlier law that applied to, sanctioned and taxed distilled spirits for beverage purposes." *Violette v. Walsh*, (D. C. Mont. 1921) 272 Fed. 1014.

Instead of granting a right, it is a limitation on privilege. *Woods v. Seattle*, (W. D. Wash. 1921) 270 Fed. 315.

As to the effect of section 2 of the Amendment, it has been said:

"The truth is, in my judgment, that too much concern seems to have been manifested because of the incorporation of section 2 into the Eighteenth Amendment. The power thereby sought to be conferred upon Congress would have been conferred by the adoption and ratification of section 1 alone; a power being accorded to the federal government, Congress, even in the absence of an express grant, would be authorized to legislate in the exertion of such power. Paragraph 18 of section 8 of the first article of the federal Constitution specifically authorizes Congress —

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or official thereof."

"Obviously this section would authorize Congress to enforce, by appropriate legislation, the Constitution or any amendment thereof. As was said by Hamilton in the Thirty-First number of the *Federalist*, respecting the particular provision just quoted, together with the one contained in the second clause of article 6:

"... It may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."

"So, too, the authority of the several states was not materially changed by the inclusion of the second section. As heretofore shown, they never surrendered their power, originally possessed in virtue of their sovereignty, to prohibit effectually within their respective limits the traffic in intoxicants. They still have that power. They merely granted to the federal government the same right within its domain. In addition, by the positive terms of the grant to themselves of 'concurrent power,' they were authorized to legislate in enforcement of the amendment — a lesser power, strictly speaking, than they already possessed, in virtue of

their own sovereignty — and, if they wished, to enforce in their own courts the prohibitions and penalties to be provided by Congress for enforcement in the federal courts." *Ex p. Crookshank*, (S. D. Cal. 1921) 269 Fed. 980.

On Fifth Amendment.—As to the effect of the Eighteenth Amendment on the Fifth Amendment, it has been said:

"But it is contended that the Fifth Amendment has not been abrogated by the Eighteenth Amendment. Broadly speaking, this is, of course, true. The adoption of an amendment to the organic law, which does not expressly change or repeal a former provision, necessitates construction of the effect of such amendment upon the older provision. A constitutional amendment cannot be unconstitutional. If it is in conflict with an older provision, so that the two cannot be reconciled or construed together, clearly the older one must yield at the tangent of conflict to the newer law. Courts have found themselves compelled to adopt, for the construction of constitutional provisions, rules strikingly similar to the rules used in construing statutes. It may be a matter of regret that age-old provisions making for the liberty of action of the citizen have been encroached upon, and to a degree whittled away; but this is not a matter wherein the courts may relieve. It is a political question, and not a judicial one.

"It follows that, if a newer constitutional amendment in point of time of adoption permits, as the Eighteenth Amendment obviously does, the passage of a law which forbids the transportation of whisky, a law which is well within the constitutional grant of power on this point is not unconstitutional, even though the effect of such a law may be to encroach upon the rights given by older provisions of the organic law, and theretofore deemed to be inalienable." *Corneli v. Moore*, (E. D. Mo. 1920) 267 Fed. 456.

On trademark rights.— "The Eighteenth Amendment to the Constitution and the laws for its enforcement, relating to the subject of prohibition, have compelled transition from the production and sale of alcoholic beverages to nonalcoholic beverages, which calls for liberal protection of trademark rights affected by this enforced change." *Sexton v. Schoenhofen Co.*, (App. Cas. D. C. 1921) 273 Fed. 327.

On obligation of lessee.—"A lessee is not released from liability for rent under a lease of premises 'to be used and occupied as a café and for no other purpose whatsoever' merely because he was subsequently deprived of their use for the sale of intoxicating liquors for beverage purposes for the remainder of the term by the Eighteenth Amendment to the federal Constitution and the Volstead Act [1919 Supp. Fed. Stat. Ann. 202]: it appearing that no provision was made in the lease for such a contingency." *Proprietor's Realty Co. v. Wohltmann*, (N. J. 1921) 112 Atl. 410. The court further said:

"By the lease the use of the premises was limited to café purposes. The word 'café' was originally a French word meaning 'a coffee house,' but the word as now ordinarily and popularly used in English means a restaurant or house for refreshments.

"In construing a written contract the words employed will be given their ordinary and popularly accepted meaning, in the absence of anything to show that they were used in a different sense. In the present case there is nothing to show that the parties used the word in any other than its popular and ordinary meaning.

"It follows, therefore, that under such a lease refreshments of all kinds allowed by law might be kept and sold.

"No doubt the parties contemplated, among other things, the sale of both intoxicating liquors and nonintoxicating beverages, because the lessee covenanted in the lease, among other things, 'to strictly comply with all national, state, municipal, or other laws, ordinances, regulations, and rules of any kind governing the possession, sale, ownership or handling of intoxicating liquors or beverages of any kind that the lessee may sell, own, have possession of, or handle.' But such intention was of course contingent upon such sale continuing to be lawful. This is to be inferred, not only from the language used, but from the fact, of course known to them, that the right to sell intoxicating liquors for beverage purposes then rested in the discretion of public officers, and above all was subject to federal and state control.

"Since neither the Eighteenth Amendment nor the Volstead Act deprived the lessee of the right to keep and sell non-intoxicating beverages and refreshments, we are called upon to deal only with a case where the lessee was subsequently deprived of the use of the premises for one only of the several purposes contemplated by the lease, and we limit our discussion and decision to such a case. Now the general rule is that, where the contract does not restrict the use of the leased premises to a single purpose, it is not invalidated by a subsequent enactment prohibiting the use for one of the several purposes contemplated by the lease. Pertinent cases are collected in a useful note in 7 A. L. R. 836.

"This rule proceeds upon the theory that, since such leases are for more than one purpose, the depriving of the lessee of one or more less than all of the purposes contemplated does not deprive him of the beneficial use of the leased property; he being still entitled to use the premises for the carrying on of the unrestricted part of the purposes contemplated by the lease. . . .

"Coming now to the application of the rule to the present case, it will be seen that the lessee has not been entirely deprived of the beneficial interest which the lease contemplated. The sale of intoxicating liquors was not the only use to which the property was agreed to be devoted. It was in legal effect leased for the double purposes of the

sale of intoxicating liquors and the sale and service of nonintoxicating beverages and refreshments, and there is no prohibition against its continued use for the latter object. These lines of business were not identical or inseparable. There being, consequently, a serviceable use for which the property is still available consistently with the limitations of the demise, the lessee is not in a position to assert that he is totally deprived of the benefit of the tenancy. It is further to be observed that, while the impossibility of obtaining a license for the sale of intoxicating liquors on the rented premises during the whole of the term of the lease might have been reasonably anticipated, no provision was made in the agreement for the relief of the lessee in such a contingency." See also *Goldberg v. Callender*, (Conn. 1921) 113 Atl. 170.

Property in intoxicating liquors.—The courts everywhere, in dealing with property rights in whisky before the adoption and ratification of the Eighteenth Amendment, uniformly recognized the existence of such rights. *Cornell v. Moore*, (E. D. Mo. 1920) 267 Fed. 456.

2. Effect on State Statutes

Amendment as repealing state statutes.—*In general.*—"There is nothing in the amendment indicating an intention to repeal or supersede the legislation of the several states, whenever the enforcement of such legislation would aid in carrying into effect the provisions of the amendment." *State v. Hartley*, (1921) 115 S. C. 524, 106 S. E. 766; *Shreveport v. Marx*, (1920) 148 La. 31, 86 So. 602.

A state statute prohibiting having liquor in possession for the purpose of sale was not repealed by the adoption of the Eighteenth Amendment and the enactment of the Volstead Act. *State v. Fore*, (1920) 180 N. C. 744, 105 S. E. 334, *followed in State v. Muse*, (1921) 181 N. C. 506, 107 S. E. 320. See to the same effect *Scroggs v. State*, (1920) 150 Ga. 753, 105 S. E. 363; *Smith v. State*, (1920) 150 Ga. 755, 105 S. E. 364.

A state statute forbidding sale of intoxicants survives this provision and the federal statute enacted to enforce it. *Alexander v. State*, (1921) 148 Ark. 491, 230 S. W. 548.

The Eighteenth Amendment to the Constitution of the United States, and the "national prohibition act," popularly known as the Volstead Act, do not supersede or abrogate the existing state law known as the prohibition act, approved March 28, 1917 (Act Ex. Sess. 1917, p. 7). *Jones v. Hicks*, (1920) 150 Ga. 657, 104 S. E. 771, 11 A. L. R. 1315.

A state statute prohibiting sales of intoxicating liquor without a license and providing a penalty for the violation thereof is not abrogated by this Amendment but remains valid and enforceable. *Com. v. Nickerson*, (1920) 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568. See also *Ulman v. State*, (1921) 137 Md. 642, 113 Atl. 124, wherein it was said: "Certainly there is no conflict so far as the state law applies to

sales for nonbeverage purposes. Because it permitted the license of sales for beverage purposes also when such sales were not prohibited by the federal Constitution, and because such licenses can no longer be issued, it does not follow that the whole law has been abrogated. On the contrary, it is not unreasonable to suppose the Legislature would have enacted laws regulating the liquor business and providing for a revenue from such sales as would have been permissible if the Eighteenth Amendment had then been in force. One of the ways of exercising control over the business by the state and preventing clandestine and illegal sales would be to enforce the prohibition feature of the existing license laws, the effect of which would be to punish every one selling without a license whether for beverage or nonbeverage purposes. The inhibition being against any sale without a license, all sales are covered, both those permitted and those prohibited by the Eighteenth Amendment. But even if it were probable that the Legislature of Maryland would not have enacted the existing liquor license laws or any part of them if it could have foreseen the adoption of the Eighteenth Amendment, that could not be taken into consideration in determining the question now before us. Doubtless many statutes would not be enacted if happenings of the future could be foreseen."

But compare *State v. Green*, (1921) 148 La. 376, 86 So. 919, where the court said regarding the repeal of such a state statute: "Act 66 of 1902, by prohibiting the selling of intoxicating liquors without a license, implies the right of any and every person to obtain the license. Such a law, if enacted subsequent to the adoption of the Eighteenth Amendment, would not be 'appropriate legislation.' It would be absolutely violative of the amendment. The statute is altogether inconsistent with the constitutional amendment, and is therefore without effect."

Statute setting up different standard as to liquor.—"Under the existing laws, should an effort be made to enjoin the officers of the United States government from prosecuting in the state of Texas an individual who dealt in an intoxicating liquor fit for beverage which contained more than one-half of 1 per cent., the case of *Rhode Island v. Palmer* would be a conclusive authority against the issuance of the injunction. The impotence of the state, in view of the federal law, to render lawful the manufacture, sale, or transportation of a beverage containing more than one-half of 1 per cent. of alcohol does not imply that the state, in the exercise of its judgment, could not elect to punish persons who dealt in intoxicants containing 1 per cent. or more of alcohol. Its refusal to punish where the percentage of alcohol was less than 1 per cent. would not obstruct or impede the right of the federal government to do so under its own law. The prosecution by the

state of those who disobeyed its mandate with reference to intoxicants containing 1 per cent. or more of alcohol would conduce to make effective the prohibition declared in the amendment to the national Constitution." *See p. Gilmore*, (1921) 88 Tex. Crim. 529, 228 S. W. 196.

Prohibition amendment as binding on legislative bodies, courts, etc.—To same effect as 1920 Supplement annotation, p. 863, *see Jones v. Cutting*, (Mass. 1921) 130 N. E. 271, holding that the fact that certain parts of a state statute are void because in conflict with this amendment does not invalidate the whole statute where the valid and enforceable parts of it are so independent of the inoperative portions as to lead to the conclusion that they would have been enacted apart from the latter, and the several sections of the statute are not so mutually dependent upon each other as to require the belief that they were intended to be an indivisible unit.

The relation of state and federal regulations to each other was stated in *Allen v. Com.*, (Va. 1921) 106 S. E. 589, as follows: "We think that there can be no conflict between the federal and state legislation on the subject under consideration so long as neither state nor federal government attempts to interdict the other from dealing with the conduct in question as federal or state offenses, respectively, as the case may be, and where the legislation of the state is confined to punishing the conduct as state offenses and the legislation of the federal government is confined to punishing the same conduct as federal offenses, neither undertaking to nullify the laws of the other enacted and operating as the expression of their edicts, respectively, promulgating the provisions as to what shall be offenses against the respective sovereignties and the punishments therefor."

III. "CONCURRENT POWER" OF CONGRESS AND STATES TO ENFORCE AMENDMENT BY "APPROPRIATE LEGISLATION"

1. Power of Congress

Power of Congress — In general.—"Practically the effect of the Eighteenth Amendment was to confer on Congress the same powers to deal with the manufacture, sale, and transportation of intoxicating liquors intrastate as it formerly possessed interstate, and also to confer on Congress the same police powers therein, and in any state, that the several states themselves had within their own territorial limits, on the same subjects, before the adoption of the Eighteenth Amendment. Taking this view, which is a hurried expression and construction of a far-reaching condition, and of a far-reaching statute, it follows that what a state could do within its own territorial limits before the adoption of the Eighteenth Amendment to stamp out the manufacture, sale, and transportation of liquor, Congress may now do.

"It follows that this is true, not only as to interstate commerce, but as to intrastate commerce. If a state could, as a part of its police powers, in furtherance of its efforts to prevent the manufacture, sale, and transportation of intoxicating liquors enjoin the use of houses, premises, and places of manufacture and sale as a common nuisance, Congress may now likewise pass a law to enjoin within any state such things as common nuisances." *U. S. v. Cohen*, (E. D. Mo. 1920) 268 Fed. 420.

"The power conferred on Congress by section 2 of the Eighteenth Amendment is plenary in its nature, and commits to Congress the discretion to determine the legislation necessary and appropriate to enforce the provisions of section 1 of this constitutional amendment. Unless the enactment has no substantial relation to the enforcement of the constitutional prohibition of the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, a court has no power to determine the wisdom of the enactment or challenge the manner of the exercise by Congress of the authority and discretion confided to it by the second section of this constitutional amendment." *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

Legislation must lend to aid enforcement.

"Any legislation enacted by Congress, pursuant to the amendment, must be calculated to enforce it by appropriate means, and not to 'defeat or thwart the prohibition' contained therein. *Rhode Island v. Palmer*, *supra*. For the same reason, any legislation enacted by the state, or any instrumentality exerting the power of the state, must be in aid of the enforcement of the amendment or in furtherance of the prohibition therein commanded; the several states have lost the power to do otherwise." *Ex p. Crookshank*, (S. D. Cal. 1921) 269 Fed. 980.

Intrastate transportation of liquor.—Since the adoption of the Eighteenth Amendment Congress can deal not only with interstate, but also with intrastate transportation of liquor. *Street v. Lincoln Safe Deposit Co.*, (S. D. N. Y. 1920) 267 Fed. 706.

Places where liquor may be possessed.—

Under the police power delegated by the Eighteenth Amendment Congress has the right to prohibit any transportation of liquors and in order to reduce the necessity for transportation to a minimum it has the power to legislate as to the places where liquor may be lawfully possessed. *Street v. Lincoln Safe Deposit Co.*, (S. D. N. Y. 1920) 267 Fed. 706.

Invasion of police power of state.—"In the enforcement of the powers conferred by the Eighteenth Amendment Congress may invade the field of the police power of the state, and its legislation may accomplish the same

or similar purposes theretofore accomplished by state legislation. This results, not because the police power of the state is superseded, but because the exercise of the constitutional power has taken Congress into the field formerly occupied exclusively by state legislation. This does not mean that the police power of the state, in whole or in part, has been taken from the state, nor that the police power has been vested in the United States. The United States may not exercise the police power as such within the state, for it 'lacks the police power.' This was reserved to the states by the Tenth Amendment; the state does not act under the police power upon an implied authority to exercise a power delegated to Congress until such time as Congress shall see fit to act. *Hamilton v. Ky. Distilleries Co.*, 251 U. S. 147, 40 Sup. Ct. 106, 64 L. ed. 194; *Ex parte Guerra* (Vt.) 110 Atl. 224. The National Prohibition Act has not deprived our state of its right to exercise its police power in the regulation and restriction of the liquor traffic.

"Section 1 of the Eighteenth Amendment 'invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the sections prohibit.' National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. ed. 946. Unless the state's exercise of that power conflicts with the constitutional grant or with the act of Congress passed in enforcement of the grant, its authority to act within its police power is supreme." *State v. Ceriani*, (Conn. 1921) 113 Atl. 316.

"In the practical exercise of the police power prohibiting the liquor traffic, any conflict between the exercise of such power by the federal government and that by a state government would have to amount to repugnancy or conflict of such a direct and positive nature as that 'the two acts could not be reconciled or consistently stand together.'" *Ex p. Crookshank*, (S. D. Cal. 1921) 269 Fed. 980.

2. Power of States

Power of states, in general.—The prohibiting by national legislation of traffic in liquor with more than one-half of one per centum of alcohol by volume does not prevent the state, or the city within the granted police power, to decide upon measures that are needful for the protection of its people by prohibiting possession or delivery of intoxicants fit for beverage purposes, under the guise of innocent preparations not within the National Prohibition Act. *Woods v. Seattle*, (W. D. Wash. 1921) 270 Fed. 315.

The state may by appropriate legislation exert its power to enforce article 18, either by new legislation or appropriate existing legislation. Neither article 18 nor the Congress sought to destroy any existing remedies by a state to curb the drink evil, and

where existing remedies are provided by a state, available for the enforcement of article 18, and in harmony with the Prohibition Act, the power of the state, through its courts, may be invoked, and a conviction in a state court for conduct which is in violation of the Prohibition Act, is a bar to a prosecution in the federal courts. It seems manifest that it was not the intent that a person should be punished by the state and federal law for the same offense. *U. S. v. Peterson*, (W. D. Wash. 1920) 268 Fed. 864.

As to the effect of the adoption of this amendment on the power of the states it has been said that it may not "be maintained with success that in the adoption and ratification of the Eighteenth Amendment the several states were surrendering any of the powers theretofore possessed by them, respecting their own jurisdiction to prescribe effective prohibition of that traffic. In all that was done, they were simply conferring upon the federal government the like power to prohibit, which theretofore, in virtue of its organization and the character of the powers reserved to the states, it had not possessed. *Hamilton v. Distilleries Co.*, 251 U. S. 146, 156, 40 Sup. Ct. 106, 64 L. ed. —. In other words, there was a surrendering by the states of the power to permit the liquor traffic, but no diminution of their power to prohibit it; they accorded to the federal government the jurisdiction to enforce absolute prohibition of the traffic (*Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. ed. —; *Rhode Island v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. ed. —, decided June 7, 1920); but they still retained the same right to themselves (*Commonwealth v. Nickerson* [Mass.] 128 N. E. 273, 277).

"As a consequence, in so far as Congress should fail successfully to provide for effective prohibition, the state under its retained right could legislate to accomplish that end. In addition, pursuant to the express terms of the 'concurrent power' granted, the state might 'by appropriate legislation,' in consonance with congressional action, itself legislate in enforcement of the Eighteenth Amendment within the limits of its own territory. Such I conceive to be the general effect of the situation created." *Ex p. Crookshank*, (S. D. Cal. 1921) 269 Fed. 980.

Regarding the power of the states to enact legislation for the enforcement of the Prohibition Amendment, the court, in *Ex p. Ramsey*, (S. D. Fla. 1920) 265 Fed. 950, said:

"On June 7, 1920, the Supreme Court of the United States handed down its decision in the seven cases pending before it, in which the construction of the Eighteenth Amendment and the Volstead Act was involved. The court in its ninth conclusion say:

"The power confided to Congress by that section [section 2 of the amendment], while not exclusive, is territorially coextensive with the prohibition of the first section,

embraces manufacture and other intrastate transaction, as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

"In considering the effect of the Eighteenth Amendment, the Volstead Act, and the recent decision of the Supreme Court of the United States on existing state legislation, it must be borne in mind that two of the seven cases were original actions brought by two states whose Legislatures had passed acts increasing the alcoholic strength of beverages over that given in the Volstead Act, and these suits were dismissed. The reason for such action, other than those expressed in the concurring opinion of the Chief Justice, is not given. The Chief Justice filed his concurring opinion, and, discussing the contentions of counsel before the court says:

"It is said, conceding that the concurrent power given to Congress and to the states does not as a prerequisite exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the states, and makes each action effective; but as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged, because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other."

"The Chief Justice, in further announcing his decision, has this to say:

"In the first place, it is indisputable, as I have stated, that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without refer-

ence to state lines or distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the amendment and legislation of Congress enacted to make it completely operative.'

"It is clear to my mind, from the conclusions reached by the majority of the court, as announced in its ninth conclusion, and from the discussion by Chief Justice White in his concurring opinion, that the second section of the amendment does vest certain powers of legislation in the states to carry out the purposes of the first section of the amendment. If I am correct in this conclusion, does it make any difference whether the legislative action of a state was taken before or after the going into effect of the amendment and the Volstead Act? I think not. Of course, I do not mean to say that the state could pass legislation which would so conflict with the congressional action as to make that a crime under the state law which would not be a crime under the Volstead Act. The decision of that particular question is not involved in these cases, and therefore I express no opinion on that subject. But if any effect is to be given to the second section of the amendment, then surely a state could pass legislation for the purpose of carrying out the amendment under the authority given in the amendment itself, which was not in violation of any provisions of the Volstead Act, and this it seems to me could be done either before or after the Eighteenth Amendment went into effect.

"The Legislature of the state of Florida, as before noted, in December, 1918, enacted chapter 7736 of the Laws of Florida, at the special session called by the Governor, and section 3 of that act provides that it shall be unlawful for any person, association of persons, or corporation, or any agent or any employé of any person, association of persons, or corporation, to have in his, her, their, or its possession, custody, or control, in this state, any alcoholic or intoxicating liquors or beverages, except as hereinafter provided. Section 3 of title 2 of the Volstead Act provides as follows:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act.'

"I fail to perceive that there is any conflict whatever between these provisions. In fact, it might almost be said that the Volstead Act, being passed subsequent to chapter 7736, was copied from such act. The laws of Florida fix the penalty for the violation of that particular section of the state

law, and it is to enforce this penalty, as I understand it, that the informations in these cases were filed, and in the first case on which the trial and conviction was had.

"While it is true that the Volstead Act affixes as the only penalty for the possession of alcoholic liquors the forfeiture of the liquor, which, etc., and the Florida statute provides a fine or imprisonment, yet such a difference in punishment does not constitute a conflict. As pointed out in some of the adjudicated cases, it is not necessary that the penalty should be identical. The act charged, if a violation of the state law and also an act of Congress, may be punished as provided in the laws, state and federal.

"It seems to me that an indictment or information which charged the possession, within the county, subsequent to the going into effect of the Eighteenth Amendment, of certain intoxicating liquor, would charge an offense against the Florida statute. If the defendant in the case relied upon showing that his possession was lawful by reason of the provisions subsequently contained in the act, such defense must be presented by the defendant. It would not invalidate the indictment or information because the act, in the Florida statute, provides for a lawful possession in subsequent sections; the exceptions not being contained in the section which forbids the possession of intoxicating liquors. It would not be necessary to state in the indictment or information that such possession was not held under the authority contained in the subsequent sections, to make such indictment or information valid. If the question should arise as to whether the limitation of quantity as pronounced in the Florida statute, and the question of right of possession as allowed under the Volstead Act, should control, it would then be time to decide the question thus raised."

Extent of legislation by state.—"It would never be competent for a state, in a matter respecting the use of liquor, to enlarge upon rights limited by congressional action. It might legislate more rigorously than Congress, in furtherance of more complete prohibition; but, in view of the supremacy of Congress in the field, it could not legislate more liberally. Nor would the fact that different, particularly more drastic, penalties are prescribed by the inferior sovereignty, necessarily result in their invalidity." *Ex p. Crookshank*, (S. D. Cal. 1921) 269 Fed. 980.

The police power of the state is paramount where it does not authorize what the National Act prohibits, and through its inherent reserve power it has the right to legislate in such manner. The state may prohibit, but it may not authorize. *Woods v. Seattle*, (W. D. Wash. 1921) 270 Fed. 315, holding a city may under power from the state prohibit the sale of jamaica ginger.

"In adopting the amendment, the states did not deprive themselves of the power to

make laws for their internal government upon the subject of intoxicating liquors. Though conferring additional powers upon Congress, they merely surrendered the power to legalize and permit a traffic now forbidden, and retained the right to enforce within their own territory provisions against violations of the acts prohibited thereby.

"The fact that under the amendment Congress may enact a law, national in its scope, and that the states may likewise enact laws effective within their own boundaries, may give rise to a situation by which the laws of each state may differ from those of each other, and also differ from the laws of Congress upon the same subject. Such state laws may not permit that which the first section of the amendment forbids, nor may acts of Congress do so. But so long as legislation of a state actually seeks to enforce, by appropriate legislation under the second section of the amendment, what is prohibited by the first, no valid objection can be made, even though the state law may differ from that of Congress. The authority of the states is not to enforce the acts of Congress, but to enforce the amendment itself. . . .

"That our prohibition law was enacted prior to the adoption of the amendment does not thereby render it inoperative." *State v. District Ct.*, (1921) 58 Mont. 684, 194 Pac. 308. See to the same effect *State v. Turner*, (Wash. 1921) 196 Pac. 638, wherein it was said: "Whatever may be the precise effect of the Eighteenth Amendment and the Volstead Act, passed pursuant thereto (Act of Congress, Oct. 28, 1919, c. 85, 41 Stat. 305), it cannot be said that, so far as the statutes prohibiting bootlegging and conducting illegal joints are concerned, they are not in aid of the enforcement of the Eighteenth Amendment, and the Eighteenth Amendment permits the passage and the enforcement of laws which were enacted either before or after that amendment which tend to the enforcement of the amendment; that power being specifically reserved as concurrent with the power of the federal government." *State v. Turner*, *supra*, was followed in *State v. Woods*, (Wash. 1921) 198 Pac. 737.

Invalid exception in state statute.—Though a state statute contains an exception which is in conflict with this amendment or with the Volstead Act, no conviction can be had in a state court in a case falling within the exception. *State v. Barksdale*, (1921) 181 N. C. 621, 107 S. E. 505, wherein the court said: "As heretofore stated, under *Rhode Island v. Palmer*, *supra*, and other like decisions, any and all state legislation in contravention of the Eighteenth Amendment and the valid provisions of the Volstead Act passed to enforce same are abrogated, and for conduct in violation of the criminal provisions of the Volstead Act a defendant can be indicted and convicted in the federal courts, notwithstanding that the

provisions of the state law would not inculpate. But there is no part of the Volstead Act that provides for or permits an indictment in the state court, and we are well assured that, though an exception may be in violation of the federal law on the subject, a defendant may not be indicted and convicted in the state court for violation of a state statute which contains an exception exculpating him until our own Legislature has acted in the matter and passed a statute that condemns him. Our state police regulations must be established by our own Legislature."

Jurisdiction to prosecute.—The offense of selling liquor unlawfully may be prosecuted in a state court notwithstanding the amendment. *Shaw v. State*, (Tex. 1921) 229 S. W. 509. See to the same effect as to the offense of possessing equipment for the manufacture of intoxicants. *Andres v. State*, (Tex. 1921) 229 S. W. 503.

In a prosecution under a state statute where the defendant seeks his release on a writ of habeas corpus on the ground that the federal legislation is paramount and prevails over that of the state legislation wherever there is conflict, he is not entitled to his discharge, unless the state statute is so completely at variance with the federal statute that nothing remains of the state statute under which the relator may be prosecuted on the indictments found against him. *Ex p. Finegan*, (N. D. N. Y. 1921) 270 Fed. 665, wherein the court, in a prosecution under the Walker Act of New York State prohibiting the sale of beverages containing more than 2.75 per cent. of alcohol by weight, said: "The border line between intoxicating and nonintoxicating beverages being somewhat uncertain, this court cannot say as a matter of law that 2.75 per cent. of alcohol by weight makes the beverage intoxicating, and therefore cannot hold in this proceeding that the statute is unconstitutional because of conflict with the Eighteenth Amendment."

3. Power of Municipalities

Delegation of power to city.—A city may enact prohibitory measures tending to enforce the National Prohibition Act where it acts in pursuance of police power granted by the state under the state constitution with a limitation that ordinances shall not be enacted in contravention of the state statute. *Woods v. Seattle*, (W. D. Wash. 1921) 270 Fed. 316. And in *Ex p. Crookshank*, (S. D. Cal. 1921) 269 Fed. 990, the power of a city to legislate subsequent to the Eighteenth Amendment was recognized under a grant of power to legislate in regard to the sale of intoxicating liquors conferred prior to that Amendment.

Compare *U. S. v. Peterson*, (W. D. Wash. 1920) 268 Fed. 864, holding that while the concurrent power given to the state does not authorize the state to delegate that power to municipalities, and that it is a

power which must be exercised by the state itself, yet the state may confer power on municipal courts and officers to enforce under state authority the provisions of this Amendment.

Prosecution under ordinance infringing Amendment.—On the prosecution of a person for violation of the provisions of a city ordinance relating to the sale of intoxicating liquors the fact that such ordinance contains provisions relating to the sale of liquors for nonbeverage purposes pursuant to permits which may infringe on the enforcement of the Eighteenth Amendment as provided for by Congress in the Volstead Act is immaterial. *Ex p. Crookshank*, (S. D. Cal. 1921) 269 Fed. 980.

4. "Concurrent Power"

"Concurrent power."—As to the meaning of the term "concurrent power" it has been said:

"An interpretation according with the court's conclusions is that the word 'concurrent' was used in the second section of the Eighteenth Amendment in the same or similar sense in which it has been used by the Supreme Court as illustrated in *Sexton v. California*, 189 U. S. 324, 23 Sup. Ct. 543, 47 L. ed. 833. In that case there was a conviction in the state court for the crime of extorting money by threatening to falsely accuse a person of an act that was made criminal only by federal law. It was urged in the federal Supreme Court that the particular acts of the offender were denounced by a federal law against extortion and therefore cognizable only in the federal courts, to the exclusion of the state courts. Sec. 711, U. S. Rev. Stat. In the federal statute against extortion, referred to, there was a provision that nothing in the title contained shall be held to take away or impair the jurisdiction of the several states under the laws thereof. The Supreme Court denied the claim of a federal jurisdiction such as to exclude the jurisdiction of the state court over the acts in question, and expressed itself in this language:

"The jurisdiction of the state court over the crime of extortion, when perpetrated under the circumstances stated in the indictment, is at least concurrent with that of the courts of the United States."

"The conviction by the state court was sustained as a proper exercise of the sovereign powers of the state; but the power of the federal government to proceed to punishment for the offense against its sovereignty was entirely unaffected. Because both courts may act against the same person for the same acts, the court used the words concurrent jurisdiction, without introducing any confusion whatever into the thought of those who are familiar with such coexisting powers of state and national governments.

"Again, the same word 'concurrent' is used in the same sense by Mr. Justice John-

son in *Houston v. Moore*, 5 Wheat. 33, 5 L. ed. 19:

"Why may not the same offense be made punishable both under the laws of the states and of the United States? Every citizen of a state owes a double allegiance. He enjoys the protection and participates in the government of both the state and the United States. * * * The actual exercise of this concurrent right of punishing is familiar to every day's practice. The laws of the United States have made many offenses punishable in their courts, which were and still continue punishable under the laws of the states. Witness the case of counterfeiting the current coin of the United States, under the Act of April 21, 1806, in which the state right of punishing is expressly recognized and preserved. Witness also the crime of robbing the mail on the highway, which is unquestionably cognizable as highway robbery under the state laws, although made punishable under those of the United States." U. S. v. Holt, (D. C. N. D. 1921) 270 Fed. 639.

"Section 2, art. 18, and section 2, art. 6, must have harmonious relation, since no express declaration in the amendment was made, nor are the provisions necessarily inconsistent. The national legislation, therefore, is paramount, and the state laws, when in conflict, must yield, *Ballaine v. Alaska N. Ry. Co.*, 259 Fed. 183, 170 C. C. A. 251, and cases cited. Much 'bewilderment' is created by 'concurrent power to enforce by proper legislation,' granted by section 2, art. 18. This is a conferred power, not upon courts of the state, giving them concurrent jurisdiction to enforce a congressional act, but primarily a power conferred upon the state legislature, and through it upon the state courts, by such legislation as it may enact in harmony with the National Prohibition Act, to enforce article 18, and while the amendment 'of its own force repeals' all inconsistent laws, it preserves inviolate laws of the state consistent with its provisions." U. S. v. Peterson, (W. D. Wash. 1920) 268 Fed. 864.

In *Com. v. Nickerson*, (1920) 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568, the court, in defining the word "concurrent" as used in section 2 of this Amendment, said:

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the state, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of

the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the states may differ in means adopted provided it is directed to the enforcement of the amendment. Legislation by the several states appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void or inoperative simply because Congress, in performance of the duty cast upon it by that amendment, has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions, regulations and penalties from those contained in the Volstead Act and not in conflict with the terms of the Volstead Act, but in harmony therewith, are valid. Existing laws of that character are not suspended or superseded by the act of Congress. The fact that Congress has enacted legislation covering in general the field of national prohibition does not exclude the operation of appropriate state legislation directed to the enforcement by different means of prohibition within the territory of the state.

"The power thus reserved to the states must be put forth in aid of the enforcement and not for the obstruction of the dominant purpose of the amendment. It must not be in direct conflict with the act of Congress in the same field. Subject to these limitations growing out of the nature of our dual system of government, the power of the states is constant, vital, effective and susceptible of continuous exercise."

In *State v. Ceriani*, (Conn. 1921) 113 Atl. 316, regarding the meaning of words, "Concurrent power" as used in section 2 of this Amendment, the court said:

"What 'concurrent power' in section 2 means has occasioned very considerable discussion. Three constructions have been suggested, and each is a possible construction.

(1) That it means joint power to Congress and the several states; (2) that it means a separate and independent power vested in each; (3) that it means a separate and independent power in each, but that such parts of the state act as conflict with the act of Congress must fall, since the National Act is the supreme law of the land. No additional construction of this term has been suggested, and no other seems permissible.

The United States Supreme Court, in *National Prohibition Cases*, 253 U. S. 350. 40 Sup Ct. 486, 588, 64 L. ed. 946, have decided that—

"'Concurrent power' does 'not mean joint power, or require that legislation . . . by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor . . . that the power . . . is

divided between' them 'along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.'

"[3] While the court has not gone further and expressly defined the meaning of 'concurrent power' we think it necessarily follows from the decision that this power is not joint; that it is a separate and independent power which the Congress and the several states exercise in the enforcement of this amendment. Each has the right to act separately and independently in aid of the amendment. But neither can act in repugnance to it.

"Concurrent power as used in this section, and when read in the light of the context and the purpose of the amendment, must be held to mean a conferred power by this amendment existing continuously in federal and state Legislature, and equal in each, and co-operating for the enforcement through appropriate legislation of the prohibitions of the Eighteenth Amendment. *Commonwealth v. Nickerson*, 236 Mass. 281, 128 N. E. 273.

"Between the two points of view that the power is separate and independent, or that it is separate and independent, but that the federal act will supersede any state legislation inconsistent with it, we think the latter to be the better, and, indeed, the necessary view.

"Article 6 of the federal Constitution must be construed in harmony with all parts of the Eighteenth Amendment. Section 2 of the Eighteenth Amendment gives to Congress and the several states equal authority to enforce this amendment. But when the federal and state acts conflict, then article 6, which provides that 'the Constitution and the laws . . . which shall be made in pursuance thereof . . . shall be the supreme law of the land,' makes the federal act supreme in those particulars in which there is conflict. The Eighteenth Amendment and article 6 can be, and hence must be, construed in harmonious relation. *Warren v. Mayor of Charlestown*, 2 Grav (Mass.) 84. 99. The rest of the state act remains in force. *State v. Districts Court (Mont.)* 194 Pac. 308. 310.

"Perhaps the difference in results would not be of great practical importance if either view prevailed. If the first view be accented, then the more restrictive law would in practice prevail, and the less restrictive be supplanted by it. But if the second view be accepted, the act of Congress remains the supreme law of the land, and uniformity in the enforcement of this amendment will obtain.

"Legislation by the state must support the primary purpose of the amendment, and cannot be repugnant to the act of Congress. Appropriate legislation by a state need not cover all that the act of Congress does. It may differ in its definition of intoxicating liquor and in the penalties it provides, and yet serve the purpose of helping to enforce the amendment."

Applying this construction to a state statute the court further said: "Section 2792, Rev. 1918, provides that a licensed dealer who had filed his application for a renewal shall not be convicted pending the decision upon his application. If this section be in force in its entirety, then sales of intoxicating liquor could be made, although prohibited by the amendment. And this shows clearly that so far forth as this statute would permit the licensed dealer to sell contrary to the prohibitions of the amendment and of the National Act it is invalidated. As to sales of less than one-half of 1 per cent. of alcohol it is valid, since such sales are not contrary to the National Act. The sales for which the accused was tried and found guilty were of intoxicating liquor whose alcoholic contents were in excess of one-half of 1 per cent. The trial court properly charged that section 2790, which the accused was charged with having violated, was at that time in force, and that the fact that the accused had made application for a renewal of his license which was pending for decision before the county commissioners did not give him a right to make such sale."

"We have found nothing in the meaning of the term 'concurrent,' as defined in the reported cases or the dictionaries, which leads us to conclude that, as used in the amendment to the Constitution, it was intended that the right of the states to pass appropriate legislation to enforce the prohibition should be more restrictive than the power conferred upon Congress to affect the same result, save that the laws of Congress should affect all the people in the United States, while the laws of the state should affect only those within its boundaries." *Ex p. Gilmore*, (1921) 88 Tex. Crim. 529, 228 S. W. 199.

5. "Appropriate Legislation"

The term "appropriate legislation," as used in this section, necessarily means such legislation as will tend to make this constitutional provision completely operative and effective. *Rose v. U. S.*, (C. C. A. 6th Cir. 1921) 274 Fed. 245.

"In the exercise of its police power the state may legislate for the enforcement of the amendment by different means and methods which do tend to this end. Undoubtedly the power conferred upon the states of enforcing this amendment by appropriate legislation contemplated the passage of new legislation by the states to provide such enforcement. But this does not attempt to compel it or to control the manner in which the state may effect this. It impairs no right theretofore existing in the state except that of acting in repugnance to the amendment. It does not expressly require the passage of enforcing legislation, nor limit the power of the state to the newly enacted legislation. It does not invalidate state legislation which is not inconsistent with the amendment or the National Prohibition Act. Such state

legislation, in existence when the amendment became effective, if it may serve in the enforcement of the amendment, is 'appropriate legislation.' This term in the Eighteenth Amendment was used in the same sense in which it was used in the Thirteenth and Fourteenth Amendments, and means such legislation as may make the amendment fully effective and adapted to its fundamental purpose. *Ex p. Virginia*, 100 U. S. 339, 344, 25 L. Ed. 676; *United States v. Reese*, 92 U. S. 214, 218, 23 L. Ed. 563. The state may thus enforce this amendment by appropriate legislation, newly enacted, or by existing legislation." *State v. Ceriani*, (Conn. 1921) 113 Atl. 316.

"The term 'appropriate legislation,' as used in other amendments to the Constitution, has been construed by the Supreme Court of the United States to mean legislation contemplated to make the amendment fully effective; that is, legislation adapted to carry out the objects the legislators had in view. . . . The framers of the amendment, having selected language specifically conferring upon the states concurrent power to enforce the prohibition by 'appropriate legislation,' in our opinion did not intend that the state's legislation should be identical with that of Congress, nor that it should be confined to the enforcement of the laws of Congress. A general law adapted to all parts of the country, it is conceived, might be inadequate to meet the conditions requisite in the enforcement of the prohibition in a given state. Legislation by the state supplementing that of Congress would seem more consistent with the intent of the framers of the amendment. Should an irreconcilable conflict develop, no doubt the provision of the federal Constitution, making that document and the laws of Congress paramount would prevail. But neither Congress nor the state being able to thwart the prohibition, but being empowered only to enforce it, the development of such a conflict would appear remote, if not impossible. The difference in the penalty prescribed by Congress and the state would not condemn the state law as unconstitutional." *Ex p. Gilmore*, (1921) 88 Tex. Crim. 529, 228 S. W. 199.

1920 Supp., p. 821, amend. 19.

Amendment as within amending power of Constitution.—This amendment is within the amending power of the Constitution as set forth in Article 5 thereof. *Leser v. Garnett*, (Md. 1921) 114 Atl. 840.

Effect of Amendment on state constitution.—In *Opinion of Justices*, (Me. 1921) 113 Atl. 614, it was held that, in view of the enactment of this amendment, which in effect amended art. 2, § 1 of the Maine Constitution regarding the qualifications of voters, the Governor of that state could appoint women as justices of the peace under art. 5, pt. 7, § 8, and art. 6, § 5 of the constitution of the state.

Effect on state election laws generally.—

This amendment automatically strikes from the state laws, organic and statutory, all discriminatory features authorizing one sex to vote and excluding the other, or placing conditions or burdens upon one not placed upon the other as a condition precedent to the right to vote, but in no wise interferes with, changes, or alters state laws with reference to elections that cannot and do not amount to a discrimination in favor of one sex against the other. It protects the man and woman alike, and a burden cannot be placed upon one sex that is not put upon the other, nor can a privilege, benefit, or exemption be given one to the exclusion of the other. The said amendment, by its own force and effect, strikes from section 177 of our state Constitution the word "male," as used in defining who are or may become electors, as well as where used in other parts of our organic or statutory laws when used in connection with the right and qualification to vote, and also strikes therefrom the use of the masculine pronoun wherever it appears, so as to make the same include and applicable to both sexes. And as the said amendment prohibits a discrimination against women by section 177, and perhaps other provisions of our state law, it likewise prohibits a discrimination against men by sections 178 and 194 of our Constitution, and has the same effect upon these provisions as to the elimination of the male sex as when used in section 177 and other provisions. The result is that upon the final ratification of the Nineteenth Amendment it had the effect of making our organic as well as statutory laws applicable to men and women alike, and placed all women in the state upon the same footing with men. *Graves v. Eubank*, (Ala. 1921) 87 So. 587, wherein the court said further as to the liability of a woman to a poll tax:

"The result is that, the Nineteenth Amendment becoming operative prior to the 1st day of October, 1920, all women who were over 21 years of age and under 45 on said date became liable to the payment of the poll tax due on said date and which would become delinquent the 1st of the following February

as a condition to vote in succeeding elections, and this appellant, having tendered the tax collector the amount of her tax, is entitled to the writ of mandamus compelling the acceptance of same and the issuance to her of a receipt therefor, and which said writ was erroneously denied by the trial court. It must not be understood from this holding that the court means to intimate that any vote heretofore cast in the November election or any other election held prior to the 1st day of February, 1921, is invalid when cast by those who acquired the right to vote by virtue of the Nineteenth Amendment, but we do hold that, in order to vote in future elections occurring after the 1st of February, they must have paid the poll tax which becomes delinquent on said 1st day of February."

Amendment as qualifying women for jury service.—This amendment does not operate in terms or by implication to qualify women as jurors. It requires legislation to do that. *State v. James*, (N. J. 1921) 114 Atl. 553, wherein it was held that a male defendant could not raise the objection that women were not drawn for jury service.

Where under the statutes of a state persons are selected for jury service from the qualified voters of the state, the legislature, in view of this amendment, is authorized to enact legislation so that women may be made liable to jury duty. *In re Opinion of Justices*, (Mass. 1921) 130 N. E. 685.

Validity of state statute requiring registrants to state age.—State statutes requiring applicants for registration as voters to state their exact ages in years and months, do not impose in any way an injurious, unreasonable, or unnecessary restraint, impairment, or impediment on the exercise of the elective franchise. On the contrary, we think that it is a reasonable, uniform, and impartial regulation, calculated to facilitate and secure the exercise of this right and to prevent its abuse, and as such does not violate this amendment. *State v. Hillenbrand*, (Ohio 1920) 130 N. E. 29, 14 A. L. R. 256.

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